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THE WHITE HOUSE

WASHINGTON

November 4, 1974

Tom

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR

KEN COLE  
JACK MARSH  
BILL TIMMONS  
BILL BAROODY  
BILL SEIDMAN  
WALLY SCOTT

FROM:

MIKE DUVAL

SUBJECT:

CARGO PREFERENCE

Attached is the latest legal position from the Department of Commerce on the effect of the waiver provision adopted by the Conferees.

Their basic conclusion is that under the most reasonable interpretation only a defense emergency will justify a waiver.

Karl Bakke, in this opinion, does point out, however, that there is some ambiguity on this point because of comments made on the House floor by Congressman Grover. The burden of Grover's remarks is that the President can waive the entire Act for reasons of economic emergency. The difficulty is that the Congressman's conclusion is not in any way supported by the language of the Act itself or the written legislative history.

If, during the debate in the Senate when this is taken up, nothing occurs to contradict Grover's argument, then it will be possible to make the argument that the President can waive for economic reasons. It should be pointed out that this will be an extremely tenuous argument, based on floor debate and without any support from the legislation itself or the Committee reports.

On the other hand, if the Grover position is challenged during Senate floor debate, then it would appear that an argument based on a non-national defense emergency would stand virtually no chance of success.

In conclusion, it appears we are in the following position: the waiver provision, on its face and based on the written record, requires a showing of national defense emergency. If the Senate debate supports the position taken by Congressman Grover in the House debate, i.e., the waiver can be based on economic emergency, then perhaps we could at least argue the economic-based waiver.



The difficulty is that even if the Senate goes along with the Grover position, the President could be in a difficult position if he attempted to waive the Act based on economic reasons: (1) those who favor the Act (the maritime interests) would argue that, under the plain language of the statute, such a waiver is not permissible and thus, he would take political heat; and (2) a court could very easily declare such a waiver invalid based on the plain language of the statute.

#### CURRENT ALTERNATIVES

It seems to me that we really have three possible courses of action:

1. Sign the bill regardless of what the Senate does during the floor debate and take a position that the President can waive for economic reasons.
2. Sign the bill only if the Senate floor debate supports the Grover position of liberal waiver; otherwise, veto.
3. Threaten veto to Senate leaders (Long, et al.) on the basis of the lack of any clear language in the Conference Committee Report supporting the proposition that the President can waive for economic reasons. State that floor debate cannot overcome this deficiency in the written record. Ask Long to reopen the Conference and rewrite the Report, making it clear that the waiver is intended to be a broad one.

I recommend the third course of action. I think anything else would leave the President in the untenable position of being for legislation which - on its face - feeds inflation. The only way around this is unequivocal power to waive for economic reasons.

I think it's important that we develop a strategy prior to Congress returning so that Bill Timmons can move to head off an unacceptable bill.

Please let me have your views as soon as possible. Thanks very much.





OCT 21 1974

MEMORANDUM FOR MICHAEL DUVAL  
Associate Director, Domestic Council

SUBJECT: Oil Cargo Preference Legislation

Apropos our discussion of October 10, 1974, set forth below is the sequence of reasoning which lead to the conclusion that only a national defense emergency would justify a waiver under §901(d)(7) of the conference version of the captioned legislation. (While I still feel that conclusion is compelling, a colloquy that occurred during consideration of the conference report by the House could provide a basis for arguing against such a strict construction. See paragraph 8, infra.)

1. The House version of the Oil Cargo Preference bill would have accomplished the desired objective by amending present § 901(b)(1) of the Merchant Marine Act (46 U.S.C. §1241(b)(1)), which imposes U.S. bottom preference requirements for certain cargoes subject to the following waiver proviso:

. . . the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of this paragraph and so notifies the appropriate agency or agencies. . . . [Emphasis added.]

The term "emergency" has uniformly been construed by all concerned to mean that a national defense emergency must exist before waiver of the present cargo preference requirements of §901(b)(1) may be invoked.



2. The Senate bill proposed to accomplish the Oil Cargo Preference requirement by adding a new subsection (d) to § 901 of the Merchant Marine Act, paragraph (7) of which provided that --

The requirements of paragraph (1) may be waived by the President upon determining that an emergency exists justifying a temporary waiver of such requirements. Any such waiver shall not exceed 180 days unless authorized by law. [Emphasis added.]

There was no legislative history to indicate whether the Senate intended the justification for invoking a §901(d)(7) waiver to be the same as or more liberal than the justification for a §901(b)(1) waiver, but the choice of identical language and the absence of a statement of intent to create a different standard strongly suggested that an identical standard was contemplated.

3. The Conferees adopted the Senate approach of adding a new subsection (d) to §901, but, with respect to paragraph (7), deleted the 180 day time limit and modified the Senate language as follows:

The requirements of paragraph (1) may be temporarily waived by the President upon determining that an emergency exists justifying such a waiver in the national interest.

4. Addition of the term "in the national interest" by the conferees did not appear to alter the substantive content of paragraph (7), since that term modifies "waiver," not "emergency;" i. e., as a matter of semantics, the conference provision can only be read to require a finding that an emergency justifies a temporary waiver, not that the "national interest" justifies a waiver.

5. Furthermore, had the conferees intended their modification of the Senate waiver provision to effect a substantive broadening of the circumstances under which a waiver might be invoked, it was reasonable to assume that they would have so indicated in the conference report. However, not only was there no such statement, but



the conferees were at pains to stress that their waiver provision was more restrictive than would have been the case under the House bill:

It should be noted that the waiver provision agreed upon by the conferees is more restrictive than the provision that would apply to the House bill. The conferees gave serious consideration to establishing a specific time limitation, but concluded that such an approach was not feasible. 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. (Congressional Record, Vol. 120, No. 151, page H 10070; October 7, 1974) [Emphasis added.]

In drawing attention to the "more restrictive" waiver provision in the conference bill, it did not seem that the conferees could have been referring to the circumstances under which a waiver could be invoked, since it is difficult to imagine a more restrictive test than a national defense emergency to trigger the waiver authority. By the same token, having deleted the Senate's 180 day limitation, the conferees could not have meant that a waiver under their provision was more restrictive as to duration than a §901(b)(1) waiver. Accordingly, it was reasonable to conclude that reference by the conferees to the "more restrictive" reach of its provision could only have had to do with who might invoke the waiver -- i. e., a waiver of the preference requirements in § 901 (b)(1) of the present Act may be initiated by the President, by the Congress or by the Secretary of Defense, whereas under new § 901(d)(7) only the President may waive the oil cargo preference requirements of new § 901(d)(1).

6. Since the conference report did not indicate that the nature of the "emergency" warranting exercise of the new waiver provision was intended to be broader than the circumstances warranting a waiver under §901(b)(1), it was reasonable to assume that if they had so intended, that fact would have merited at least "equal billing" with the self-evident and rather unnoteworthy comparison of the respect

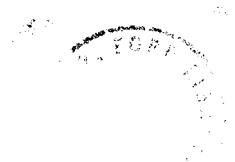


in which the new waiver provision was narrower than the House bill. Failure of the conferees even to mention the standard of justification for a §901(d)(7) waiver suggested, therefore, that they did not intend a different standard to be applied than the one that would have been applied to the House proposal--i.e., the existing standard requiring a national defense emergency.

7. Accordingly, as I stated in our conversation, the better reading of the conference waiver provision in context with the present Act and the conference report seemed to be that a national defense emergency was required, and that a waiver on grounds of economic emergency would not be justified.

8. However, subsequent to that conversation, the House took up the conference report on H. R. 8193. In the course of debate Congressman Grover, Minority Floor Manager of the conference report, responded as follows to allegations that the bill would increase the price of gasoline:

Mr. Speaker, I have heard the arguments on the other side. Heretofore in our hearings, there were contrary arguments and a heavy weight of evidence that indeed this legislation will not increase the cost of gasoline. That claim is a scarecrow; it is a bugbear. In the present conference report, we do not require one single gallon of oil to be carried in an American bottom. It is permissive only and required only where the ships are available. And, by golly, if American bottoms are available and they are lined up, unused, and if there are American sailors available to sail the ships, we should put the oil in those bottoms. Again, it is permissive. It is not required. The President is authorized in this conference report--has absolute discretion--to waive completely every requirement of the legislation in the national interest. If there is going to be an increase in gasoline as a result of this legislation, which I doubt, the President can weigh that impact of the



bill in the national interest. This is a good bill. It is economically sound. It is ecologically sound. I urge the support of the conference report. (Congressional Record, Vol. 120, No. 155, page H 10433; October 11, 1974) [Emphasis added.]

The foregoing statement standing alone would at least create ambiguities with respect to the breadth of the waiver, in that it does not appear to recognize the requirement that the President make a determination that a temporary emergency exists, be it economic or otherwise. However, Mr. Grover immediately followed this statement with a detailed discussion of the legislative background of the waiver provision and the conferees' action with respect thereto. He stated:

Mr. Speaker, the legislation as passed by the two bodies did not differ in any fundamental respect, but rather in terms of legislative drafting. The House-passed bill consisted of an amendment to section 901(b) of the Merchant Marine Act of 1936. The Senate-passed bill, on the other hand, established a new subsection (d) to section 901 of the act thereby segregating the provisions of this legislation dealing with the importation of petroleum from the provisions of existing law governing the carriage of Government-sponsored cargoes.

The Senate approach necessitated the adoption of a number of provisions which were not required in the House bill to cover such matters as Presidential waiver and establishment of agency responsibility for administration of the act. The House bill, of course, was able to rely upon existing provisions of section 901 (b) in these regards. The Committee of Conference adopted the Senate approach with only minor revisions dealing principally with the question of Presidential waiver authority.





The waiver language of existing section 901(b), which the House bill would have relied upon, provides for a waiver whenever the Congress by concurrent resolution or otherwise, or the President or the Secretary of Defense declares that an emergency exists justifying a temporary waiver and so notifies the appropriate line agencies of the Government. The Senate-passed bill eliminated the references to congressional action and to the Secretary of Defense as redundant and imposed a 180-day limit on the duration of any waiver. The managers on the part of the House considered such a limitation arbitrary and unwise. After consultation with the President, a new waiver provision was drafted which states that this act may be temporarily waived by the President upon determination that an emergency exists justifying such a waiver in the national interest.

While it is clear that the utilization of this waiver authority by the President must be based upon a specific emergency of a temporary nature, the adoption of the phrase "in the national interest" is intended to vest in the President broad discretion with respect to the nature of the emergency which might justify invoking this authority. It is my understanding that the President is entirely satisfied with the waiver authority conferred upon him by this legislation as reported by the committee of conference. (Congressional Record, Vol. 120. No. 155, pp. H 10433-10434; October 11, 1974) [Emphasis added.]

Chairman Sullivan, who was the next member recognized, did not challenge Mr. Grover's statement, nor did Mr. Downing who followed Mrs. Sullivan and was also a Majority House Conferee.



The foregoing legislative history would appear sufficient to support an argument that use of a §901(d)(7) waiver is not limited to national defense emergencies, absent contradictory legislative history during Senate consideration of the conference report. It is difficult to predict whether the Senate conferees will undertake to rebut Congressman Grover's broad interpretation of the conference waiver provision, although the majority conferees (Hollings, Inouye, Long and Magnuson) are probably politically unsympathetic with such a liberal reading. Absent such rebuttal, however, the Grover interpretation can be said to have been acquiesced in by the Senate's silence on the subject.

If there is such rebuttal, however, I think the Senate's position would be the stronger of the two. Accordingly, Bill Timmons may well want to take a sounding of the Senate conferees, particularly of Magnuson and Long.

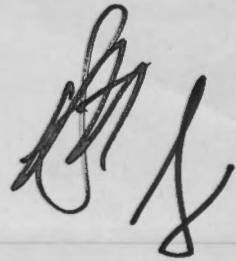
*Karl E. Bakke*

Karl E. Bakke  
General Counsel



12/3/74

(Absh. bgh)  
sapo42



Jack Bowen. SFU matter

1. SFU may merge SMU
2. GAO report Spts Navy on Falcon tankers
3. Wants to call SFU to advise re #2.

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Sandlinger appt.



COUNCIL ON INTERNATIONAL ECONOMIC POLICY  
WASHINGTON, D.C. 20500

W. D. IBERLE

*Keep as  
check!!  
for next  
week*

MEMORANDUM FOR

THE PRESIDENT

SUBJECT: OIL CARGO PREFERENCE LEGISLATION

The so-called "waiver provision" contained in the Conference Report on H. R. 8193 provides as follows:

"The 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."

Interpretation of Waiver Provision: With the exception of a statement made on the floor of the House of Representatives during consideration of the Conference Report, there is no legislative history clarifying whether a waiver of the cargo preference requirements may be invoked solely for national security reasons, or additionally for economic or foreign policy reasons.

Those factors suggesting that the waiver can only be invoked for national security reasons are:

(1) Section 901(b)(1) of the Merchant Marine Act provides for a waiver by Congress or the President or the Secretary of Defense with respect to cargo preference on government impelled cargos upon declaration that "an emergency exists justifying a temporary waiver...." The legislative history in connection with this language clearly indicates that the "emergency" must relate to national security. The above language of Section 901(b)(1) is similar to the



language found in the Conference Report on the present Cargo Preference bill. Such similarity means that one could make a strong argument that the legislative history in connection with waiver for government impelled cargos should also apply in the present case.

(2) In your recent message to Congress you indicated that the legislative history with respect to the waiver provision was not explicit and implied some doubt as to whether you could waive the cargo preference requirements for economic as well as foreign affairs and national security reasons.

The factors suggesting that the waiver can be invoked for economic or foreign policy reasons as well as national security reasons are:

(1) A statement by Representative Grover interpreting the Conference Report on the floor of the House. In responding to allegations that the bill would increase the price of gasoline, Representative Grover indicated that, "The President is authorized in this conference report--has absolute discretion--to waive completely every requirement of the legislation in the national interest.... While it is clear that the utilization of this waiver authority by the President must be based upon a specific emergency of a temporary nature, the adoption of the phrase 'in the national interest' is intended to vest in the President broad discretion with respect to the nature of the emergency which might justify invoking this authority." (Emphasis added.)

(2) The waiver provision in the Conference Report noted above would appear in a separate subsection of the Merchant Marine Act than the language of existing Section 901(b)(1). Thus the legislative history in connection with Section 901(b)(1) does not necessarily apply to the language of the waiver section in the Conference Report.

Invocation of Waiver Provision: Because of economic commitments which will probably be made subsequent to the signing of this legislation, it is highly desirable that the waiver provision be invoked soon after the bill is signed into law. If there is a substantial delay in exercising the waiver, investments and commitments will be made in expectation of receiving the benefits of the Act. After such actions are taken, it would be extremely difficult from a political and economic view to invoke the waiver.



Secondly, you should recognize the probability of litigation initiated by labor and supported by the shipbuilders challenging the validity of a waiver based on economic or foreign policy grounds, as opposed to one based on national security grounds. It is not clear what the result of such litigation would be.

Arguments Favoring Use of Waiver for National Security Reasons:

(1) Lack of U.S. capacity. We presently have the capacity to handle only 15% of the oil tonnage transported, whereas the bill initially requires that 20% of the oil tonnage be carried on U.S. vessels. In meeting the 20% requirement, vessels presently used for domestic shipping would be transferred for international use.

(2) With 20% initially, and eventually 30% of U.S. capacity designated for oil transportation use, the Department of Defense would encounter difficulty in finding sufficient capacity to handle their transshipment requirements.

(3) The flow of oil to the United States might be interrupted if suppliers refused to ship on U.S. flag vessels rather than on other fleets of their choice.


Arguments Favoring Use of Waiver for Economic or Foreign Policy Reasons:

(1) Application of the legislation will result in a substantial inflationary impact on the price of petroleum and petroleum products, electricity, heat, transportation, manufactured and processed goods, and also on ship construction costs.

(2) The costs of shipping petroleum will increase from \$300 to \$600 million per year, depending on the volume of import and the shipping rates for foreign flag ships.

(3) The legislation would violate U.S. treaties of Friendship, Commerce and Navigation with over 20 countries. Additionally, such U.S. legislation might invite retaliation by foreign countries.

(4) The inflationary impact of the legislation may reduce the competitiveness of U.S. exports of petroleum-based products because of higher prices, resulting in an adverse balance of payments impact.

  
W. D. Eberle  
Executive Director

bcc: Secretary Simon, Secretary Dent, Messrs Hartmann,  
Seidman and Marsh



February 10, 1975

MEMORANDUM FOR: THE PRESIDENT  
FROM: JACK MARSH  
SUBJECT: Cargo Preference

Mike Duval mentioned to me a matter which you might wish to give some consideration although it is not a proposal and it is something that Mike is studying further.

He pointed out to me that there may be some merit to a 25¢ per barrel preference on imported oil in favor of American merchant shipping. You will recall you touched on this subject last week. The suggestion is to try to use this to gain support for your energy package.

He points out there may be several advantages to this, including:

1. A stimulus to American shipping much of which is tied up.
2. Fairness to American tankers who must compete against preference in other Nations.
3. Capitol Hill support.
4. Preference goes to cargo only and not to construction.
5. Might head off cargo legislation now moving forward in Congress.

This is simply in the idea stage, and Mike is making a quiet assessment which when complete, I will pass on for your further consideration.

