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

RELEASED

B-196854.3 March 19, 1984

The Honorable Silvio O. Conte
Ranking Minority Member
Committee on Appropriations
House of Representatives

Dear Mr. Conte:

You have asked for clarification and expansion of our views on the Chadha decision and the appropriations process. Your letter to us of July 14, 1983, asked us to discuss Chadha's impact on reprogrammings, committee vetoes, committee approvals, deferrals and rescissions. Our February 15, 1984, letter discussed the latter two items, concluding that the legislative veto proscribed by the Chadha decision is distinguishable in most cases from the congressional approval or disapproval process provided by the Impoundment Control Act of 1974.1/

The basis for our Impoundment Control Act position is simply that legally enforceable congressional intervention in executive branch activities is only precluded under Chadha where there has been a clear congressional delegation of authority to the executive branch, as is the case with the authority delegated to the Attorney General to determine the rights of aliens to remain in this country after their visas have expired. When the authority of the executive branch to take a certain action is not clear or is prohibited, a legislative veto does not unconstitutionally impede executive action; that is, it does not withdraw from the Executive authority previously delegated to it. The veto merely informs the executive that the congressional body does not wish to make an exception and permit an action not previously delegated. This need not rise to the level of legislation to be effective.

1/ The one situation in which congressional disapproval action under the Impoundment Control Act would run afoul of Chadha would be a resolution disapproving a deferral specifically authorized by the Antideficiency Act, 31 U.S.C. § 1512 (1982). However, to the best of our knowledge, neither House of Congress has passed an impoundment resolution disapproving a proposed Antideficiency Act deferral since the Impoundment Control Act was enacted.

In the impoundment context, rescissions are approved by bicameral action which is presented to the President. Deferrals are disapproved by the action of one House, but, except for Antideficiency Act deferrals, they involve situations where there has been no clear delegation of authority to the executive branch to defer the utilization of budget authority. Thus, one-House resolutions disapproving deferrals are permissible in our view. It is our strong conviction that the mechanisms of the Impoundment Control Act should not be abandoned or altered unless the Supreme Court subsequently requires this action. Of course, the Congress would still be free to register its disapproval of a proposed deferral by legislative action in appropriate circumstances.

In our view, this rationale is useful in considering Chadha's impact on the other appropriation techniques mentioned in your letter. Although there is some overlap among these techniques, we will discuss each in turn.

Reprogrammings

Where there is no statutory procedure enacted to regulate the redirecting of budget authority from one purpose to another within an appropriation account and the Congress enacts a lump-sum appropriation without limitations it is implicitly conferring the authority to reprogram.

There are a number of informal (i.e., non-statutory) limitations that specific committees have placed on the authority of certain agencies to reprogram. Some of these have been incorporated into regulations by the agencies themselves. An example would require that the agency "request" and the authorizing committee "approve" any desired reprogramming. Such informal, nonbinding limitations may continue to be observed, even after Chadha. However, an agency is legally entitled to disregard these informal procedures, although it is unlikely that it would choose to do so. See 55 Comp. Gen. 308 (1975).

A statutory requirement to accomplish the same purpose, that is, committee approval of or a committee veto over reprogrammings of lump-sum appropriations, would not be permissible under Chadha. Such a statutory requirement would amount to an attempt to reserve to the Congress the authority to overturn an executive action--a reprogramming decision made pursuant to the delegation of authority in the lump-sum appropriation--without use of the constitutionally-mandated legislative procedure. Statutory requirements to report to certain

committees before proceeding to reprogram or to delay reprogramming action for a specified waiting period, of course, remain valid.

Committee Vetoes

Purportedly binding committee vetoes of proposed action the authority for which has been previously delegated to the executive branch would most likely be unconstitutional under Chadha. Lie-and-wait provisions, coupled with informal, non-statutory expressions of committee disapproval of proposed executive branch actions of course, remain as constitutional methods of congressional oversight.

Committee Approvals

Properly drafted, statutorily required pre-implementation committee approval of proposed executive branch action is permissible under Chadha. For example, section 7 of the Public Buildings Act of 1959, 40 U.S.C. §606 (1976), requires prospectus approval by House and Senate authorizing committees before appropriations may be made for the construction of public buildings which will cost more than a stipulated minimum amount. Since the executive branch has no authority to expend funds for public buildings without an authorization and, in most cases, a line item appropriation, the prospectus approval requirement is constitutionally permissible.

Similarly, the Military Construction Codification Act, 10 U.S.C. §§2801-08 (1982), requires that certain urgent military construction projects not otherwise authorized by law be reported to House and Senate authorizing committees. The projects may proceed at the expiration of a 21-day waiting period or before if approved by the committees. In this case, the authority provided the executive branch to expend funds for certain military construction is not overridden by a lie-and-wait provision.

Another kind of committee approval used in recent appropriations acts is not as clearly free of Chadha difficulties. For example, the Department of Housing and Urban Development--Independent Agencies Appropriations Act, 1984, Pub. L. No. 98-45, 97 Stat. 219, 228, limits appropriations for certain activities to specified amounts unless approval for use of greater amounts is received from the Committees on Appropriations. Similarly, the Department of Transportation and Related Agencies Appropriations Act, 1983, Pub. L. No. 97-369, 96 Stat. 1765, provides that "none

of the funds in this Act shall be available for the execution of the sale or transference of Government-owned securities of the Consolidated Rail Corporation without the prior consent of the House and Senate Committees on Appropriations." There have been many similar riders in recent appropriations acts.

In the described situations, no authority to spend beyond specified amounts or to sell Conrail securities without committee approvals has been delegated to the executive branch by these appropriations riders. Accordingly, a convincing argument may be made that there is no unconstitutional impeding of executive action by the imposition of a committee approval requirement for obligations or expenditures beyond those clearly authorized by the appropriations acts. However, because riders requiring committee approval before obligations or expenditures may be made for otherwise appropriate purposes would at least be subject to challenge on Chadha grounds, it would appear prudent to choose one of the surer methods to control the use of appropriations, discussed below.

Other Considerations

As a general proposition, congressional control over Executive Branch spending may be maintained without after the fact involvement by the Congress or its committees by greater use of line item appropriations and the use of riders on appropriations acts which clearly limit the authority of the executive branch to spend for specified purposes or in specified amounts. Similarly, conditional spending authorizations, such as those contained in the two appropriations acts discussed above, could be accomplished through the supplemental appropriations process rather than through the committee approval mechanism. However, since these additional controls would severely limit executive branch flexibility, the best approach might well be to make greater use of informal, non-statutory approval devices along the lines of those currently used for reprogramming within lump-sum appropriations. These executive-legislative accommodations retain a measure of congressional control which we think is constitutionally permissible.

If we may be of further assistance in this troublesome area, please call on us.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States