



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

August 1, 1977

B-115398

The Honorable Strom Thurmond
United States Senate

Dear Senator Thurmond:

This replies to your letter of July 22, 1977, in which you requested our analysis of the authority of the executive branch to issue stop-work orders for work on the B-1 bomber. Your letter states your concern that such instructions were given prior to the completion of congressional action on the President's request pursuant to the Impoundment Control Act of 1974 to rescind \$462 million of fiscal year 1977 procurement funds that were provided to the Department of Defense (DOD) for this purpose. Thus, you question whether the President violated controlling law by issuing the stop-work orders.

We conclude that the executive branch can legally terminate B-1 bomber production without the need for additional specific legislative authority other than the action taken pursuant to the Impoundment Control Act. We do, however, have serious policy reservations about the practice of beginning to dismantle a program before the Congress has had an opportunity to express itself pursuant to the Impoundment Control Act. We intend to express our views to the executive branch on this matter shortly. There follows a discussion of our findings and conclusions.

I. DOD FISCAL YEAR 1977 AUTHORIZATION AND APPROPRIATION ACTS:

A. The Fiscal Year 1977 Authorization Act.

The B-1 bomber was not specifically authorized by DOD's fiscal year 1977 authorization act, Public Law 94-361, approved July 14, 1976. Rather, procurement of these aircraft was authorized by the general language of title I of the statute, "Procurement":

"For aircraft: for the Army, \$554,100,000; for the Navy and the Marine Corps, \$2,995,800,000, of which not more than \$104,100,000 shall be available only for the procurement of the A-6E aircraft; for the Air Force, \$6,143,800,000." (Emphasis added.)

The Committee reports on H.R. 12438, the bill that ultimately was enacted as Public Law 94-361, clearly indicate that B-1 bomber production was authorized by and included within the above-quoted language. See S. Rep. No. 94-1004 (Committee of Conference), 94th Cong., 2d Sess. 20 (1976); S. Rep. No. 94-878, 94th Cong., 2d Sess. 15 (1976); and H.R. Rep. No. 94-967, 94th Cong., 2d Sess. 39 (1976).

B. The Fiscal Year 1977 Appropriation Act.

Similarly, except for a limitation on the use of funds for the B-1 prior to February 1, 1977, the fiscal year 1977 DOD appropriation act, Public Law 94-419, approved September 22, 1976, did not provide funds specifically for the bomber procurement. Instead, funding for the aircraft was included in the lump-sum appropriation in title IV of the appropriation under the heading "Aircraft Procurement, Air Force":

"For construction, procurement, and modification of aircraft and equipment, including armor and armament, specialized ground handling equipment, and training devices, spare parts, and accessories therefor; specialized equipment; expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land without regard to section 9774 of title 10, United States Code, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to the approval of title as required by section 355, Revised Statutes, as amended; reserve plant and

Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes including rents and transportation of things; \$6,067,700,000, and in addition, \$21,500,000, of which \$8,600,000 shall be derived by transfer from "Aircraft Procurement, Air Force, 1976/1978", and \$12,900,000 which shall be derived by transfer from "Aircraft Procurement, Air Force, July 1, 1976/1978", to remain available for obligation until September 30, 1976. Until February 1, 1977, the obligation of funds appropriated in this Act for the procurement of the B-1 bomber shall be limited to a cumulative rate of not to exceed \$87,000,000 per month."

The Committee reports on H.R. 14262, the bill that was enacted as the DOD fiscal year 1977 appropriation act, indicate that, of the \$6,067,700,000 appropriated, \$948 million (in addition to prior-year advance procurement funds) was intended for use for B-1 bomber procurement. See S. Rep. No. 94-1046, 94th Cong., 2d Sess. 216 (1976); and H.R. Rep. No. 94-1231, 94th Cong., 2d Sess. 150 (1976).

II. THE PRESIDENT'S DECISION TO CURTAIL B-1 BOMBER PRODUCTION AND THE IMPOUNDMENT CONTROL ACT OF 1974:

On July 19, 1977, as a consequence of his decision not to proceed with the original B-1 bomber production plans, the President proposed the rescission under the Impoundment Control Act of 1974, title X of Public Law 93-344, approved July 12, 1974, of \$462 million. This amount was a part of the funds that had been appropriated to DOD in Public Law 94-419, above, for aircraft procurement of the Department of the Air Force during fiscal year 1977. The amount sought for rescission was determined to be in excess of the Government's estimated termination liabilities resulting from the President's decision to halt B-1 bomber production. See Rescission Proposal No. R77-18, July 19, 1977. We have determined that, prior to the date of the rescission request, stop-work orders on B-1 bomber production activities were issued on June 30, 1977, and were followed by termination orders on July 6, 1977.

III. ANALYSIS:

The question of whether the stop-work orders properly were issued to halt work on the B-1 bomber prior to completion of congressional action on the request to rescind the \$462 million focuses upon the basic authority of the executive branch to both initiate and terminate B-1 bomber procurement efforts.

In a recent opinion we considered the authority of the executive branch to change the Clinch River Breeder Reactor Project (CRBRP) from a program for the construction and operation of a demonstration liquid metal fast breeder reactor to one only for the design of such a reactor. In our letter to Senators Jackson and Baker of June 23, 1977, copy enclosed, we analyzed the legislative basis of the CRBRP. We found that the CRBRP project and funding therefor were specifically authorized by law. Because the President indicated his intention not to proceed in accordance with the legislation establishing and describing the CRBRP, we concluded that executive branch actions and expenditures to implement the revised plans would be legally improper.

The legislative basis for the B-1 bomber is not similar to that of the CRBRP. Unlike the breeder reactor where we found specific legislative authority for and a description of the program, there is no specific legislative authority for procurement of the B-1 aircraft. Similarly, where we found constraints in the CRBRP authorizing statute describing the purposes for which funds could be appropriated (construction and operation of the demonstration plant) there are no limitations in either the DOD authorization or appropriation acts for fiscal year 1977 limiting, at this time, the executive branch's authority regarding B-1 bomber production.

While it might be argued that the committee reports on the DOD authorization and appropriation acts constrain the executive branch insofar as the bomber is concerned, we must point out that, unless such constraints appear in the enacted statutes, they have no legal effect and do not affect the executive branch's authority. See Matter of LTV Aerospace Corporation, B-183851, October 1, 1975. ✓ copy enclosed.

Accordingly, and in light of the facts that: the B-1 bomber was not specifically authorized or described in law; funds were not specifically appropriated for production of the bomber; and that both the DOD authorization and appropriation acts for fiscal year 1977 do not at this time constrain the executive branch's activities in the B-1 bomber program, we must conclude that issuance of stop-orders prior to completion of congressional action pursuant to the Impoundment Control Act of 1974 on R77-18 was not in violation of law.

While we conclude that, as a matter of law, the executive branch has not violated the statutes governing the B-1 bomber program, we believe the practice of initiating major program terminations prior to the time Congress has been either informed of such decisions or allowed to complete action under the Impoundment Control Act of 1974 to consider the rescission proposals on the program, creates a situation that jeopardizes the possibility of restarting the program should the Congress disapprove the rescission proposal and specifically direct continuation of the program. At a minimum, terminating and then restarting the program could greatly increase program costs. We intend to notify the executive branch of our views on this practice and will keep you informed of the status of our discussions with them.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

Enclosures - 2

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DIGEST

Since the B-1 bomber is not specifically authorized by statute nor is it the subject of specific appropriations, and in the absence of any other applicable statutory restrictions, the executive branch may lawfully terminate production of the B-1 as long as it complies with the Impoundment Control Act. As matter of policy, however, termination of major program should not be initiated before Congress has been informed or allowed to complete consideration of rescission proposal. B-115398, June 23, 1977, distinguished. To the Hon. Strom Thurmond.