

CRS Report for Congress

Received through the CRS Web

Committee Controls of Agency Decisions

November 16, 2005

Louis Fisher
Senior Specialist in Separation of Powers
Government and Finance Division

Committee Controls of Agency Decisions

Summary

Congress has a long history of subjecting certain types of executive agency decisions to committee control, either by committees or subcommittees. Especially with the beginning of World War II, the executive branch agreed to committee controls as an accommodation that allowed Congress to delegate authority and funds broadly while using committees to monitor the use of that discretionary authority. These committee-agency arrangements took the form of different procedures: simply notifying the committee, obtaining committee approval, "coming into agreement" understandings, and using the congressional distinction between authorization and appropriation to exercise committee controls.

By the 1930s, the White House and the Justice Department began to object to committee-approval arrangements as an encroachment into executive duties and a violation of separation of powers. Litigation in the 1970s, supported by the Administration, resulted in the Supreme Court's decision *INS v. Chadha* (1983), striking down every form of legislative veto: two-house, one-house, committee, subcommittee, and chairman. The Court ruled that whenever Congress intends to exercise control over any action outside the legislative branch, it must comply with the regular constitutional requirements for lawmaking: action by both houses (bicameralism) and submission of a bill or joint resolution to the President for his signature or veto (Presentation Clause).

Notwithstanding this decision, agencies continue to fashion accommodations that settle some decisions at the level of committees and subcommittees. This type of arrangement is seen frequently in reprogramming procedures, where agencies seek committee/subcommittee approval before shifting certain types of funds within an appropriations account. A number of committee vetoes are also used outside the reprogramming process.

This report explains how and why committee vetoes originated, the constitutional objections raised by the executive branch, the Court's decision in *Chadha*, and the continuation of committee review procedures since that time. For a brief six-page treatment, see CRS Report RS22132, *Legislative Vetoes After Chadha*, by Louis Fisher. This report will be updated as events warrant.

Contents

The Presentation Clause	1
Nineteenth Century Exceptions	2
Early Twentieth Century	2
Constitutional Disputes	3
“Come into Agreement” Provisions	3
Presidential Objections	5
Congressional Override Debate	6
Committee Veto Resurfaces	8
Accommodations Under Eisenhower	9
Authorization-Appropriation Distinction	10
“Imperative Needs”	10
Attorney General Opinion	11
Committee Vetoes Persist	12
Legal Objections	13
Presidents Take Aim	13
Johnson Draws the Line	14
Congressional Rulemaking Provision	15
Carter’s Challenge	16
Some Exceptions Allowed	16
Litigation	18
Lower Court Action	18
INS v. Chadha	19
Elected Branch Response	19
Statutory Fixes	20
Resort to Congressional Rules	21
Notification	21
Nonstatutory Understandings	21
NASA Accommodation	22
Transferring AID Funds	23
The “Baker Accord”	23
Continued Litigation	24
D.C. Area Airports	24
GSA Notification	25
Reprogramming of Funds	25
Origin of Reprogramming	26
Defense Reprogramming	26
Other Committee Procedures	29
Conclusions	31

Committee Controls of Agency Decisions

This report explains the origin, growth, and persistence of committee controls over executive agency decisions in the face of repeated legal and constitutional objections by various Administrations. By reviewing the origin of committee controls six to seven decades ago, one is better able to understand how and why these committee-agency relationships were forged, and why some committee-veto provisions have survived after the Supreme Court, in *INS v. Chadha* (1983), declared the legislative veto unconstitutional. What is interesting about the continuation of committee review procedures after *Chadha* is that they appear not merely in statutory provisions (objected to regularly by Presidents in their signing statements) but in agency budget manuals as well. That is, despite constitutional objections raised by Presidents and the Justice Department, executive departments and agencies have found it both practicable and necessary to submit certain proposals to designated committees for their review and approval.

The Presentation Clause

A committee veto requires an executive agency to submit a proposed action to designated committees before placing the program in operation. This procedure obviously departs from the customary route of having Congress pass a bill and present it to the President. Article I, Section 7, of the Constitution provides that “every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)” shall be presented to the President for his signature or veto. Legislative actions short of a public law have included various types of legislative vetoes: two-house (concurrent resolution), one-house (simple resolution), and committee/subcommittee controls.

Even before the development of legislative vetoes, the Constitution permitted some exceptions to the Presentation Clause. Congress adopted constitutional amendments in the form of resolutions and referred them directly to the states (rather than through the President) for ratification. The procedure, following the language of Article V of the Constitution, was sanctioned by the Supreme Court in 1798.¹ Also from an early date, Congress passed simple and concurrent resolutions for internal housekeeping matters. Since these were not regarded as “legislative in effect,” there was no need to submit them to the President. Many of them were adopted pursuant to congressional powers under Article I to determine procedural rules in each house and to punish or expel Members of Congress. Committee subpoenas and the power of either house to hold an executive official in contempt are other actions not considered to be legislative in effect.

¹ *Hollingsworth v. Virginia*, 3 Dall. 378 (1798).

Nineteenth Century Exceptions

A Senate report in 1897 concluded that “legislative in effect” depended not on the mere form of a resolution but on its substance. If it contained matter that was “legislative in its character and effect,” it had to be presented to the President.² However, executive officials at times recognized that the legislative effect of such resolutions could be changed fundamentally by having their use sanctioned in a public law. In 1854 Attorney General Caleb Cushing stated that a simple resolution could not coerce a department head “unless in some particular in which a law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House.”³

For example, legislation in 1867 placed the following restriction on appropriations for public buildings and grounds: “To pay for completing the repairs and furnishing the executive mansion, thirty-five thousand dollars: *Provided*, That no further payments shall be made on any accounts for repairs and furnishing the executive mansion until such accounts shall have been submitted to a joint committee of Congress, and approved by such committee.”⁴ President Andrew Johnson could have objected that the lawmaking process established by the Constitution requires action by both chambers and submission of a bill to the President for his signature or veto. However, he may have concluded that obtaining approval from a joint committee would be easier than getting legislation through the entire Congress.

Early Twentieth Century

Attorney General Cushing’s opinion covered certain types of one-house and two-house actions used to direct executive officials. In 1903, Congress resorted to simple resolutions to direct the Secretary of Commerce to make investigations and to issue reports.⁵ Two years later, Congress relied on concurrent resolutions to direct the Secretary of War to make investigations in rivers and harbors matters.⁶ In 1920, President Woodrow Wilson vetoed a bill because it provided that no government publication could be printed, issued, or discontinued unless authorized under such regulations prescribed by the Joint Committee on Printing. He objected that Congress had no right to endow a joint committee or a committee of either House “with power to prescribe ‘regulations’ under which executive departments may operate.”⁷

Other Presidents were willing to agree to committee controls if Congress would transfer to them additional authority. In 1929, President Herbert Hoover proposed

² S. Rept. No. 1335, 54th Cong., 2d Sess. 8 (1897).

³ 6 Ops. Att’y Gen. 680, 683 (1854).

⁴ 14 Stat. 469 (1867).

⁵ 32 Stat. 829, § 8 (1903).

⁶ 33 Stat. 1147, § 2 (1905). See 2 Hinds’ Precedents §§ 1593-94.

⁷ 17 *A Compilation of the Messages and Papers of the Presidents* 8846 (1925 ed.).

to Congress that it delegate to him the authority to reorganize executive agencies, subject to the approval of a joint committee of Congress.⁸ When Congress passed legislation for reorganization authority in 1932, it allowed either house to disapprove a presidential proposal.⁹

Constitutional Disputes

Administrations objected to committee involvement in certain kinds of executive matters. In 1933, Attorney General William Mitchell issued an opinion that regarded as unconstitutional a bill that authorized the Joint Committee on Internal Revenue to make the final decision on any tax refund that exceeded \$20,000.¹⁰ Previous legislation had allowed the committee to decide all tax refunds over \$75,000. Apparently executive officials had lived with the higher threshold without objection. By lowering the amount, a political accommodation was somehow transformed into unconstitutional interference with executive decisions.¹¹

Despite Mitchell's opinion, Congress continues to require the Treasury Department to notify the Joint Committee on Taxation of refunds above a certain level. Prior to 2000 the amount was \$1,000,000.¹² In 2000 Congress increased the amount to \$2,000,000.¹³ It would be possible for a President or administration official to raise a constitutional objection that the committee's disapproval of a refund beyond the statutory ceiling would be merely advisory and not binding, but the political cost of that position might well exceed any perceived benefits of a pure version of separated powers.

“Come into Agreement” Provisions

A unique type of committee veto emerged during World War II to handle military construction and the acquisition of land by the military services. Administration officials raised some constitutional questions about this involvement of Congress in executive decisions, but political accommodations were worked out between the branches. Because of the magnitude of wartime construction, it was considered impracticable to follow the customary practice of having Congress authorize each defense installation or public works project. Discretion had to be granted to executive officials, but Congress was also intent on establishing effective legislative controls.

Beginning with an informal system in 1942, all proposals for acquisition of land and lease arrangements were submitted in advance to committees of jurisdiction.

⁸ *Public Papers of the Presidents*, 1929, at 432.

⁹ 47 Stat. 413-15, §§ 401-08 (1932).

¹⁰ 37 Ops. Att'y Gen. 56 (1933).

¹¹ See 76 Cong. Rec. 2448 (1933).

¹² 26 U.S.C. § 6405(a) (1994).

¹³ Pub. L. No. 106-554, 114 Stat. 2763A-634, § 305(a) (2000); 26 U.S.C. § 6405(a) (2000).

During House debate on February 23, 1943, Representative Melvin J. Maas of the Naval Affairs Committee said there “has been a growing apprehension relative to the military services going into the real-estate business.” The committee felt “while we must allow discretion to the Navy in the selection of sites, that at least we should know what they are doing.”¹⁴ The bill therefore required the Secretary of the Navy to report to the House and Senate Naval Affairs Committees on all prospective acquisitions of land, by lease or otherwise.¹⁵

In a letter of February 17, Secretary of the Navy Frank Knox wrote to Representative Carl Vinson, chairman of the House Naval Affairs Committee, about concerns that had been expressed with respect to the proposed construction of certain facilities for the development of the naval air transport services. It was Knox’s understanding that the committee accepted the need for these projects and that “when the details have been worked out they will be discussed with the committee before final commitments are made. This arrangement is satisfactory to me.”¹⁶ Would the Navy Department merely report to the committees, in advance, and then proceed with its plans? Some legislators thought that the committees would have to first grant their approval to the specific projects. As one Member noted, the department would have “to come back to the committee for further approval.”¹⁷ Other lawmakers believed that if the committees objected to the proposed projects, Congress as a whole would have to disapprove by regular legislation.¹⁸

Secretary Knox clarified the situation with another letter to the House Naval Affairs Committee, this one dated February 22. Concerning the bill language requiring the Secretary of the Navy to report to the Naval Affairs Committees on all prospective acquisitions of land, by lease or otherwise, Knox explained the political accommodation that would eliminate the need for Congress to vote on each specific acquisition:

It is my understanding that this amendment has been proposed in order to avoid the necessity of having specific legislative authorization for each individual acquisition of land. I understand further that the committee understands from the wording of the amendment that the Department will come into the agreement with the Naval Affairs Committees of the House and Senate with respect to acquisitions before final commitments are made. This procedure is acceptable to me.¹⁹

That informal system was replaced by statutory directives in a 1944 statute governing the construction of public works for the Navy. The statute provided: “prior to the acquisition, by lease or otherwise, of any land under authority of this act, the Secretary of the Navy shall report to the Senate and House Naval Affairs

¹⁴ 89 Cong. Rec. 1218 (1943).

¹⁵ *Id.*

¹⁶ *Id.* at 1219.

¹⁷ *Id.* (remarks by Rep. Cole).

¹⁸ *Id.* at 1218 (remarks by Rep. Maas); *id.* at 1220 (remarks by Rep. Maas).

¹⁹ *Id.* at 1229.

Committees all such prospective acquisitions.”²⁰ The committees would therefore know in advance of pending actions and could register their approval or disapproval. A few months later Congress tightened the statutory language, replacing the merely “report” language to mutual agreement between the Secretary of the Navy and the naval committees. The new language read:

prior to the acquisition or disposal, by lease or otherwise, of any land acquired for naval use under the authority of this, or any other Act, the Secretary of the Navy shall come into agreement with the Naval Affairs Committees of the Senate and of the House of Representatives with respect to the terms of such prospective acquisitions or disposals; and recital of compliance with this proviso in any instrument of conveyance by the Secretary of the Navy under authority of this or any other Act shall be conclusive evidence of the Secretary’s compliance with this proviso as to the property conveyed.²¹

In return for the Administration’s agreement to abide by committee objections, Congress consented to enact general authorization statutes providing lump-sum amounts rather than trying to specify individual projects. Both sides found it a reasonable compromise.

Additional “come into agreement” provisions were added in 1949 and 1951, requiring the approval of the Armed Services Committees for acquisition of land and real estate transactions.²² In a January 6, 1951 statute authorizing military and naval construction, Congress stated in Section 407 that the military services “may not grant or transfer to another Government department or agency other than a military department or to any other party any land or buildings of a permanent nature . . . except as authorized by an Act of Congress enacted subsequent to the date of enactment of this Act.”²³

Presidential Objections

Nine days after signing the January 6, 1951 statute, President Harry Truman sent a special message to Congress objecting that the language in Section 407 “may seriously impede our mobilization effort by causing unnecessary and unwarranted delay in the transfer for other governmental uses of property excess to the needs of the military departments.”²⁴ He cautioned Congress to avoid getting involved in the details of management: “it seems to me unwise at a time when the Congress will be fully concerned with matters of greatest national importance, to go through the process of reviewing in detail, transaction by transaction, the sale or disposition to the general public of such few pieces of property as may be determined to be surplus

²⁰ 58 Stat. 8 (1944).

²¹ *Id.* at 190.

²² 63 Stat. 66 (1949); 65 Stat. 365, § 601 (1951).

²³ 64 Stat. 1223, § 407 (1951).

²⁴ *Public Papers of the Presidents*, 1951, at 107.

to the needs of the government as a whole.”²⁵ He urged Congress to repeal the section.

Congress did repeal Section 407, but in its place adopted a committee-control mechanism. On May 15, 1951, President Truman vetoed the bill, objecting that it would require the Army, Navy, Air Force, and Federal Civil Defense Administration “to come into agreement with the Committees on Armed Services of the Senate and House of Representatives with respect to the acquisition or disposal of real property, including leases involving an annual rental in excess of \$10,000, and including transfers of real property between the military departments or to other Federal agencies, or to States, with certain minor exceptions.” He acknowledged that “Congress or its members have a special interest in a number of real estate transactions by the Executive Branch of the Government,” and that “full information with respect to those transactions has in the past and will in the future be made readily available to the interested Committees of the Congress.” However, he said that a legal requirement to submit real estate transactions to congressional committees “would result in the imposition of a severe and unnecessary administration burden on the Department of Defense.”²⁶ Subjecting administrative proposals to committee review might cause serious delays on agency execution and planning. In addition, he argued, rather than have real estate transactions handled largely in the field, they would have to be centralized in the Pentagon, leading to potential waste of time and money.

The points raised by President Truman concerned administrative, not constitutional, problems. Yet he also expressed his concern “by what appears to me to be a gradual trend on the part of the legislative branch to participate to an even greater extent in the actual execution and administration of the laws.” Under the U.S. Constitution “it is contemplated that the Congress will enact the laws and will leave their administration and execution to the executive branch.” The delays he identified in the vetoed bill “testify to the wisdom of that constitutional policy.” He regarded it as “particularly inappropriate to depart from that policy in the field of military emergency when expeditious action may be vital to the survival of our nation.”²⁷

Congressional Override Debate

The House overrode the veto handily by a vote of 312-68.²⁸ Representative Carl Vinson explained that the bill had passed his committee on Armed Services unanimously, had passed the House unanimously, and had passed the Senate with the change of a single word. The purpose of the bill, he said, was to take the April 4, 1944 statute requiring the Navy to “come into agreement” with the Naval Affairs

²⁵ *Id.*

²⁶ *Public Papers of the Presidents*, 1951, at 280-81.

²⁷ *Id.* at 282.

²⁸ 97 Cong. Rec. 5444-45 (1951).

Committees, and to extend the same principle to the Army and the Air Force.²⁹ All 35 members of the House Armed Services Committee recommended that the veto be overridden.³⁰

Representative Vinson also disputed the charge that the bill would lead to excessive delays or heavy administrative burdens on the Defense Department. Experience over the previous nine years — two years by informal agreement and seven by statutory requirement — had not revealed such problems. Substantial sums, he said, had been saved as a result of close committee review. Moreover, “there was no objection from the Department of Justice as to the constitutionality of this question of [committee] veto.”³¹

Ironically, Vinson looked for support to the work done by Truman in 1944 when he headed a Senate investigation committee, uncovering “many injustices” by the War Department in acquiring hotels. Senator Truman compared those problems with the experience of the Navy Department, which “advises the legislative committees of its real estate acquisitions in advance and keeps those committees advised of its situation.”³²

Vinson said that when the Armed Services Committee held a hearing on the draft bill in 1951, a general from the Corps of Engineers, representing the Defense Department, objected that the bill would cause too much trouble and delay. The committee told him: “General, you can write the bill to suit yourself.” He exempted rivers and harbors and flood control projects and exempted leases on agricultural grazing permits. As to the balance of the bill that he drafted, Vinson said “of course he is against it because all departmental officials are against Congress knowing what goes on.”³³

As an example of savings realized through the committee review process, Representative Vinson described a \$30,000,000 proposal by the Navy Department to construct a new plant to manufacture aircraft engines. After House Armed Services asked the Navy to make a further investigation and survey, it withdrew the proposal because it found existing facilities suitable to do the work.³⁴ Vinson offered this advice:

If any man in this House that is sent here to exercise this responsibility will go back home and tell your people that you are sent to Washington only to appropriate money that the Department of Defense wants and you know nothing about it until the time comes to foot the bill, I guarantee if you make that kind of

²⁹ Id. at 5435.

³⁰ Id.

³¹ Id. at 5436.

³² Id.

³³ Id.

³⁴ Id.

a statement they will send a man with a little more inquisitive mind to Washington.³⁵

To Vinson, Congress had every right to scrutinize real estate transactions by executive agencies, especially on the transfer of government land and buildings: “[w]hy should we permit the Department of Defense, whenever it makes up its mind, to sell this piece of property or sell that piece of property? It is Government property, and Congress should have some control over Government property.”³⁶

Several Members of the House, including Abraham Multer, Boyd Tackett, Chet Holifield, and Wright Patman argued that Congress had no right to administer the laws that it enacts. Some of these objections came from Members who thought that the Armed Services Committee was encroaching upon the jurisdiction of their own committees, such as Expenditures in Executive Departments and Banking and Currency.³⁷ After the House overrode President Truman’s veto, the Senate tabled the President’s message and did not take it up again.³⁸

Committee Veto Resurfaces

Having failed to override Truman’s veto, lawmakers decided to write a new bill and included within it the disputed “come into agreement” provision. The bill became law on September 28, 1951. Instead of the earlier dollar threshold of \$10,000, the new language increased it to \$25,000 for five specified categories.³⁹ President Truman signed the bill and did not make a separate signing statement commenting on the committee veto.

House and Senate debate sheds some light on the compromise language and the determination of Congress to vest control in the Armed Services Committees notwithstanding constitutional objections about the separation between the branches. Representative Vinson, managing the bill in the House, explained that the authority given to the Armed Services was so necessary that it was incorporated in the pending bill.⁴⁰ The “come into agreement” procedure was included as Section 601, adopting in two subsections the same \$10,000 threshold as the bill that President Truman had vetoed. Three subsections had no dollar threshold at all.⁴¹ The bill passed 353 to 5.⁴² In the Senate, Section 601 was amended by increasing \$10,000 to \$25,000 and

³⁵ Id.

³⁶ Id. at 5437.

³⁷ Id. at 5437-43.

³⁸ Id. at 5490.

³⁹ 65 Stat. 336, 365, § 601 (1951).

⁴⁰ 97 Cong. Rec. 9816 (1951).

⁴¹ Id. at 9834.

⁴² Id. at 9956.

making the higher threshold apply to all five subsections.⁴³ In conference, the House accepted the Senate substitute with the exception of a single word in subsection (d).⁴⁴ President Truman signed the bill into law.⁴⁵

In his last year in office, President Truman had one more opportunity to voice his objection to committee vetoes. Congress passed a bill authorizing the Postmaster General to lease quarters for Post Office purposes. The legislation required every lease-purchase agreement negotiated under authority of the bill to receive the approval of the House and Senate Committees on Post Office and Civil Service and the House and Senate Committees on Public Works. Congress adjourned sine die on July 7, 1952, for the second session of the 82d Congress. The bill reached Truman two days later. In a pocket veto, he questioned “the propriety and wisdom of giving Committees veto power over executive functions authorized by the Congress to be carried out by executive agencies.”⁴⁶

There appeared to be no Administration objection that final year to placing veto power not merely with a committee but with a committee chairman. A supplemental appropriation bill, enacted on July 15, 1952, established procedures for making changes in Bureau of the Budget Circular A-45, dated June 3, 1952. The statute provided that the circular could be amended or changed during the current fiscal year “by the Director of the Budget with the approval of the chairman of the Committee on Appropriations of the House of Representatives.”⁴⁷

Accommodations Under Eisenhower

During the presidency of Dwight D. Eisenhower, on several occasions administration officials raised constitutional objections to the sharing of administrative decisions with political groups outside the executive branch. On May 25, 1954, President Eisenhower vetoed a bill providing for the conveyance of lands within a military camp in Florida. In agreeing to the general purpose of the bill, he objected to a provision that authorized the State of Florida to dispose of “interests or rights in land by lease, license, or easement or by contract of sale of timber or timber products” upon the condition that in the case of federal lands — and within nine months after enactment of the bill — the state and the Secretary of the Army agreed on how to dispose of the revenues from such operations. Eisenhower supported cooperative action between federal and state governments, but drew the line at a provision that required the state and the Secretary to then “come into agreement” with the Armed Services Committee. To give the committee joint control over such decisions “would violate the fundamental constitutional principle of separation of powers prescribed in Articles I and II of the Constitution which place the legislative

⁴³ Id. at 10968.

⁴⁴ Id. at 11529 (Amendment 30).

⁴⁵ 65 Stat. 365, § 601 (1951).

⁴⁶ *Public Papers of the Presidents, 1952-53*, at 488.

⁴⁷ 66 Stat. 661, § 1413 (1952).

power in the Congress and the executive power in the Executive branch.”⁴⁸ The making of a contract or agreement on behalf of the United States “is a purely executive or administrative function.”⁴⁹ He recommended that the bill be modified by requiring executive agencies to submit reports to Congress on actions taken. The modified bill became law on July 14, 1954, without the coming-into-agreement provision.⁵⁰

Authorization-Appropriation Distinction

Congress responded with a different mechanism for assuring committee control. Legislation enacted on July 22, 1954 amended the Public Buildings Act to authorize the Administrator of General Services to acquire title to real property and to provide for the construction of certain public buildings by executing purchase contracts. With the Administration blocking the coming-into-agreement provision, the General Services Administration (GSA) statute provided as follows:

No proposed purchase contract agreement shall be executed under this section unless such agreement has been approved by the Director of the Bureau of the Budget, as evidenced by a written statement of such officer to the effect that the execution of such agreement is necessary and is in conformity with the policy of the President. No appropriations shall be made for purchase contract projects which have not been approved by resolutions adopted by the Committees on Public Works of the Senate and House of Representatives, respectively, within three years after the date of enactment of this Act.⁵¹

President Eisenhower did not object to this procedure. During debate on the bill, lawmakers explained that they had checked with the Parliamentarians of the two houses and were satisfied that the procedure was an appropriate and constitutional methods of “retain[ing] the authorization power in the hands of the Congress”⁵² If an appropriation should be proposed that lacked the approval of the Public Works Committees, the appropriation would be subject to a point of order.⁵³

“Imperative Needs”

A year later, Congress placed a committee veto in the defense appropriations bill. No part of the funds appropriated in that bill “may be used for the disposal or transfer by contract or otherwise of work that has been for a period of three years or more performed by civilian personnel” of the Defense Department unless justified to the Appropriations Committees at least ninety days in advance of such disposal or transfer, “that its discontinuance is economically sound and the work is capable of performance by a contractor without danger to the national security: *Provided, That*

⁴⁸ *Public Papers of the Presidents*, 1954, at 508.

⁴⁹ *Id.*

⁵⁰ 68 Stat. 474 (1954).

⁵¹ 68 Stat. 519 (1954).

⁵² 100 Cong. Rec. 10016 (1954) (remarks by Sen. Case).

⁵³ *Id.* (remarks of Sen. Holland).

no such disposal or transfer shall be made if disapproved by either committee within the nine-day period by written notice to the Secretary of Defense.”⁵⁴

In signing the bill, President Eisenhower said he did so because the funds “are urgently needed.” Except for that “imperative need,” he would have withheld his approval because Attorney General Herbert Brownell had advised him that the committee veto “constitutes an unconstitutional invasion of the province of the Executive.”⁵⁵ Congress had “the power and the right” to grant or deny an appropriation, but once the funds are provided they must be “administered by the executive branch of the Government alone, and the Congress has no right to confer upon its committees the power to veto Executive action or to prevent Executive action from becoming effective.”⁵⁶ He stated that his approval of the bill was not intended to acquiesce to the procedure, and to the extent the Appropriations Committees exercised a veto, “such section will be regarded as invalid by the executive branch of the Government in the administration [of the bill] unless otherwise determined by a court of competent jurisdiction.”⁵⁷ No litigation resulted from this statute. The statement that the provision would be regarded as invalid left it in the hands of the Administration, and particularly the Secretary of Defense, whether to honor or defy a committee veto. If the Administration chose the latter course, it could have expected legislative sanctions of one form or another.

Attorney General Opinion

On the same day as Eisenhower’s signing message, Attorney General Brownell released a six-page opinion entitled “Authority of Congressional Committees to Disapprove Action of Executive Branch.” He concluded that the committee-veto provision in the defense appropriations bill “engrafts executive functions upon legislative members and thus overreaches the permitted sweep of legislative authority. At the same time, it serves to usurp power confided to the executive branch.”⁵⁸ Congress “as a whole” retains the right to legislate on contractual authority, but “it is quite clear that committees of the Congress do not have the legal capacity to enact legislation.”⁵⁹

Brownell reviewed the provisions of Articles I and II of the Constitution and cited previous cases by the Supreme Court on the doctrine of separation of powers. He denied that the provision in the defense appropriations bill could be sustained as a proper condition to an appropriation. He acknowledged that Congress may “impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution.” Invalid conditions, he warned, would place “the separability of the

⁵⁴ 69 Stat. 321, § 638 (1955).

⁵⁵ *Public Papers of the Presidents*, 1955, at 688.

⁵⁶ *Id.* at 689.

⁵⁷ *Id.*

⁵⁸ 41 Ops. Att’y Gen. 230, 231 (1955).

⁵⁹ *Id.*

branches of Government . . . in the gravest jeopardy.”⁶⁰ Brownell regarded the committee-veto provision as “separable from the remainder of the act and, if viewed as imposing an invalid condition, does not affect the validity of the remaining provisions.”⁶¹

Committee Vetoes Persist

In 1956, President Eisenhower confronted two other committee vetoes. On July 16 he vetoed a bill authorizing certain construction projects at military installations. One section of the bill, relating to the Talos missile, provided that none of the authorizations “shall be effective until the Secretary of Defense shall have come into agreement” with the Armed Services Committees. Another section provided that notwithstanding any other provision in the bill, or any other law, no contract shall be entered into by the United States for the construction or acquisition of military family housing units unless the Defense Department “has come into agreement” with the Armed Services Committees. He objected to those provisions as “a serious departure from the separation of powers as provided by the Constitution.”⁶² Congress made no attempt to override the veto and repassed the bill without the coming-into-agreement clauses.⁶³ The new legislation provided for notification and semiannual reports to the Armed Services Committees.⁶⁴

On August 6, 1956, President Eisenhower signed a small reclamation project bill into law, but offered comments in his signing statement. He described a section as “seriously faulted” because it provided that the Secretary of the Interior could execute contracts during a 60-day period only if neither of the designated committees adopted a committee resolution disapproving the project within the waiting period. Only if both committees approved the project proposal could the Secretary proceed to execute the contract. If either committee disapproved, the Secretary could not proceed further unless the entire Congress approved the project.⁶⁵ Eisenhower explained that he signed the bill because Congress had adjourned and could not receive and act upon his veto message. He said he had been assured that the committees of jurisdiction would take action to correct the deficiencies he identified in the next session of Congress.⁶⁶

A statute of June 5, 1957, amended the disputed section by removing the committee veto but adopted a substitute procedure that provided essentially the same legislative control. The statute provided that no appropriation for a small reclamation project could be used prior to 60 calendar days from the date that the Secretary of the

⁶⁰ Id. at 233.

⁶¹ Id. at 235. This opinion is reprinted as “Separation of Powers: Executive and Legislative Branches,” 60 Dick. L. Rev. 1 (1955).

⁶² *Public Papers of the Presidents*, 1956, at 597.

⁶³ 70 Stat. 991 (1956).

⁶⁴ Id. at 1012, § 302; id. at 1016, § 408(c); id. at 1018, § 416.

⁶⁵ *Public Papers of the Presidents*, 1956, at 649.

⁶⁶ Id. For statutory language, see 70 Stat. 1045, § 4(c) (1956).

Interior submitted the project to Congress “and then only if, within said sixty days, neither the House nor the Senate Interior and Insular Affairs Committee disapproves the project proposal by committee resolution.”⁶⁷ This looked like the same kind of committee veto, but it was directed not at the Secretary but at the Appropriations Committees. In that sense, it was a committee veto *within* Congress and not directly between the branches. It was modeled after the July 22, 1954, statute on public buildings, previously discussed. Eisenhower signed the bill after Brownell assured him that this procedure — based on the authorization-appropriation distinction — was within Congress’s power.⁶⁸

Legal Objections

Acting Attorney General William P. Rogers issued a legal analysis, “Authority of Congressional Committees to Disapprove Action of Executive Branch,” dated August 8, 1957. In reviewing a statute with a come-into-agreement provision, he objected that this type of committee veto “permits organs of the legislative branch to take binding actions having the effect of law without opportunity for the President to participate in the legislative process, [and] also permits mere handfuls of members to speak for a Congress which is given no opportunity to participate as a whole.”⁶⁹ Rogers reviewed the occasions where Presidents had expressed their opposition to committee vetoes, either in veto messages or signing statements.

In 1959, Congress again used the authorization-appropriation process to constrain the Executive. Legislation enacted on September 9 continued the committee veto in the Public Buildings Act. No appropriation could be made to construct any public building or acquire any building to be used as a public building involving an expenditure in excess of \$100,000 and no appropriation could be made to alter any public building involving an expenditure in excess of \$200,000 “if such construction, alteration, or acquisition has not been approved by resolutions adopted” by the House and Senate Committees on Public Works.”⁷⁰ President Eisenhower made no comment in signing the bill.

Presidents Take Aim

Presidents Truman and Eisenhower had expressed many objections to committee vetoes, and the opposition from the Justice Department and the White House continued to mount. In veto messages and signing statements, President Lyndon B. Johnson challenged a number of these provisions. On December 31, 1963, he signed the Public Works Appropriations Act, although it contained a provision stipulating that “[n]o real property or rights to the use of real property, or activity shall be disposed of or transferred by license, lease, or otherwise except to

⁶⁷ 71 Stat. 49, § (d) (1957).

⁶⁸ Joseph P. Harris, *Congressional Control of Administration* 230-31 (1964).

⁶⁹ 41 Ops. Att’y Gen. 300, 301 (1957).

⁷⁰ 73 Stat. 480, § 7 (1959).

another agency of the United States Government unless specifically approved by the appropriate legislative committees of the House and Senate.”⁷¹ Pointing to previous opinions by Attorneys General, he agreed that it was proper for committees of jurisdiction to request information, and for the two branches to engage in consultation, but announced his intention to treat the committee-veto provision “as a request for information and to direct that the appropriate legislative committees be kept fully informed with respect to disposal and transfer actions taken by the Panama Canal Company.”⁷² With this language he attempted to exercise a revisory veto, altering bill language to make it conform with his constitutional interpretation. A more practical question was what would happen when the designated committees objected? Would the Panama Canal Company ignore the committees’ position?

In similar fashion, on July 17, 1964, President Johnson signed the Water Resources Research Act.⁷³ It did not contain express language for a committee veto, but it was his understanding that one provision “in effect” required the Secretary of the Interior to obtain the approval of House and Senate committees for each water research grant or contract: “Although this legislation is so phrased that it is not technically subject to constitutional objection, it violates the spirit of the constitutional requirement of separation of powers between the executive and legislative branches.”⁷⁴

Johnson Draws the Line

A year later, on June 5, 1965, President Johnson vetoed the Pacific Northwest Disaster Relief Act because it contained a provision that prohibited an appropriation for certain actions unless the Committees on Public Works had first granted their approval by resolution.⁷⁵ This type of committee veto had been accepted by the Eisenhower Administration because it was internal to Congress, but to Johnson it “seriously violates the spirit of the division of powers between the legislative and executive branches.”⁷⁶ He was advised by the Attorney General that the procedure was “clearly a ‘coming into agreement’ with a congressional committee requirement.”⁷⁷

A new bill, without the dispute provision, was quickly drafted.⁷⁸ Several Members of the House strongly objected to the legal analysis that had been presented to President Johnson. They thought that the requirement for approval by the Public Works Committees was appropriate because it involved a new program of an

⁷¹ 77 Stat. 847 (1963).

⁷² *Public Papers of the Presidents*, 1963-64, I, at 104.

⁷³ 78 Stat. 329 (1964).

⁷⁴ *Public Papers of the Presidents*, 1963-64, II, at 862.

⁷⁵ 111 Cong. Rec. 12669 (1965).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 12671-73, 12725-26.

unknown nature that the Office of Emergency Planning would present.⁷⁹ However, given the pressing need to deal with disaster relief, the House accepted the stripped-down bill.⁸⁰ President Johnson signed this revised bill.⁸¹

On August 21, 1965, President Johnson vetoed the military construction authorization bill because Section 611 provided that no military camp, post, station, base, yard, or other installation or facility could be closed, abandoned, or substantially reduced in mission until 120 days after reports of the proposed actions were made to the Armed Services Committees. Such reports could be submitted only between January 1 and April 30 of each year. If Congress were to adjourn sine die before the 120 days passed, the Administration would have to resubmit the report to the next regular session of Congress. Johnson objected that the procedures “could seriously interfere with and adversely affect the administration of our military program.” He refused to sign into law “a measure which deprives him of power for eight months of the year even to propose a reduction of mission or the closing of any military installation”⁸² Congress rewrote the bill, deleting the offending language, and it became law the following month.⁸³

As another example of Johnson’s determination to curb committee power, on October 26, 1965, he signed the omnibus rivers and harbors bill. Section 201(a) incorporated the familiar procedure of forbidding an appropriation unless the Public Works Committees had passed resolutions of approval.⁸⁴ Johnson’s signing statement said: “I do not plan to implement section 201(a) of this legislation.”⁸⁵ It was a curious threat, because it was not an executive matter. If one of the authorizing committees failed to pass a resolution of approval, and a point of order was successfully raised against an appropriation, the control would be in Congress, not the presidency.

Congressional Rulemaking Provision

A different position was taken during the Nixon presidency. On May 28, 1972, President Richard M. Nixon signed the Second Supplemental Appropriations Act, commenting on two provisions. He pointed out that the Public Buildings Act provided that no appropriations may be made for projects until the Public Works Committees had approved GSA’s prospectuses for the buildings. He wrote: “The Congress regards this ‘no appropriation may be made’ provision . . . as internal Congressional rulemaking not affecting the executive branch, and this Administration

⁷⁹ Id. at 13692.

⁸⁰ Id. at 13690-97.

⁸¹ *Public Papers of the Presidents*, 1965, II, at 664; 79 Stat. 131 (1965).

⁸² *Public Papers of the Presidents*, 1965, II, at 907.

⁸³ 79 Stat. 793 (1965).

⁸⁴ 79 Stat. 1073, § 201(a) (1965).

⁸⁵ *Public Papers of the Presidents*, 1965, II, at 1082.

has acquiesced in that construction.”⁸⁶ On the other hand, he objected to a provision in the bill that required the GSA to seek approval from the committees. This procedure, he said, was unconstitutional.⁸⁷ In signing the Public Buildings Amendments of 1972, he again accepted the “no appropriation may be made” provision as appropriate internal congressional rulemaking.⁸⁸

President Gerald Ford objected to a number of committee-veto provisions in bills he signed. A defense appropriations bill required approval from the Appropriations and Armed Services Committees of the House and Senate. Regarding the provision as unconstitutional, instead of vetoing the entire bill he said he would treat the committee-approval requirement as “a complete nullity.”⁸⁹ He made a similar comment when signing the Foreign Assistance and Related Appropriations Act on July 1, 1976. One provision conditioned the availability of appropriated funds “upon the acquiescence of the Appropriations Committees of each House of Congress.” He decided that the provision was severable from the balance of the bill.⁹⁰

Carter’s Challenge

The major critique of legislative vetoes came from President Jimmy Carter. In a message to Congress on June 21, 1978, he objected to the proliferation of this type of congressional control. He said that in the previous four years “at least 48 of these provisions have been enacted — more than in the preceding twenty years.”⁹¹ He regarded as unconstitutional all forms of the legislative veto: two-house, one-house, and committee. The only exception he regarded as permissible was the one-house veto over reorganization proposals submitted by the President.⁹² He said that he would treat existing legislative vetoes, or those he must sign in the future, as “report-and-wait” provisions.⁹³ The Administration would report certain proposals to Congress and its committees, wait a certain amount of time, and then carry out the law regardless of whether committees disapproved or failed to approve.

Some Exceptions Allowed

The Carter challenge to legislative vetoes contained a few exceptions. An opinion by Attorney General Griffin Bell in 1977 attempted to justify the one-house veto in the reorganization statutes. The Administration wanted to keep this procedure, despite some constitutional doubts, because it offered a number of

⁸⁶ *Public Papers of the Presidents*, 1972, at 627.

⁸⁷ *Id.* at 628.

⁸⁸ *Id.* at 687.

⁸⁹ *Public Papers of the Presidents*, 1976-77, I, at 242.

⁹⁰ *Public Papers of the Presidents*, 1976-77, II, at 1935-36.

⁹¹ *Public Papers of the Presidents*, 1978, I, at 1146.

⁹² *Id.* at 1147.

⁹³ *Id.* at 1149.

advantages to the executive branch: Congress had to act on a presidential proposal (it couldn't bottle it up in committee or fail to act) and no amendments were permitted. Congress had to act up or down within a fixed time period.

In justifying this type of legislative veto (and no other), Attorney General Bell reasoned that the procedures for legislative action prescribed in Article I, § 7, “are not exclusive.”⁹⁴ He found most legislative vetoes unconstitutional because they did not respect the constitutional checks on legislative power and threatened to shift the balance of power to Congress “and thus permitting the legislative branch to dominate the executive.”⁹⁵ However, if statutory procedures did not affect the constitutional balance between the branches — “that is, the power of presidential veto is effectively preserved and the principle of bicameralism is respected — the fact that the procedure is not explicitly authorized by the language of Article I is not enough to render the statute constitutional.”⁹⁶

What Bell drew from this analysis was the fact that a congressional one-house veto of a reorganization plan did not alter executive-legislative relations or the law. If one house decided to disapprove the President's reorganization plan, the structure of government remained as before. The reorganization process allowed the President to retain control. The President “will submit to Congress only plans which he approves and rather than be forced to accommodate the demands of Congress as to the shape of the plan, he can decide to submit no plan at all.”⁹⁷

In Bell's judgment, presidential control over other legislative vetoes was not the same. If one house or both houses decided to disapprove an agency regulation or a reprogramming of funds within an appropriations account, the matter was closed. Bell was also concerned that those legislative vetoes involved Congress in the administration of continuing programs. By contrast, the reorganization statute “does not involve creation of a new substantive program or congressional interference with authorized administrative discretion in an ongoing program. The doctrine of separation of powers is not violated.”⁹⁸

On the day that President Carter issued his statement regarding legislative vetoes as unconstitutional, two officials from his Administration appeared at a press conference to explain the scope of his policy. Reporters wanted to know how Carter's position applied to the procedure governing arms sales, which Congress, under law, could veto by concurrent resolution. Attorney General Bell was asked whether President Carter would feel bound if Congress, by a two-house veto, disapproved the pending Mideast arms sales package. Bell replied: “He would not be bound in our view, but we have to have comity between the branches of government, just as we have between nations. And under a spirit of comity, we could

⁹⁴ 43 Ops. Att'y Gen. 71, 73 (1977).

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Id. at 74.

abide by it, and there would be nothing wrong with abiding by it. We don't have to have a confrontation every time we can."⁹⁹ Presidential Assistant Stuart Eizenstat added:

I think the point the Judge is making is that we don't concede the constitutionality of any of [the legislative vetoes] yet, but that as a matter of comity with certain of these issues where we think the Congress has a legitimate interest, such as the War Powers Act, as a matter of comity, we are willing to forego the specific legal challenge and abide by that judgment because we think it is such an overriding issue.¹⁰⁰

Eizenstat's remarks were significant because they moved away from the unyielding opposition of President Carter to legislative vetoes (with the exception of reorganization authority) and signaled that constitutional concerns could be waived depending on the presence of "an overriding issue." That is, room was left for ordinary political accommodations. Eizenstat referred to the War Powers Act because it provides for a concurrent resolution of disapproval to force the President to withdraw U.S. forces engaged in hostilities. Opening the door to areas where Congress "has a legitimate interest," however, left no clear legal or constitutional boundaries.

Litigation

President Carter's decision to confront Congress on the legislative veto came at a time when this form of congressional control was being actively litigated in federal court. Congress had begun to apply the legislative veto to agency rulemaking: a one-house veto over General Services Administration regulations on Nixon's papers, a two-house veto over regulations issued by the Commissioner of Education, a two-house veto over passenger restraint rules by the National Highway Traffic Safety Administration, a one-house veto over Federal Election Commission regulations, a one-house veto to disapprove incremental pricing regulations proposed by the Federal Energy Regulatory Commission, and a two-house veto for Federal Trade Commission rules.¹⁰¹ The Justice Department was prepared to confront legislative vetoes in court.

Lower Court Action

Federal courts initially limited their holdings to the specific statute before them and often avoided, on procedural grounds, any decision at all. The incremental, case-by-case approach ended in 1982 when the D.C. Circuit struck down the one-house veto of FERC regulations, the two-house veto of FTC regulations, and a committee

⁹⁹ Office of the White House Secretary, Briefing by Attorney General Griffin B. Bell, Stuart E. Eizenstat, Assistant to the President for Domestic Affairs and Policy, and John Harmon, Office of Legal Counsel, Department of Justice, June 21, 1978, at 4.

¹⁰⁰ *Id.*

¹⁰¹ Louis Fisher, *Constitutional Conflicts Between Congress and the President* 149 (4th ed. 1997).

veto of Housing and Urban Development Department reorganizations. The broad basis of these rulings implied that all legislative vetoes, of whatever character, were unconstitutional because they failed to follow the established course of lawmaking: passage of a bill by both houses and submission of the bill to the President for his signature or veto.¹⁰²

INS v. Chadha

In 1983, the Supreme Court ruled that the one-House legislative veto in the Immigration and Nationality Act was unconstitutional because it violated both the principle of bicameralism and the Presentation Clause. Whenever congressional action has the “purpose and effect of altering the legal rights, duties, and relations of persons” outside the legislative branch, Congress must act through both houses in a bill presented to the President.¹⁰³ The mere fact that a law or procedure is “efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government.” It was not enough that the legislative veto might be a “convenient shortcut” or an “appealing compromise.”¹⁰⁴

Elected Branch Response

The conditions that created the legislative veto over the years did not change with the Court’s opinion in *Chadha*. Executive officials still wanted substantial latitude in administering delegated authority; legislators still insisted on maintaining control without having to pass another statute. It could be expected that the executive and legislative branches would develop substitutes that served as the functional equivalent of the legislative veto. Instead of exercising a one-house veto over executive reorganization proposals (now invalid under *Chadha*), Congress could insist on a joint resolution of approval, which is what it did in 1984 to comply with the Court’s decision.¹⁰⁵ A joint resolution of approval satisfied the twin tests of bicameralism and presentment, but it required the President to obtain the support of both houses within a specified number of days. If one house withheld support the practical effect was a one-house veto. The new procedure was deemed so onerous

¹⁰² Clark v. Valeo, 559 F.2d 642, 650 n.10 (D.C. Cir. 1977), aff’d sub nom., Clark v. Kimmitt, 431 U.S. 950 (1977); Atkins v. United States, 556 F.2d 1028, 1059, 1963-65 (Ct. Cl. 1977), cert. denied, 424 U.S. 1009 (1978); Chadha v. INS, 634 F.2d 408, 433 (9th Cir. 1980); Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982); Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982); AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982). See Fisher, Constitutional Conflicts Between Congress and the President, at 150-52.

¹⁰³ INS v. Chadha, 462 U.S. 919, 952 (1983). A few weeks later the Court affirmed the opinions of the D.C. Circuit striking down the FERC and FTC legislative vetoes; 463 U.S. 1216 (1983).

¹⁰⁴ INS v. Chadha, 462 U.S. at 944, 958-59.

¹⁰⁵ 98 Stat. 3192 (1984).

that the Reagan Administration decided not to request a renewal of reorganization authority after it expired.

Statutory Fixes

Congress also replaced several legislative vetoes in the District of Columbia Home Rule Act with a joint resolution of disapproval.¹⁰⁶ This form of action puts the burden on Congress to stop a District of Columbia initiative. Three statutes in 1985 removed legislative vetoes from statutory procedures. The concurrent resolution governing national emergencies was replaced by a joint resolution of disapproval.¹⁰⁷ The same approach was used on legislation concerning export administration.¹⁰⁸ A number of legislative vetoes had been used in the past to deal with federal pay increases. Congress converted those to a joint resolution of disapproval.¹⁰⁹

After *Chadha*, some Members of Congress introduced legislation to change the War Powers Act of 1973 to remove the concurrent resolution and replace it with a joint resolution of disapproval.¹¹⁰ As finally enacted, however, it became a freestanding and alternative legislative procedure that is available to force a vote to order the withdrawal of troops.¹¹¹ The Nuclear Non-Proliferation Act of 1978 included a two-house veto (concurrent resolution) over certain agreements for cooperation.¹¹² In response to *Chadha*, that procedure was changed in 1985 to provide for a joint resolution of disapproval.¹¹³

Legislation in 1974 gave Congress a one-house veto to disapprove presidential proposals to defer (delay) the spending of appropriated funds.¹¹⁴ Even before *Chadha*, Congress had begun to disapprove deferrals by inserting language in bills passed through the regular legislative process, and continued to do that after *Chadha* was announced. In 1986, however, when the Reagan Administration turned to deferrals to satisfy the deficit targets in the Gramm-Rudman-Hollings Act, affected parties went to court to contest the legality of presidential proposals. They argued that if the one-house veto was invalid under *Chadha*, the President's deferral authority was inextricably tied to the unconstitutional legislative veto. According to the argument of plaintiffs, Congress would not have delegated the deferral authority to the President unless it knew it had a one-house veto to maintain control. If one part of the statute fell, so did the other. The federal courts accepted that argument,

¹⁰⁶ 98 Stat. 1945, 1974, § 131 (1984).

¹⁰⁷ 99 Stat. 405, 448, § 801 (1985).

¹⁰⁸ 99 Stat. 120, 160, § 301(b) (1985).

¹⁰⁹ 99 Stat. 1322, § 135(e) (1985).

¹¹⁰ 129 Cong. Rec. 28406-08, 28673-74, 28683-84, 28686-89 (1983).

¹¹¹ *Id.* at 33395-96 (1983); 97 Stat. 1062, § 1013 (1983); 50 U.S.C. § 1546a (2000).

¹¹² 92 Stat. 120, 139-41, § 308 (1978).

¹¹³ 99 Stat. 160, § 301(b) (1985); 42 U.S.C. §§ 2159(b)-(f) (2000). See also *Cranston v. Reagan*, 611 F.Supp. 247, 251 (D.D.C. 1985).

¹¹⁴ 88 Stat. 297, 335, § 1013(b) (1974).

holding that the deferral authority and the one-house veto were inseverable.¹¹⁵ Congress promptly converted the judicial doctrine into statutory law.¹¹⁶ The effect was to limit the President to routine, managerial deferrals and prohibit the use of deferral authority to delay the spending of funds simply because the President disagreed with the budget priorities enacted into law.

Resort to Congressional Rules

Internal House and Senate rules offered another alternative. Congress could require that funds be appropriated only after an authorizing committee passed a resolution of approval. If an agency adopts a regulation that offends Congress, legislators can attach language to an appropriations bill denying the use of funds to implement the regulation. Since the President would rarely veto an appropriations bill because it contained an objectionable rider, the practical effect may be viewed as a two-house veto. Because of House-Senate comity, the effect in many instances will be more like a one-house veto.

Notification

Statutes can require that designated committees be notified before an agency implements a program. Notification does not raise a constitutional issue, since it falls within the report-and-wait category already sanctioned by court rulings.¹¹⁷ But “notification” also can be a code word for a committee veto. Only in highly unusual circumstances would an agency defy the expressed wishes of an authorization or appropriation committee.

Nonstatutory Understandings

Congress continued to use the legislative veto in the years following *Chadha*. Most of the legislative vetoes require agencies to obtain the approval of the Appropriations Committees. Presidents regularly sign them into law, objecting that they are invalid under *Chadha* and thus a legal nullity. These signing statements interpret the statutory language to require only that designated committees be notified of a pending agency action.¹¹⁸ The extent to which the statutory language actually functions as a committee veto depends on committee-agency relations and a willingness to develop informal understandings. *Chadha* may have the effect of limiting statutory provisions; it does not touch nonstatutory arrangements.

¹¹⁵ *City of New Haven, Conn. v. United States*, 809 F.2d 900 (D.C. Cir. 1987); *City of New Haven, Conn. v. United States*, 634 F.Supp. 1449 (D.D.C. 1986).

¹¹⁶ 101 Stat. 754, 785, § 206 (1987).

¹¹⁷ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-15 (1941); *INS v. Chadha*, 462 at 935 n.9.

¹¹⁸ E.g., 40 *Weekly Comp. Pres. Doc.* 3013 (December 23, 2004), statement on signing communications legislation; *id.* at 2453 (October 18, 2004), statement on signing the Department of Homeland Security Appropriations Act, 2004; *id.* at 2454 (October 18, 2004), signing the District of Columbia Appropriations Act, 2005.

NASA Accommodation

When President Reagan signed an appropriations bill in 1984, he objected to the presence of seven provisions that required executive agencies to seek the prior approval of the Appropriations Committees.¹¹⁹ In stating that he would implement legislation “in a manner consistent with the *Chadha* decision,”¹²⁰ he implied that committee-veto provisions would be regarded by the Administration as having no legal effect. After notifying the committees, apparently agencies could do as they liked without obtaining the committees’ approval.

The House Appropriations Committee responded by reviewing a procedure that had worked well with the National Aeronautics and Space Administration (NASA) for about four years. Statutory ceilings (caps) were placed on various NASA programs, usually at the level requested in the President’s budget. NASA could exceed those caps only if it received permission from the Appropriations Committees. Because the Administration now threatened to ignore the committee controls, the House Appropriations Committee said that it would repeal both the committee veto *and* NASA’s authority to exceed the caps.¹²¹ If NASA wanted to spend more than the caps allowed, it would have to do what the Court mandated in *Chadha*: have a bill passed by both houses and presented to the President.

NASA did not want to obtain a new public law every time it found it necessary to exceed spending caps. To avoid that burden, NASA Administrator James M. Beggs wrote to the Appropriations Committees and suggested a compromise. Instead of putting the caps in a public law, he recommended that they be placed in the conference report that explains how Congress expects a public law to be carried out. He then pledged that NASA would not exceed any ceiling identified in the conference report without first obtaining the prior approval of the Appropriations Committees:

Without some procedure for adjustment, other than a subsequent separate legislative enactment, these ceilings could seriously impact the ability of NASA to meet unforeseen technical changes or problems that are inherent in challenging R&D programs. We believe that the present legislative procedure could be converted by this letter into an informal agreement by NASA not to exceed amounts for Committee designated programs without the approval of the Committees on Appropriations. This agreement would assume that both the statutory funding ceilings and the Committee approved mechanisms would be deleted from the FY 1985 legislation, and that it would not be the normal practice to include either mechanism in future appropriations bills. Further, the agreement would assume that the future program ceiling amounts would be identified by the Committees in the Conference Report accompanying NASA’s annual appropriations act and confirmed by NASA in its submission of the annual operating plan. NASA would not expend any funds over the ceilings

¹¹⁹ *Public Papers of the Presidents*, 1984, II, at 1056.

¹²⁰ *Id.* at 1057.

¹²¹ H. Rept. No. 916, 98th Cong., 2d Sess. 48 (1984).

identified in the Conference Report for these programs without the prior approval of the Committees.¹²²

NASA continued to abide by this agreement, which is permissible under *Chadha*.¹²³ While not legally bound by the agreement set forth in the letter, NASA knows that violations of trust would likely provoke the Appropriations Committees to reinsert caps in the public law and compel the agency to seek a separate law each time it finds it necessary to exceed the spending ceilings.

Transferring AID Funds

For about a decade, Congress required the Agency for International Development (AID) to obtain the prior, written approval of the Appropriations Committees before transferring funds from one appropriations account to another. In 1987, OMB Director James Miller III advised Congress that the committee veto violated the constitutional principles announced in *Chadha*. The House Appropriations Committee threatened to repeal both the committee veto and the transfer authority, forcing the agency to do what the Supreme Court asked: come to Congress and follow bicameralism and presentment for each transfer action. Representative David R. Obey, chairman of the Appropriations subcommittee handling foreign assistance, reportedly remarked: “To me, that [OMB letter] means we don’t have an accommodation any more, so the hell with it, spend the money like we appropriated it. It’s just dumb on their part.”¹²⁴

In the face of the committee’s response, the Administration agreed to acquiesce to the committee veto.¹²⁵ When Miller repeated the constitutional objection the next year, Congress followed through on its threat and deleted both the committee veto and the transfer authority. In 1989, the two branches adopted compromise language that allowed AID to transfer funds provided it adhered to “regular notification procedures.”¹²⁶ AID would notify the Appropriations Committees about proposed transfers and wait 15 days. If the committees objected during that period, AID would proceed only at great peril. Ignoring committee objections could result in the loss of transfer authority.

The “Baker Accord”

Another example of an informal agreement that permitted committee control over agency activities involved the “Baker Accord” of 1989. In the early months of the Bush I Administration, Secretary of State James A. Baker III decided to give four

¹²² Letter from James M. Beggs, Administrator of the National Aeronautics and Space Administration, to Rep. Edward P. Boland, chairman of the Subcommittee on HUD-Independent Agencies of the House Committee on Appropriations, Aug. 9, 1984.

¹²³ E.g., 139 Cong. Rec. 23351 (Oct. 4, 1993).

¹²⁴ Edward Walsh, “OMB Objection Raises House Panel’s Hackles,” *Washington Post*, Aug. 13, 1987, at A13.

¹²⁵ *Id.*; 101 Stat. 1329-155, § 514 (1987).

¹²⁶ 103 Stat. 1219, § 514 (1989).

committees of Congress a veto power over the fractious issue of funding the Nicaraguan Contras. Given the interbranch confrontation over the Iran-Contra affair, institutional trust was at a low point. In return for receiving \$50 million in humanitarian aid for the Contras, Baker reportedly agreed that a portion of the funds could be released only with the approval of certain committees and party leaders.¹²⁷ According to newspaper accounts, White House Counsel C. Boyden Gray objected to this level of involvement by Congress in foreign policy, especially through what appeared to be an unconstitutional legislative veto.¹²⁸ Former judge Robert H. Bork regarded the Baker Accord as “even more objectionable” than the legislative veto struck down in *Chadha*, because it permitted control by mere committees instead of by a one-house veto.¹²⁹

However, the informal nature of the Baker Accord was not prohibited by *Chadha* and Baker accepted the compromise. In a letter to Congress, he agreed that the Contras would not receive financial assistance after November 30, 1989, unless he received letters from “the Bipartisan Leadership of Congress and the relevant House and Senate authorization and appropriations committees.”¹³⁰ Four Members of Congress sued the President and the Secretary of State for entering into this “side agreement” with Congress, claiming that it represented a forbidden legislative veto. A federal district court dismissed the lawsuit on the grounds that the plaintiffs had no standing and that the case constituted a question of national defense and foreign policy committed to the elected branches.¹³¹

Continued Litigation

After *Chadha*, several statutory provisions were reviewed in the courts to determine their consistency with the principles established by the Court. Statutes that seemed to put lawmakers too much in the center of agency decision making were struck down. Other statutes, relying on informal agreements between committees and agencies, survived.

D.C. Area Airports

In 1986, Congress passed legislation creating a board of review (composed of nine Members of Congress) and gave it veto power over decisions made by a regional authority responsible for two airports serving the Washington, D.C. metropolitan area. The Supreme Court held that the legislative veto power violated the doctrine

¹²⁷ John Felton, “Bush, Hill Agree to Provide Contras With New Aid,” *CQ Weekly Report*, March 25, 1989, at 656.

¹²⁸ David Hoffman & Ann Devroy, “Bush Counsel Contests Contra Aid Plan,” *Washington Post*, March 26, 1989, at A5.

¹²⁹ 135 Cong. Rec. 6528 (1989).

¹³⁰ Letter from Secretary of State James A. Baker, III, to Speaker Jim Wright, April 28, 1989, reprinted in Louis Fisher, *American Constitutional Law* 206 (6th ed. 2005).

¹³¹ *Burton v. Baker*, 723 F.Supp. 1550 (D.D.C. 1989).

of separation of powers.¹³² Congress then reconstituted the board, giving it the power to recommend but not veto. The new statute authorized Congress to pass a joint resolution of disapproval to reject actions by the regional authority. Joint resolutions satisfy the *Chadha* requirements of bicameralism and presentment, but the courts found the new arrangement unconstitutional. The D.C. Circuit held that the board of review acted as an agent of Congress and that the power to make “recommendations” was in fact the power to coerce.¹³³ If the board adopted congressional recommendations, its proposals would take effect immediately. If it did not adopt the recommendations, it would have to transmit them to Congress for a 60-legislative day review period. Depending on the calculation of legislative days, the delay could last six months. Because of the time-sensitive nature of decisions for major airports, postponements of that magnitude had a coercive effect.¹³⁴

GSA Notification

Federal courts recognize less coercive instruments used by congressional committees. A case decided after *Chadha* involved a statute that required the General Services Administration (GSA) to notify appropriate committees of Congress in advance of a negotiated sale of surplus government property in excess of \$10,000. GSA regulations further provided that in the “absence of adverse comment” by the review committees, the disposal agency might sell the property on or after 35 days.¹³⁵ The U.S. Claims Court found the procedure to be tantamount to committee disapproval and therefore unconstitutional under *Chadha*.¹³⁶ The U.S. Court of Appeals for the Federal Circuit reversed, finding nothing unconstitutional about the decision of agencies to voluntarily bind themselves by regulation to defer to committee objections: “There is nothing unconstitutional about this: indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary government.”¹³⁷

Reprogramming of Funds

An area where committee and subcommittee controls over agency actions persist after *Chadha* is reprogramming. Reprogramming consists in moving funds within an appropriation account. Since the money remains within the account, there is no legal violation, unless some provision of law makes it so. To move the funds outside the account to another account, an agency must receive specific statutory authority. This type of shift of funds is called transfers. The terms “reprogramming” and

¹³² Wash. Airports v. Noise Abatement Citizens, 501 U.S. 252 (1991).

¹³³ Hechinger v. Metro. Wash. Airports Authority, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 513 U.S. 1126 (1995).

¹³⁴ Id. at 101-05.

¹³⁵ 40 U.S.C. § 484(e)(6); 41 C.F.R. § 101-47.304-12(f).

¹³⁶ City of Alexandria v. United States, 3 Ct.Cl. 667, 675-78 (1983).

¹³⁷ City of Alexandria v. United States, 737 F.2d 1022, 1026 (C.A.F.C. 1984).

“transfers” are sometimes used interchangeably, but they describe very different activities.

Although it is the practice of Congress to appropriate in large, lump-sum amounts, it is the understanding of the appropriations and authorizing committees that the money will be spent in accordance with the original departmental budget justifications, as amended by committee and congressional action. Agency officials are expected to keep faith with Congress and respect the integrity of budget estimates. Congressional committees and executive agencies recognize that it is often necessary and desirable to depart from budget justifications, prepared months and sometimes years in advance of the actual obligation and expenditure of funds.

Origin of Reprogramming

The term “reprogramming” does not appear in committee reports and committee hearings until the mid-1950s. Prior to that time, however, essentially the same kind of budgetary practice had been carried out under different names, such as “transfers,” “adjustments,” and “interchangeability.” An article by Arthur W. Macmahon in 1943 describes a subcommittee process that allowed the Bureau of the Census to spend money that had been appropriated for a somewhat different purpose.¹³⁸ A committee report in 1940 contains an understanding that permitted the Forest Service to reallocate appropriations “irrespective of any earmarking that may have been set up in the Budget.”¹³⁹ Elias Huzar wrote about a World War II “gentlemen’s agreement” requiring the War Department to “notify, and get the approval of, the military appropriations subcommittees before it effected transfers.”¹⁴⁰

Defense Reprogramming

Congress consented to this shifting of funds during World War II as a necessary emergency measure. As the practice persisted, however, members of the Appropriations Committees grew restive and began to reassert legislative spending prerogatives. This attitude was particularly pronounced in 1949 when Congress adopted the concept of the “performance budget,” which endorsed a trend toward lump-sum appropriations. The National Security Act Amendments of 1949 authorized the Secretary of Defense to prepare the budget estimates in such form and manner “so as to account for, and report, the cost of performance of readily identifiable functional programs and activities”¹⁴¹ Subsequent reductions in the number of appropriations accounts for the Defense Department increased executive spending flexibility.

¹³⁸ Arthur W. Macmahon, “Congressional Oversight of Administration: The Power of the Purse” (Part 2), 58 Pol. Sci. Q. 380, 404 (1943).

¹³⁹ *Id.* at 404.

¹⁴⁰ Elias Huzar, *The Purse and the Sword* (Ithaca, N.Y.: Cornell University Press, 1950), at 352.

¹⁴¹ 63 Stat. 586, § 403 (1949).

In response, Congress began to require the Defense Department to report on a regular basis on reprogramming activities and, eventually, to seek prior approval of selected items from designated committees. From 1948 to 1955, the number of appropriations accounts for the Defense Department was cut by half: from 104 accounts in 1948 to 48 by 1955.¹⁴² This shift of responsibility to committees coincided with the development of other forms of committee vetoes during this period, including the “come into agreement” procedure.

The first specific legislative guideline appeared in 1954. In reporting out the defense appropriations bill, the Senate Appropriations Committee identified areas in which economies were believed possible. To the extent that reductions could not be accomplished in the areas suggested “without detrimental effect, adjustments should be made in such areas as will not impair the program. The committee directs, however, that in no instance shall a project within an appropriation exceed the amount of the original budget estimate.”¹⁴³ The conference report on the 1954 defense bill further defined the authority of the Defense Department to shift funds within an appropriation:

... it is agreed by the managers that such transfers [reprogrammings] shall be effective only with respect to those specific projects which were reduced by the House and made the subject of appeal for restoration to the Senate and only upon prior approval of the Appropriations Committees of the Senate and the House of Representatives for the Department of Defense.¹⁴⁴

During hearings in 1955 on the defense budget, Representative John Taber remarked that every year there were at least 10 to 15 Defense Department reprogramming requests asking the House Appropriations Committee to approve a change in some items from the original justifications. Requests were submitted to the chairman and ranking member of the defense subcommittee for their consideration. DOD Comptroller Wilfred J. McNeil, acknowledging that some diversions took place without the committee’s knowledge, maintained that clearance was obtained from the Appropriations Committees on all important matters.¹⁴⁵ In a committee report in 1955, the House Appropriations Committee warned that it had never been its intention to permit the military departments to have “unrestricted freedom in reprogramming or shifting funds from one category or purpose to another without prior notification or consent of the Committee.”¹⁴⁶ In addition to this process of notification and approval over selected items, the committee now requested semiannual tabulations for all reprogramming actions by the Defense Department. The Pentagon responded by issuing a set of instructions that defined the scope of

¹⁴² Louis Fisher, “Reprogramming of Funds by the Defense Department,” 38 J. Pol. 77, 80 (1974).

¹⁴³ S. Rept. No. 1582, 83d Cong., 2d Sess. 1-2 (1954).

¹⁴⁴ H. Rept. No. 1917, 83d Cong., 2d Sess. 8 (1954).

¹⁴⁵ House Committee on Appropriations, hearings on “Department of Defense Appropriations for 1956,” 84th Cong., 1st Sess. 562-63 (1955).

¹⁴⁶ H. Rept. No. 493, 84th Cong., 1st Sess. 8 (1955).

reporting requirements and established criteria as to what would constitute a “major reprogramming” action.¹⁴⁷

By 1959, House Appropriations reported that semiannual tabulations, while helpful, had not been sufficiently timely. Moreover, the practice of having military services advise the committee of major reprogrammings had become “virtually inoperative.” The committee directed the Pentagon to report periodically — but in no case less than 30 days after departmental approval — the approved reprogramming actions involving \$1 million or more in the case of operation and maintenance, \$1 million or more for research, development, test, and evaluation (RDT&E), and \$5 million or more in the case of procurement. The Pentagon prepared new instructions to comply with the committee’s policy.¹⁴⁸

In hearings in 1961, House Appropriations discovered that the Navy had reprogrammed \$584 million in shipbuilding funds to start construction on five additional Polaris submarines, without first seeking and obtaining the approval of the Appropriations Committees.¹⁴⁹ The committee responded by adopting four changes to tighten up reprogramming procedures. In a letter to Defense Secretary Robert S. McNamara, dated March 20, 1961, chairman George H. Mahon asked that specific committee approval be required for the following categories of reprogramming: (1) procurement of items omitted or deleted by Congress; (2) programs for which specific reductions in the original requests were made by Congress; (3) programs which had not previously been presented to or considered by Congress; and (4) quantitative program increases proposed above the programs originally presented to Congress.¹⁵⁰ Secretary McNamara accepted the first two points but not the last two. The department was worried that committee prior approval would come to include the Armed Services Committees, because of the trend toward annual authorizations (Section 412) that began in 1959.¹⁵¹

Mahon wrote to McNamara on April 26, 1961, agreeing to the more modest reprogramming procedures, “at least for a trial period.” The new DOD understanding on reprogramming included review not only by the Appropriations Committees but by the Armed Services Committees as well.¹⁵² Current DOD directives continue the

¹⁴⁷ Reprinted in Senate Committee on Government Operations, hearings on “Budgeting and Accounting,” 84th Cong., 2d Sess. 113-19 (1956).

¹⁴⁸ H. Rept. No. 408, 86th Cong., 1st Sess. 20 (1959); Department of Defense Instruction, “Reprogramming of Appropriated Funds — Report on,” No. 7250.5 (October 23, 1959).

¹⁴⁹ House Committee on Appropriations, hearings on “Department of Defense Appropriations for 1962” (Part 1), 87th Cong., 1st Sess. 105-06, 109 (1961).

¹⁵⁰ House Committee on Appropriations, hearings on “Department of Defense Appropriations for 1962” (Part 3), 87th Cong., 1st Sess. 578 (1961).

¹⁵¹ *Id.* at 579-80. Section 412(b) of the Military Construction Act of 1959 provided that no funds could be appropriated for the procurement of aircraft, missiles, or naval vessels unless first authorized by Congress; 73 Stat. 322 (1959).

¹⁵² Harold W. Stoneberger, “An Appraisal of Reprogramming Actions,” Student Research Report No. 159, Resident School Class of 1968 (Washington: Industrial College of the (continued...)

practice of making semiannual reports, obtaining prior approval on selected items and programs, and making prompt notification on others. Under certain circumstances, approval is needed from Appropriations and Armed Services but also the Intelligence Committees.¹⁵³

Other Committee Procedures

The Defense Department regularly produces the most detailed instructions on reprogramming and the procedures and thresholds for notifying committees and receiving their approval. Other agency documents are less elaborate. The Budget Execution Manual for the Department of Energy explains that congressional controls over reprogramming depend on the “approved program baseline and are generally delineated in the department’s base table and related documentation.” Congress requires the department to “ensure that the appropriate committees are promptly and fully notified whenever a necessary change to the approved program baseline is required.” Notifications of such changes are provided to Congress through submission of formal reprogramming proposals, “and the Department shall comply with subsequent directions in the responses from the Congressional committees.”¹⁵⁴ Stated here is the requirement to not merely notify the committees but to comply with their directions. Failure to follow this understanding “will not only violate the trust and latitude granted the Department, but could translate into stringent statutory constraints and limitations imposed on the Department by Congress.”¹⁵⁵

Energy’s budget manual also emphasizes that the department is expected to comply with both the specific numbers and provisions included in the law and in nonstatutory sources. Reprogrammings result from any departure from a program baseline described in the Department’s base table “and amplified in Congressional reports (House, Senate, or Conference) accompanying authorization and appropriations acts.”¹⁵⁶

Reprogramming instructions from the Department of Transportation are explicit about committee prior-approval: “Reprogrammings submitted to Congress must not be implemented until DOT is officially notified to proceed with the proposed actions by both the House and Senate Appropriations Subcommittees.”¹⁵⁷ Similar language appears in the budget manual for the Treasury Department. Adjustments to the financial plan are considered normal and expected, but Congress “has established limitations on amounts and major program changes that can be reprogrammed

¹⁵² (...continued)
Armed Forces), at 48-50.

¹⁵³ Department of Defense, “Reprogramming of DOD Appropriated Funds,” DOD Financial Management Regulation, Vol. 3, Ch. 6 (August 2000).

¹⁵⁴ U.S. Department of Energy, Budget Execution Manual, DOE M 135.1-1 (9-30-95), at V-1, para. 1a(1).

¹⁵⁵ *Id.* at V-2, para. 1a(2).

¹⁵⁶ *Id.* at V-3, para. 3a.

¹⁵⁷ U.S. Department of Transportation, Reprogramming Guidance, May 2005, at 1, para. 3.

without formal approval by the Appropriations Subcommittees.”¹⁵⁸ Dollar thresholds are spelled out to indicate the type of reprogrammings that require subcommittee approval.¹⁵⁹ A sample letter from the Treasury Department to an appropriations subcommittee begins: “This letter requests approval for a reprogramming in”¹⁶⁰

Committee or subcommittee approval may be implied in some cases. The budget manual for the U.S. Geological Survey provides that reprogramming proposals submitted to the Appropriations Committee “for prior approval shall be considered approved after 30 calendar days if the Committee has posed no objection.”¹⁶¹ It appears in many cases that if the agency does not hear within the prescribed period of time it does not move forward. Instead, it will contact the committee or subcommittee and ask whether there are any objections. Often, the proposed reprogramming is not implemented until explicit committee approval is granted.

Committee vetoes over Veterans Affairs (VA) activities are currently vested in the Appropriations Committees (regarding reprogramming), but earlier statutes gave the authorizing committees a veto role. Prior to 1992, it was not in order in either house to consider a bill, resolution, or amendment that would make an appropriation for any fiscal year for a major VA medical facility project or a major VA medical facility lease unless “the project or lease has been approved in a resolution adopted by the Committee on Veterans’ Affairs of that House.”¹⁶² This provision, Section 5004 of Title 38, was renumbered Section 8104 in 1991.¹⁶³ The next year, the provision for a committee veto exercised through a resolution of approval was deleted.¹⁶⁴

Current VA procedures for reprogramming explain that any shift of funds within an appropriations account for a purpose other than that contemplated at the time of appropriation “is generally preceded by consultation between the Federal agencies and the appropriate Congressional committees. It involves formal notification and, in some instances, opportunity for disapproval by Congressional Committees.”¹⁶⁵ All reprogramming actions “will adhere to the requirements of the Committee on Appropriations.”¹⁶⁶ No obligation of funds for which reprogramming authorization

¹⁵⁸ Treasury Department, Strategic Management Manual, March 29, 2001, Chapter 6-30, at 1.

¹⁵⁹ *Id.*, Ch. 6-32, at 1.

¹⁶⁰ *Id.* at 5.

¹⁶¹ U.S. Geological Survey Manual, March 6, 1998, 327.1 — Funds Control, at 6, para. 12B(4).

¹⁶² 38 U.S.C. § 5004(a)(2) (1988).

¹⁶³ 105 Stat. 238, § 402(b)(1) (1991).

¹⁶⁴ 106 Stat. 1984, § 301(a) (1992).

¹⁶⁵ Department of Veterans Affairs, Reprogramming, at 1.

¹⁶⁶ *Id.*, para. 1.

is required “shall be made before approval is obtained from OMB and the appropriation committees.”¹⁶⁷

The appropriations subcommittees cite four types of reprogrammings that require prior notification: (1) reprogramming of funds in excess of \$500,000 between programs, activities, and elements; (2) any reprogramming that changes an agency’s funding requirement in future years; (3) any reprogramming that changes the funds for programs or projects specifically cited in a committee report, and (4) any reorganization of offices, programs, or activities.¹⁶⁸ Upon approval by the department, the subcommittees “must be informed prior to implementation.”¹⁶⁹ As to the type of action that must be approved by the Appropriations Committees, details are set forth in the joint statement of managers in the annual appropriations conference report. Dollar thresholds are specified. In addition, the conferees expect the Appropriations Committees to be promptly notified of all reprogramming actions below the thresholds. If the actions would have the effect of significantly changing an agency’s funding requirements in future years, or if programs or projects specifically cited in the statement of the managers or accompanying reports of the House and Senate are affected by the reprogramming, the reprogramming “must be approved” by the Appropriations Committees regardless of the amount proposed to be moved.¹⁷⁰

Conclusions

Committee controls over agency actions have a long history. They have proved to be a helpful device in permitting the delegation of discretionary authority to the agencies while at the same time retaining close legislative review. The Supreme Court’s decision in *Chadha*, striking down all types of legislative vetoes (including committee vetoes), has not eliminated the types of committee-agency agreements that guide the reprogramming process and other executive actions. Moreover, these committee vetoes have not been litigated and subjected to judicial review and possible invalidation, nor is there any indication that someone is likely to gain standing to bring these committee vetoes into court.

¹⁶⁷ Id., para. 4.

¹⁶⁸ Id. at 1-2.

¹⁶⁹ Id. at 2.

¹⁷⁰ 150 Cong. Rec. H10824 (daily ed. Nov. 19, 2004).