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Cargo preference

Wednesday 12/18/74

Meeting
12/18/74
5:15 p.m.

1:10 Mike DuVal's office called to say you are invited to a meeting with the President in the Cabinet Room at 5:15 this afternoon -- subject: cargo preference. Those attending:

- Seidman
- Greenspan
- Eberle
- Ash
- Secy. Dent
- Baroody
- Marsh
- Timmons
- Cole
- DuVal

(It will be for 10 minutes; principals only)

ran late



THE WHITE HOUSE
WASHINGTON

To: Phil Buchen

I have a few changes in mind, but
you will want to see this.

Phil Areeda

encl.

December 20, 1974



I. The Meaning of the Waiver

The Merchant Marine Act, as amended by H.R. 8193, provides in §901(d)7 that:

"The [cargo preference] requirements of paragraph 1 may be temporarily waived by the President upon determination that an emergency exists justifying such a waiver in the national interest."

The Conference Report describes this provision as "more restrictive" than the original House bill which provided that cargo preference requirement may be waived whenever Congress, or the President, or the Secretary of Defense "declares that an emergency exists justifying a temporary waiver." The Conference Report goes on to say:

"It is the intent of the Conferees that the temporary duration of the waiver referred to in the provision is to exactly coincide with the duration of the emergency which triggered the waiver."

A subsequent exchange of letters between the House and Senate Conferees declared:

"That the statutory waiver language is intentionally broad in scope and gives the President great flexibility. Upon determining that an emergency exists, including a defense, economic or foreign policy emergency, the provision would allow him to waive all or a portion of the requirements of paragraph 1.... In any event, we believe that the intent of the Congress is to provide the President broad authority to deal with emergencies, and that the legislation, as written, provides such authority."

One may indeed conclude that the waiver authority is "broad" in the sense that the triggering "emergency" may be military, economic, or diplomatic. Nor is there any specific time limit on the duration of the waiver.

It should, however, be observed that the waiver is limited in the following respects. First, it must, according to the statute, operate only "temporarily." Thus the waiver must be grounded in some temporary condition or circumstance, and can continue only so long as that condition or circumstance continues.



Second, the triggering event must be an "emergency." Third, the "emergency" must be described with sufficient particularity by the President so that the "temporary" waiver may be seen, in the Conference Report language, "to exactly coincide" with it. Fourth, the triggering emergency and the resulting waiver may not be so broad in character or extensive in duration as to preclude meaningful cargo preference requirements which the statute commands.

In short, the language of the statute and its legislative history are unmistakable in authorizing only temporary waivers for rather precisely defined emergencies. For the President to sign H. R. 8193 and then to eviscerate it with a more or less continuous waiver would be both contrary to law and evidence of "sharp dealing" in bad faith.

There should be no doubt, finally, that a waiver can be challenged in court. The beneficiaries would probably have standing to challenge the waiver directly in a declaratory judgment or other suit. Even so, the Courts would allow the President broad discretion to determine what is an "emergency" requiring a temporary waiver "in the national interest." The Courts probably would sustain a waiver grounded in a specified rate of inflation (e. g., 10% or more). But a waiver grounded on, say, 3% inflation would not be a "temporary" response to an "emergency." A series of waivers, moreover, would ultimately be seen by the Courts as contrary to the statute. But even if the Courts would sustain such a series of waivers, to eviscerate a statute through Presidential waivers would not be faithfully to execute the nation's laws.



II. Is the President Committed to Sign?

In his Message of November 18, 1974, the President addressed cargo preference in the following language:

"Although I fully support a strong U. S. merchant marine, I am seriously concerned about problems which this bill raises in the areas of foreign relations, national security, and perhaps most significantly, the potential inflationary impact of cargo preference.

"Administration officials have testified during congressional hearings on our concerns about the impact of this bill.

"The House-Senate conferees adopted new language concerning the waiver provision so that the requirements of this bill 'may be temporarily waived by the President upon determination that an emergency exists justifying such a waiver in the national interest.' However, the legislative history of the waiver does not expressly demonstrate that the Congress intends it to be broad in scope.

"The potential problems which could arise if this bill becomes law require a provision which will permit the President to waive its requirements for economic as well as foreign affairs and national defense reasons. Since the waiver language in the bill is not explicit, the Conference Committee Report should make it clear that the Congress intends to grant broad waiver authority.

"Other provisions in the bill which concern me are: (1) the narrowness of the definition of which ships are eligible to participate in this trade, (2) the rebate of oil import fees and (3) the unnecessary anti-pollution requirement that vessels serving certain ports be built with expensive double bottoms."

The conclusions to be drawn from this language are several.

(a) The concerns stated in the final paragraph have not entirely been met. The rebate on oil import fees is continued. (I cannot speak to the other points.)

(b) The Conference Committee Report was not amended. This is not, however, a significant point because an exchange of letters among the Conferees provides a weighty legislative history that indeed "the Congress intends to grant broad waiver authority." Our problem



is not with the legislative history but with the statutory language and the very concept of a "temporary" "waiver" to meet a defined "emergency."

(c) The quoted language does not state a commitment to sign the bill even if the concerns stated in the final two paragraphs were met. The quoted language does not indicate that a bill so revised would be acceptable--as was expressly stated about other bills elsewhere in the message. It is not stated or suggested that the concerns mentioned in the final three paragraphs resolve the basic concern expressed in the initial paragraph.

(d) The quoted language is consistent with the view that cargo preference is undesirable in any form, but that its worst features ought to be lessened in order to minimize the problems that would result if it became law through, for example, an override of a Presidential veto.



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THE WHITE HOUSE
WASHINGTON

~~Eva,~~

Mr. B
FYI

Since Mr. Buchen received a copy of the draft, I thought you would want a copy of the final to complete your file.

Eleanor

12/26



December 21, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: PHILLIP AREEDA

SUBJECT: CARGO PREFERENCE BILL
H. R. 8193

You asked about the meaning of the waiver provision in the cargo preference bill, H. R. 8193. I conclude that the grounds for waiver are "broad" but that any waiver must be a "temporary" response to an "emergency." A succession of temporary waivers might possibly be sustained in the courts but would be contrary to the statute. More detail is stated in the attachment.

The attachment also discusses whether your November 18 statement about cargo preference commits you to sign H. R. 8193.

Attachment

PA chron.
Memo to President's file
Cargo Preference (HR 8193)



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"Other provisions in the bill which concern me are: (1) the narrowness of the definition of which ships are eligible to participate in this trade, (2) the rebate of oil import fees and (3) the unnecessary anti-pollution requirement that vessels serving certain ports be built with expensive double bottoms."

The conclusions to be drawn from this language are several.

(a) The concerns stated in the final paragraph have not been met. Ships built abroad are not eligible to participate even if operating under the U. S. flag; and the rebate on oil import fees is continued.

(b) The Conference Committee Report was not amended. There was, however, an exchange of letters among the conferees which establishes the legislative history that "the Congress intends to grant broad waiver authority."



Our problem is not with the legislative history but with the statutory language and the very concept of a "temporary" "waiver" to meet a defined "emergency."

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