



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

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February 15, 1984

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

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Dear Mr. Conte:

Your letter of July 14, 1983, asked for our views on the impact of Immigration and Naturalization Service v. Chadha, U.S. ___, 103 S. Ct. 2764 (1983), on the appropriations process. As we understand that you are primarily concerned with the continuing validity of the Impoundment Control Act, 2 U.S.C. §§ 681-88 (1982), our response is directed toward a discussion of that Act affected by Chadha.

Chadha enunciated the fundamental proposition that the Congress may alter a result obtained under existing authority of law only by following the Constitutional prescription for legislation. The Attorney General pursuant to statutory authority had concluded that one Chadha could remain in the United States rather than being deported. The House of Representatives, in turn, sought to require Chadha's deportation by exercising a statutorily provided right to veto the Attorney General's determination. The Supreme Court held that as the Attorney General's determination was final, having been reached in full accord with the powers and authority delegated to him, it could be overturned only by further legislation which under the Constitution required bicameral passage and presentment to the President for approval. Statutory provisions purporting to authorize the Congress, in effect, to legislate without meeting these requirements were thus struck down as unconstitutional.

The Impoundment Control Act provides for dealing with two types of impoundments in separate ways. Under the Act, the President is required to report all impoundments to the Congress. Funds impounded must be made available for obligation if the Congress registers disapproval.

For budget authority which the President seeks to have rescinded, approval is registered by the enactment in both houses of a required rescission bill, and disapproval is registered by failure of both houses to pass the required

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rescission bill for a period of 45 days. Where the President seeks only to delay or defer rather than rescind the availability of budget authority, congressional approval is registered by inaction and disapproval is registered through enactment in either house of a resolution of disapproval.

A word of explanation may be helpful toward a full appreciation of the scheme provided in the Impoundment Control Act. Budget authority provided in the normal course of funding for the implementation of Government programs is intended to be made available to carry out program purposes in an orderly and timely fashion. Nevertheless, despite this inherent underlying presumption favoring prompt program implementation, occasions arise when for various reasons, such as considerations of fiscal policy, the President seeks either to delay the incurrance of obligations or to avoid the use of budget authority entirely. Authority for these Presidential actions varies, from clear lack of authority, through situations involving complex issues relevant to determining the extent of Presidential authority, to clear existence of authority on the basis of specific statutory provisions governing the "return" of budget authority not needed due to economies effected.

Before enactment of the Impoundment Control Act, in fact as early as 1803, Presidents occasionally had impounded funds. Congress, in turn, had long disparaged this practice. The dimensions of the problem increased dramatically, and courts were deluged with citizen suits seeking the release of impounded funds, when President Nixon impounded nearly 20 percent of the Federal budget.

It became clear by 1974, when the Impoundment Control Act was enacted, that many impoundments were legally impermissible. Nixon administration officials were repeatedly compelled by judicial action to release impounded funds. Most of the Nixon impoundments were designed to permanently prevent the use of appropriated funds. Short term impoundments (deferrals) on the other hand are not as universally alike, and generally were not considered in the pre-Act court cases. Some decisions to postpone spending such as by apportionment or by establishing contingency reserves are expressly authorized by statute. Other impoundments may be impliedly authorized if they are compatible with program goals while deferrals which dilute or impede program effectiveness or are contrary to congressional intent with respect to program functions may well be unauthorized. Deferrals of funds required to be distributed under entitlement programs or formula grants are expressly unauthorized.

With the above distinctions in mind, let us turn to the application of Chadha.

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Under a purist or literal view, we might simply say that provisions of the Impoundment Control Act which purport to restrict the President's authority through congressional inaction in the case of rescissions and through single House resolutions in the case of deferrals have been rendered ineffective by Chadha. The only instances in which this broad conclusion could appropriately apply, however, are those involving clear Presidential authority to impound without need for further congressional involvement. At the other extreme are those instances where the President has no authority to impound. Here it is clear that congressional inaction or single House resolutions as a means of restricting initiated impoundments does not run afoul of Chadha, since there is no need for such congressional involvement to rise to the level of legislation. The President's underlying lack of authority in the first instance is sufficient to support restriction of his impoundment action.

Stated briefly, then, Chadha, viewed literally, would seem to undermine the procedural scheme of the Impoundment Control Act in cases where the impoundments are effected pursuant to clear authority; but Chadha does not affect operation of the act's procedures in cases where impoundments are effected without authority. Where funds are impounded without authority, the relevant action or inaction in the Congress serves merely to express either a willingness or unwillingness to ignore the withholding of budget authority involved. And this does not rise to the level of "legislating".

Between the extremes of clearly authorized impoundments and those clearly unauthorized are impoundments which go against the grain of the expected timely implementation of Government programs for which budget authority is provided by duly enacted law. The authority for such impoundments, whether seeking rescission or deferral, is often clouded and complex.

Recognizing that though procedures laid out in the Impoundment Control Act serve, in some instances, to restrict Presidential authority to impound, the Act in other instances provides for the Congress to avoid disturbing impoundments which at bottom are not authorized. Add those impoundments which are effected without a clear cut authoritative basis and we can conclude that the Impoundment Control Act provided authority toward a workable mechanism for balancing the powers of the executive and legislative branches with regard to subtle and complex issues not readily amenable to more straightforward consideration on a case-by-case basis.

In other words, we do not have here a full delegation through legislation of program authority with an attempt to reserve some element of control by a procedure short of that

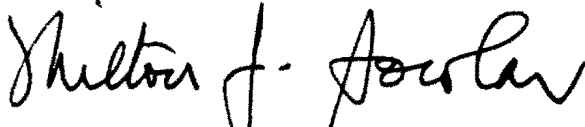
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prescribed by the Constitution for the enactment of legislation. Rather, what we have is a set of procedures designed to provide for the resolution of issues related to the orderly application of budget authority for program purposes. These procedures do not purport in any way to control congressionally the substantive program determinations made by the Executive branch pursuant to program authorities provided by law. Under these circumstances, it is not at all clear that the Impoundment Control Act need be viewed as being vitiated by Chadha.

Finally, it is important to note that the President through the Director of the Office of Management and Budget has stated that the Administration, notwithstanding Chadha, will continue to report impoundments in accordance with the provisions of the Impoundment Control Act, and the administration has done so. And it is important to note, too, that actions taken by the President and the Congress pursuant to the Act do not purport in any way to affect the substantive rights which derive from the programs affected by impoundment action. That is, the Act may not be relied upon to defeat any substantive rights otherwise due under the affected programs.

We think it sound to continue application of the Impoundment Control Act as before Chadha and, should the executive branch choose at some later date to avoid following the Act, that the applicability of Chadha be litigated prior to taking any action to amend provisions of the Act.

Sincerely yours,

for 
Comptroller General
of the United States