B-130515

JUL 10 1973

The Honorable Harrison A. Williams, Jr., Chairman
Committee on Labor and Public Welfare
United States Senate

Dear Mr. Chairman:

Reference is made to your request of March 30, 1973, for our comments on S. 1376, 93d Congress, the proposed "Economic Opportunity Amendments of 1973."

The stated purpose of S. 1376 is to preserve the Office of Economic Opportunity (OEO). The bill is designed to overcome recent efforts to administratively dismantle OEO and to transfer or "phase out" most OEO programs. These administrative actions, insofar as they relate to funding or functioning of Community Action Agencies (CAAs), were held to be unlawful and were enjoined by Judge William B. Jones, of the United States District Court for the District of Columbia, in Local 2677, American Federation of Government Employees, et al. v. Phillips, et al., Civ. Actions No. 371-73, 375-73, 379-73, filed April 11, 1973, summarized at 41 U.S.L. Week 2342 (April 17, 1973). In similar litigation, the United States District Court for the Northern District of Illinois, Eastern Division, concluded that these actions were lawful, and declined to issue a preliminary injunction. Local 2816, Office of Economic Opportunity Employees Union, AFGE, AFL-CIO, et al. v. Phillips, et al., No. 73 C 500, filed April 11, 1973, reaffirmed upon reconsideration, April 27, 1973. The future course of this litigation is unknown at the present time. However, it appears that efforts to phase out the CAAs have been terminated at least for the present on the basis of the opinion and order in the Local 2677 case. See OEO memorandums dated April 26, 1973, enclosed herewith.

Section 1(a) of the bill would direct that no part of any sums apportioned pursuant to the Economic Opportunity Act be impounded or withheld. Section 1(c) of the bill would make the provisions of subsection (c) of section 3679 of the Revised Statutes, as amended, 31 U.S.C. 665(c), commonly known as the Antideficiency Act, inapplicable to appropriations made pursuant to the Economic Opportunity Act. We have several comments with respect to these provisions. First, assuming that the purpose of section 1(a) of the bill is to preclude impoundment or withholding of OEO funds generally, we question whether this objective would be achieved by use of the phase "* * * sums which have been

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apportioned pursuant to * * * the Economic Opportunity Act * * *." Apportionment of funds normally refers to the process carried out by the Office of Management and Budget pursuant to subsection (c) of the Antideficiency Act, which in authorizing the establishment of reserves, provides the most common vehicle for impoundments.

Secondly, we question whether OEO appropriations should be completely exempted from the apportionment and reserve procedures of the Antideficiency Act. These procedures serve a necessary function in promoting the economical and effective use of appropriations. A problem arises only when they are employed in derogation of the purposes of particular appropriation acts. It is the position of this Office that the authority to establish reserves under the Antideficiency Act is limited to providing for contingencies or effecting savings which are in furtherance of, or at least consistent with, the purposes of an appropriation; and that the act does not authorize reserves or impoundments for general economic or fiscal reasons or for other reasons extraneous to individual appropriations acts. In this connection, enclosed is a copy of our statement of January 30, 1973, before the Subcommittee on Separation of Powers of the Senate Judiciary Committee which presents in detail our construction of the Anti-deficiency Act. See particularly, pages 7-10, and the first attachment. It might also be noted that the recent efforts to phase out OEO programs do not appear to involve impoundment, at least as that practice is normally understood. For example, it was observed in the Local 2677 opinion that the full amount appropriated for the CAAs would be obligated; however, such appropriations would be used, in part, to close down this program. See slip. op. at 7. In other words, the crucial issue was not impoundment as such, but diversion of appropriations from the purposes for which they were provided.

In view of the foregoing observations, the Committee might wish to consider amending section 1(a) of the bill to read as follows:

> The Congress directs that no part of any appropriation available pursuant to the Economic Opportunity Act of 1964, as amended, shall be impounded, withheld or diverted from obligation for the purposes for which provided, except to the extent specifically authorized or required by law on the basis of circumstances or considerations having particular application to such appropriation.

The foregoing language would preclude impoundments or diversions of OEO appropriations which are purportedly based upon general economic, fiscal or policy considerations, such as the need to contain overall Federal spending in order to combat inflation, prevent obligations in excess of the debt limitation, and/or avoid tax increases. Impoundments of this nature have been justified on the basis of alleged implicit authority derived from the statutory debt limit, the Economy Act of 1946, and the Economic Stabilization Act. Such impoundments have no particular or special application to OEO appropriations; nor are they specifically authorized or required by law (except in the remote event that an expenditure or obligation would actually exceed the debt limit). At the same time, this language would preserve what, in our view, is the legitimate application of authority to make apportionments and to establish reserves under subsection (c) of the Antideficiency Act. It makes clear, however, that the authority to establish reserves under subsection (c)(2) is limited to circumstances or considerations having particular application to OEO appropriations. Thus, for example, considerations relating to overall Federal spending could not be converted into a basis for impoundment under the Antideficiency Act.

If the foregoing language is adopted, subsection 1(c) of the bill could be deleted. In either event, it is suggested that if any language prohibiting or limiting impoundments is considered favorably, the Committee make clear that the adoption of such language shall not be construed as ratification of present or past impoundments with respect to OEO or any other appropriations.

Section 4 of the bill would make 5 U.S.C. 3348 applicable to the filling of a vacancy in the office of OEO director. The purpose of this provision is to limit the service of an acting director without reference to the requirement of Senate confirmation to a period of 30 days. Section 3348 of title 5 merely imposes a 30-day limit upon temporary service authorized by sections 3345-3347 thereof. Section 3349 of title 5 limits the methods of providing for temporary service. These sections, derived from the so-called Vacancies Act, comprise an interrelated system governing temporary appointments. Accordingly, it is suggested that section 4 of the bill be amended to include them all. This could be accomplished by changing lines 9 through 11 on page 3 of the bill to read:

> The filling of a vacancy occurring in the Office of the Director shall be governed by sections 3345 through 3349 of title 5, United States Code.

As you know, the legality of the appointment of an acting OEO director is also the subject of a recent opinion by Judge William B. Jones in Williams, et al. v. Phillips, U.S.D.C.Dist.Col., Civ. No. 490-73, filed June 11, 1973. Judge Jones held, in effect, that neither the Vacancies Act nor any other authority provides for the appointment of an acting director. Enactment of section 4 of S. 1376 would serve to settle this issue, both by providing authority for the appointment of an acting director and by limiting the time during which an acting director could serve without reference to the requirement of Senate confirmation.

We have no comments to offer concerning the other provisions of the bill.

Sincerely yours,

Paul G. Dembling

Acting Comptroller General
of the United States

Enclosures