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

December 20, 1985

B-208231

The Honorable John D. Dingell
Chairman, Subcommittee on
Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

By letter dated November 13, 1984, you asked that we review the importation by United States utilities of electricity from Canada to ascertain the impacts of such imports on the utilities and their ratepayers. Our Resources, Community, and Economic Development Division has undertaken this review and has been in contact with your staff regarding its progress.

Your staff asked that as part of this effort we evaluate the Department of Energy's (DOE) authority to regulate electricity imports, with particular attention to whether DOE could use its "presidential permit" for this purpose. This is the permit required of those who propose to construct and operate facilities at United States borders for the purpose of importing or exporting electricity.

Having completed our analysis of DOE's authority to regulate imports, we provided your office with a copy of our tentative conclusions. Your staff asked that we confirm these conclusions formally. The enclosure to this letter is in response to that request.

To summarize our conclusions, the Congress has not delegated to DOE or the President any authority to regulate electricity imports specifically. General trade laws do provide for limited regulation of imports in certain instances. Whether any of these laws would be available to regulate electricity imports would depend on the particular circumstances surrounding the import.

Because power to regulate commerce with foreign nations is vested by the Constitution in the Congress, it is not clear that the presidential permit, about which you expressed particular interest, may be used to regulate electricity imports.

641C

B-208231

The presidential permit is not an exercise of authority delegated by the Congress; rather, it is derived from the President's constitutional powers in the area of foreign affairs. The power of the President, relying solely on his constitutional authorities and not also on a delegation of authority from the Congress, to regulate international trade is doubtful, but the courts have not ruled squarely on the issue.

However, it would not seem inappropriate for DOE to monitor and evaluate the growing importation of electricity from Canada to ascertain whether there are or will be problems which the federal government should address.

We trust this will be useful to you.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure

DEPARTMENT OF ENERGY'S AUTHORITY TO REGULATE ELECTRICITY IMPORTS

In the area of foreign affairs, the United States Constitution grants powers to both the Legislative and Executive branches. The Constitution grants the Congress the power to regulate foreign commerce, and grants the Executive the power to make treaties and names him the Commander-in-Chief of the Armed Forces. The scope of the respective authorities, however, has never been well defined.

Clearly, the Congress has the power to regulate electricity imports. (See Part I, below.) We have found, however, no legislation whereby the Congress has attempted to do so, or has delegated authority to the President or DOE to do so.

The presidential permit (see Part II, below) is not a delegation from the Congress of its regulatory power. Rather, it is an exercise of the President's constitutional powers in the area of foreign affairs, and according to DOE, it is not designed to regulate electricity imports.

We have been asked whether DOE can use the presidential permit to regulate electricity imports from Canada. That would depend on whether the President, relying solely on his own authorities and not also on a delegation of authority from the Congress, can regulate trade. This question, however, has not been settled within the legal community. (See Part III.)

I

REGULATION OF FOREIGN COMMERCE

The United States Constitution grants to the Congress the power to regulate commerce with foreign nations. U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause). This authority has been exercised to regulate imports of electricity. In 1906, the Congress authorized the Secretary of War to issue permits for the importation of electricity from Canada, and set limits on the amounts which could be imported. Act of June 29, 1906, Pub. L. No. 59-367, 34 Stat. 626 (1906). However, that authority expired in 1913. See Act of April 5, 1912, Pub. L. No. 69-24, 37 Stat. 631 (1912). We found no current legislation whereby the Congress has specifically

641e

delegated to the President or DOE authority to regulate electricity imports.[1]

The only current legislation we found which addresses electricity imports does not authorize regulation of these imports. Section 202(f) of the Federal Power Act specifically excluded from regulation by the Federal Energy Regulatory Commission electricity generated in a foreign country which is transmitted from that country into a neighboring state and is not thereafter transmitted into another state. 16 U.S.C. § 824a(f). Section 7(d) of the Energy Supply and Environmental Coordination Act merely directed the Federal Power Commission (a predecessor of DOE) to issue a presidential permit for import facilities at Fort Covington, New York, without preparing an environmental impact statement. 15 U.S.C. § 793(d).

The Congress has delegated to the executive branch limited regulatory authority with respect to imports. For the most part, that authority may be used only to deal with imports that are injuring or threatening to injure a United States industry. Generally, these laws establish specific procedures and require that certain determinations be made before the Executive can impose regulation. For example, countervailing duties may be imposed on the product of a foreign industry which receives subsidies from its government. 19 U.S.C. § 1671. The President has broad discretion in providing relief to industries vital to the national security that are being injured by imports. 19 U.S.C. § 1862. Other trade laws authorize the imposition of antidumping duties,[2] the protection of depressed industries that need time to invest in new plant and equipment in order to compete with imports,[3] relief for domestic firms injured when a

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[1] The Federal Power Act authorizes DOE to regulate the export of electricity by issuing licenses for that purpose. 16 U.S.C. § 824a(e).

[2] 19 U.S.C. § 1673.

[3] 19 U.S.C. § 2251.

foreign firm has infringed on their patent rights,[4]/ and the imposition of temporary import restrictions to deal with balance-of-payments deficits.[5]/ The Congress has also authorized the President to enter into and to enforce trade agreements if he determines, for example, that a foreign country has imposed barriers to international trade which unduly burden and restrict the foreign trade of the United States or adversely affect the United States economy.[6]/ Whether any of these laws would be available as a basis for regulating electricity imports from Canada would depend on the particular circumstances surrounding the import.

II.

PRESIDENTIAL PERMIT

The presidential permit is required of any person who proposes to construct and operate facilities at the borders of the United States for the purpose of importing or exporting electricity. Executive Order 10485, September 8, 1953. Because DOE specifically licenses exports of electricity, the presidential permit is sometimes viewed, by analogy, as a means of regulating electricity imports. According to DOE, however, the permit is not designed to regulate import trade. Authority to issue the permit is not derived from the Commerce Clause or any delegation of legislative power, but from the President's own constitutional powers.

In response to questions we asked DOE regarding the presidential permitting process, the Acting General Counsel explained that the permitting process represents an assumption by the President of the government's inherent power to protect the territory of the United States. Letter from Acting General Counsel, DOE, April 29, 1985. Thus, the permit is designed to regulate and control the physical connection by transmission line and related facilities of United States

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4/ 19 U.S.C. § 1337.

5/ 19 U.S.C. § 2132.

6/ 19 U.S.C. § 2112.

territory to the territory of a foreign country, and to prevent any potential deleterious effect on United States territory from that connection.

In 1896, the Attorney General asked a Federal District Court in New York to enjoin a French company from landing at Coney Island a telegraphic cable connecting the United States to Haiti. United States v. La Compagnie Francaise des Cables Telegraphiques, 77 F. 495 (S.D.N.Y. 1896). The Attorney General argued that no one has any right to establish a physical connection between the territory of the United States and that of a foreign country without the consent of the United States Government. The court declined to grant an injunction because the laying of the cable was completed prior to the filing of the motion to enjoin. The court did, however, opine that the Attorney General's argument was a sound one. And, the court stated, in the absence of congressional action, whether to grant such consent "would seem to fall within the province of the executive." Id. at 496.

In several opinions in the late 1800's and early 1900's, Attorneys General, referring to these statements in the 1896 Federal District Court opinion about the powers of the executive, advised that the President could act to regulate and control any physical connection between the United States and a foreign country. The most thorough analysis of the President's authority in this regard is found in an 1898 opinion of Acting Attorney General John K. Richards concerning a proposed telegraphic cable between Paris and New York. 22 Op. Att'y Gen. 13 (1898). Mr. Richards explained that the jurisdiction of the United States within its own territory is exclusive and absolute. In the absence of action by the Congress, according to Mr. Richards, the President has a constitutional responsibility to preserve the territorial integrity of the United States and to protect its foreign interests.

Mr. Richards pointed out that the President is not limited by the Constitution to enforcing specific acts of the Congress. He has a duty to protect "the fundamental rights which flow from the Constitution and belong to the sovereignty it created"; he has charge of our relations with foreign powers; and he is the Commander-in-Chief of the United States Armed Forces.

Other Attorneys General followed this logic and Presidents were advised that they could regulate a telegraphic cable to Cuba and Puerto Rico,[7] facilities to be used to import electricity from Canada,[8] and a gas pipeline from Texas to Monterey, Mexico.[9] In each instance, the Attorney General's opinion emphasized, as did the court's in 1896, that the President could act because the Congress had not acted. The court stated that "it is indisputable that congress has absolute authority over the subject." United States v. La Compagnie Francaise des Cables Telegraphiques, 77 F. at 496. Acting Attorney General Richards stated further that the President's permission to establish a connection between the United States and a foreign country is subject to subsequent congressional action. 22 Op. Att'y Gen. at 27.

We have found only one instance where the Congress has legislated with respect to a type of physical connection. In 1921, the Congress specifically authorized the President to regulate the landing of telegraphic cables by issuing licenses. 47 U.S.C. §§ 34, 35. The President has delegated this authority to the Federal Communications Commission. Executive Order 10530, part IV, May 10, 1954. The President has assumed the responsibility for regulating other types of facilities connecting the United States to foreign countries. As we have already discussed, DOE was made responsible for regulating facilities for the transmission of electricity. Executive Order 10485, September 3, 1953, as amended by Executive Order 12038, February 3, 1978. The Department of State was made responsible for other types of facilities, such as petroleum pipelines, water conduits, cable cars and bridges. Executive Order 11423, August 16, 1983.

Although the Congress has not legislated with respect to facilities for the transmission of electricity, it has, in a certain sense, acknowledged the presidential permitting process. In 1974, the Congress directed the Federal Power

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7/ 22 Op. Att'y Gen. 408 (1899).

8/ 30 Op. Att'y Gen. 214 (1913).

9/ 38 Op. Att'y Gen. 163 (1935).

Commission to issue a presidential permit under Executive Order 10485 for transmission facilities near Fort Covington, New York, without preparing an environmental impact statement. 15 U.S.C. § 793(d).

The United States Court of Appeals for the Second Circuit has also recognized the presidential permitting process of Executive Order 10485. Greene County Planning Board v. Federal Power Commission, 528 F.2d 38 (2d Cir. 1975). The Planning Board had petitioned the court to review the permit issued by the Federal Power Commission (FPC) authorizing the construction of transmission facilities at Fort Covington. The Planning Board argued that the Federal Power Act provided the court with jurisdiction to review FPC actions. The court dismissed the Planning Board's petition. The court concluded that for various reasons, the permit did not fall within its jurisdiction under the Federal Power Act, and that it could not, therefore, review the permit. Id. at 45. The court stated that the permit was issued under Executive Order 10485, which it described as delegating to FPC "an executive function..., a function rooted in the President's power with respect to foreign relations if not as Commander in Chief of the Armed Forces." Id. at 46. Although the preamble to the executive order refers to the Federal Power Act, the court said, "it does so simply to explain why the President delegated the duty to issue international connection permits. The preamble does not suggest that the Act is the basis for Executive Order No. 10485." Id. (emphasis in original).

III.

PRESIDENT'S AUTHORITIES IN FOREIGN AFFAIRS

By its very nature, a presidential permit will undoubtedly affect a permittee's ability to import electricity, even though the purpose of the permit is only to protect the territorial integrity of the United States. For example, a permit may be denied because the proposed facility might adversely affect the environment. The denial would, of course, make it physically impossible to import electricity. In other situations, a permit may be denied or conditioned in order to control the physical effects of the import on the United States transmission system. An unrestricted flow of electricity could lead to power surges or overloads which

might damage the United States transmission system. Or, reliance on an undependable Canadian source might cause periodic, abrupt cessations in supply, resulting in sequential, or "rolling," blackouts in the United States. But the question which we are asked to address goes beyond that type of control: can DOE, as part of the permitting process, consider economic factors and deny or condition the permit for purposes of controlling the import of the article itself, i.e., electricity? For example, may its denial of a permit be based on such factors as the availability of domestic sources of supply, or the impact of imports on the financial attractiveness of developing domestic sources?

It is at least doubtful whether the President can exercise his permitting discretion in such a manner as to regulate electricity imports without any statutory basis upon which to regulate. Historically, the scope of the respective authorities of the Legislative and Executive branches in the area of foreign affairs has been in dispute, giving rise to some tension between the two branches. The Constitution grants the Congress the power to regulate foreign commerce, but grants the Executive the power to make treaties and names him the Commander-in-Chief of the Armed Forces. One commentator stated that "even though the conduct of general foreign policy, particularly political and defense matters, may rest largely in the Executive Branch, when it comes to economic foreign policy, the Congress does not hesitate to assert itself." J. Jackson, Legal Problems of International Economic Relations 128 (1977).

Courts, while generally construing the President's role in foreign affairs very broadly, are cognizant of and seem to accommodate this tension. When faced with a challenge to a presidential action with respect to foreign relations, particularly in trade matters, courts generally have looked for some congressional action either specifically delegating authority to the President or approving an action of the President, while at the same time speaking in broad terms of the President's power in the area of foreign relations.

For example, the Supreme Court, in United States v. Curtiss-Wright Export Corporation, stated that in matters of foreign affairs, "the President alone has the power to speak or listen as a representative of the nation." 299 U.S. 304, 319 (1936). The Court described the President as "the sole organ of the federal government in the field of international

641k

relations," and as having "very delicate, plenary and exclusive power." Id. at 320. The Court did, however, recognize Congress' role.

The particular matter before the Court concerned an export of arms to Bolivia. The Congress, by joint resolution, provided that the President could prohibit sales of arms to South American countries during the course of armed conflict in Bolivia. The President implemented the joint resolution by proclamation. In affirming the President's action to regulate the export of arms, the Court found authority deriving from the joint resolution, which delegated legislative power to the President, and from the President's own powers. Id. at 319-20. Although the Court asserted that the President's power in foreign affairs is quite broad and that he does not require an act of the Congress as a basis to exercise it, the Court also stated that the President's power "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." Id. at 320.

Similarly, in Chicago and Southern Air Lines v. Waterman Steamship Corporation, the Court upheld an order issued by the Civil Aeronautics Board (CAB) pursuant to the Civil Aeronautics Act granting Chicago and Southern Air Lines an overseas air route and denying that route to Waterman Steamship Corporation. The Court acknowledged the Congress' power over foreign commerce and the President's powers as Commander-in-Chief and as "the Nation's organ in foreign affairs." 333 U.S. 103, 109 (1948). The Court concluded that the CAB drew its authority from both sources: "Legislative and Executive powers are pooled obviously to the end that commercial and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies." Id. at 110. More recently, in upholding President Carter's agreement with Iran ending the 1980-81 hostage crisis, the Court said, "[c]rucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." Dames and Moore v. Regan, 453 U.S. 654, 680 (1981).

One commentator has suggested that the President, even though he has been delegated no specific authority by the Congress, might be able to impose some sort of regulation over foreign trade as an exercise of his own powers. L. Henkin, Foreign Affairs and the Constitution 148-50 (1972). We have found no instance where the Supreme Court has addressed this

issue. Lower courts, however, have commented on this matter, and in concept they have been rather assertive in drawing a line between the President's power and the Congress'. The United States Court of Customs and Patent Appeals, for example, stated that "[i]t is * * * clear that no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency." United States v. Yoshida International, Inc., 526 F.2d 560, 572 (C.C.P.A. 1975) (emphasis in original). The court found in that case, however, that the President had been delegated authority to regulate or prohibit the importation of goods during a serious balance of payments deficit, and that this allowed him to impose an import surcharge on zippers.

In another instance, United States v. Guy W. Capps, Inc. the Fourth Circuit Court of Appeals stated, similarly, that the President, in the absence of express authorization by the Congress, could not regulate foreign commerce: "Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone." 204 F.2d 655, 660 (4th Cir. 1953). In Capps, the Fourth Circuit found that the Congress had prescribed a scheme regulating imports of potatoes from Canada and that the President's action had not complied with that scheme. Id.[10]/

In 1968 and again in 1972, after negotiations between the Secretary of State and representatives of Japanese and European steel producer associations, foreign steel producers agreed to limit their exports of steel to the United States (so-called "Voluntary Restraint Agreements"). Consumers Union challenged the arrangements, asserting that the Executive branch had no power under the Constitution and laws of the United States to enter into or to arrange restrictions on foreign commerce in steel. Consumers Union of the United States v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974). The court found that the Voluntary Restraint Agreements were not beyond the Executive's authority, because they were not an exercise in regulation of foreign commerce. They were instead simply assurance of voluntary restraint given to the Executive. Id. at 143. There are indications in the court's opinion that,

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10/ The Supreme Court affirmed the Fourth Circuit's decision but on other grounds. 348 U.S. 296 (1955). The Court did not reach the issue of the President's authority to regulate foreign commerce.

had it found the agreements to be a regulatory action, it might have reached a different conclusion:

> "From the comprehensive pattern of its legislation regulating trade and governing the circumstances under and procedures by which the President is authorized to act to limit imports, it appears quite likely that Congress has by statute occupied the field of enforceable import restrictions, if it did not, indeed, have exclusive possession thereof by the terms of Article I of the Constitution. There is no potential for conflict, however, between exclusive congressional regulation of foreign commerce--regulation enforced ultimately by halting violative importations at the border--and assurances of voluntary restraint given to the Executive."
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> Id. (emphasis in original).11/

As this discussion indicates, we have found no specific judicial guidance regarding the President's authority, in the absence of congressional action, to regulate foreign commerce. Acting to protect the territorial integrity would appear more clearly within the scope of the President's powers in foreign affairs.

Authority for economic regulation of foreign commerce by the President is less clear. For example, if the President, through DOE, attempted to limit imports of Canadian electricity, and a potential importer were to challenge his authority to do so, would a court find the question to be "political," to be left to the President and the Congress to settle? Would the court interpret the President's authorities in foreign relations so broadly as to allow him in effect to

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11/ In the Trade and Tariff Act of 1984, the Congress authorized the President to negotiate restraint agreements limiting steel imports for a 5-year period. Pub. L. No. 98-573, § 801, 98 Stat. 2948, 3043, 19 U.S.C. § 2253 note.

regulate commerce, even though the regulation of commerce is specifically granted to the Congress? Or, would the court find that the President, asserting no statutory basis upon which to regulate, has overstepped his authorities?

In the two instances we found where courts reviewed presidential permits of foreign connections, the courts did not review the permits as vehicles for regulating commerce; thus, the courts did not address the issue of whether the permit was a proper regulation by the Executive of foreign commerce.

In Greene County Planning Board v. FPC (the only case we have found where a presidential permit issued under Executive Order 10485 was challenged), that issue was raised, but the Second Circuit avoided addressing it. The Planning Board had asked the court to exercise its jurisdiction under the Federal Power Act to review the permit. The FPC and the permittee argued that the permit was not issued under the Federal Power Act, but under section 7(d) of the Energy Supply and Environmental Coordination Act and Executive Order 10485; they argued that the Planning Board's petition for review presents a nonjusticiable political question--"whether the permit was issued in accordance with the proper conduct of the foreign relations of the United States." 528 F.2d at 40 Finding that it had no jurisdiction under the Federal Power Act, the court decided that it did not need to address the question of the President's role in foreign relations. Id. (See discussion above.)

In its 1896 opinion, the Federal District Court in New York discussed the Executive's authority to issue permits regulating physical connections between the United States and a foreign country. United States v. La Compagnie Francaise des Cables Telegraphiques, 77 F. at 496 The court, in its discussion, did not indicate whether the Executive was authorized to use such a permit to regulate imports of goods.

Given the uncertain state of the law and the delicacy of the issue, we can only advise that this matter is a litigable issue the outcome of which is unpredictable and may be largely dependent on the facts of the particular regulatory action. This being the case, it would not seem inappropriate for DOE to monitor and evaluate the growing importation of electricity from Canada to ascertain whether there will be problems which

the federal government should address. DOE plays an important role in the development of national energy policy (see, e.g., 42 U.S.C. § 7321) and thus would appear to be in the best position to monitor the import situation, identify problems likely to arise, and propose solutions to them.

If, as a part of this exercise, DOE should identify problems, it has a number of options available to it, depending, of course, on the type of problem and its severity. Among them are: suggesting that the appropriate government official initiate procedures under the trade laws which might result in the imposition of duties or in a trade agreement; working with the Congress to develop a legislative solution; or exploring the possibility of negotiating an agreement with Canada, in an exercise of Executive powers, whereby Canada would voluntarily control the flow of electricity into the United States.

ENERGY
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Electricity imports