Congressional Research Service

Memorandum December 18, 2007

TO: Senator Jim DeMint
Attention: Thomas Jones

FROM: Todd B. Tatelman
Legislative Attorney
American Law Division

SUBJECT: The President's Authority to Issue an Executive Order Governing Executive Agency Responses to "Earmarks" Contained Only in Committee Reports

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This memorandum is in response to your request for a legal analysis of the President's authority to issue an executive order that would instruct "federal agency officials to ignore Congressional Earmarks contained in committee report language." In addition, you have also asked us to address whether, as a matter of law, earmarks contained only in committee report language are legally binding on federal agencies.

Based on our review of the relevant constitutional provisions, statutes, and applicable case law it appears that the President possesses the necessary legal and constitutional authority to issue such an executive order. That said, the issuance of an executive order appears to be a discretionary act whose issuance is solely vested with the President of the United States. With respect to your second question, it appears that because the language of committee reports do not meet the procedural requirements of Article I of the Constitution – specifically, bicameralism and presentment – they are not laws and, therefore, are not legally binding on executive agencies. Practical political considerations as well as notions of comity between the legislative and executive branches, however, may serve to encourage compliance with these directives, despite the fact that as a matter of law they are not binding.

Executive Orders

Generally speaking, executive orders and Presidential proclamations are used extensively by Presidents to achieve policy goals, set uniform standards for managing the Executive Branch, or to outline a policy view intended to influence the behavior of private citizens. The Constitution does not contain any provisions that define either executive orders or proclamations, nor is there a specific provision authorizing their issuance. As such, the legal authority for the execution and implementation of executive orders stems from implied constitutional and statutory authority. In the constitutional context, presidential power to issue such orders has been derived from Article II, which states that "the executive power shall be vested in a President of the United States," that "the President shall be Commander

in Chief of the Army and Navy of the United States," and that the President "shall take care that the laws be faithfully executed."[1] The President's power to issue executive orders and proclamations may also derive from express or implied statutory authority.[2] Irrespective of the implied nature of the authority to issue executive orders and proclamations, these instruments have been employed by every President since the inception of the Republic. Despite the amorphous nature of the authority to issue executive orders, Presidents have not hesitated to wield this power over a wide range of often controversial subjects.[3]

Given both the implied legal and constitutional authority as well as the long-standing accepted practice of Presidents, it appears that a President can, if he so chooses, issue an executive order with respect to earmarks contained solely in committee reports and not in any way incorporated into the legislative text. The question of whether a President would opt to issue such an order is political in nature and, thus, beyond the scope of this memorandum.

Committee Report Language

The fact that directives or statements contained solely in committee reports do not meet minimum constitutional standards required for binding legislative action by Congress leads directly to the conclusion that such statements do not have the force and effect of law. Specifically, committee report language does not meet the procedural requirements of Article I, which state that "every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States."[4] These provisions are commonly referred to as the Bicameralism and Presentment Clauses.

In *INS v. Chadha*,[5] the Supreme Court analyzed the Immigration and Nationality Act, which granted to Congress the power to exercise a "legislative veto" over decisions made by the Attorney General under the Act. Specifically, the Act enabled Congress to overrule deportation decisions by the passage of an appropriate resolution by one House of Congress.[6] The Court noted that such a "legislative veto" constituted an exercise of legislative power, as its use has "the purpose and effect of altering the legal rights, duties, and relations of persons...outside the legislative branch."[7] As such, the Court concluded that a "legislative veto" could only be exercised in comportment with the bicameralism and presentment requirements of Article I.[8] Given that the statute authorized either House of Congress to execute the "legislative veto," the Court determined that the provision was an

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[1] U.S. Const., Art. II, §1, 2, & 3. *See* Orders and Proclamations, *supra* n. 1, at 6-12.

[2] *See Youngstown Sheet and Tube Co. v. Sawyer* 343 U.S. 579 (1952).

[3] *See* T.J. Halstead, *Executive Orders: Issuance and Revocation*, CRS Rept. RS20846 (Mar. 19, 2001).

[4] U.S. Const. art. I, sec. 7, cl. 2.

[5] 462 U.S. 919 (1983).

[6] *Id.* at 923.

[7] *Id.* at 952.

[8] *Id.* at 954-955.

unconstitutional violation of the separation of powers doctrine.[9] With its decision in *Chadha*, the Supreme Court established that Congress may exercise its legislative authority only "in accord with a single, finely wrought and exhaustively considered procedure;" namely, bicameral passage and presentation to the President for his signature or veto.[10]

Based on the Court's decision in *Chadha*, it seems evident that language contained solely in committee reports may not be construed as having the force of law. This conclusion is further buttressed by the Court's holding in *American Hospital Ass'n v. NLRB*, that it "obviously" could not be contended that "a statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating."[11]

Moreover, in a decision predating *Chadha*, the Comptroller General stated that committee report directives are not legally binding. According to the Comptroller General in *In the Matter of LTV Aerospace Corporation*, "there is a clear distinction between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying restrictions or conditions in a non-statutory context."[12] In addition, the Comptroller General held that "when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies."[13] Further, the Comptroller General stated that Congress itself has indicated a recognition of the fact that language in committee reports that is not likewise evidenced in statutory language is not legally binding.[14]

It should be noted, however, that practical political considerations have traditionally encouraged agencies to give significant weight to information contained in committee reports, especially in the appropriations context. In *LTV*, for instance, the Comptroller General noted that the fact that such language is not legally binding "does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds."[15] Rather, according to the Comptroller General, agencies "ignore such expressions of intent at the peril of strained relations with the Congress. The Executive Branch ... has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty."[16] Finally, it should also be noted that it is not uncommon for agencies

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[9] *Id*. at 954-955.

[10] *Id.* at 951.

[11] 499 U.S. 606, 616 (1991).

[12] *In the Matter of LTV Aerospace Corporation,* 55 Comp. Gen. 307, 318 (1975).

[13] *Id*. at 319.

[14] *Id*. at 321.

[15] *Id*. at 325-26.

[16] *Id.*

to enter into informal agreements with Appropriations Committees that facilitate conformance with directives and statements contained solely in committee reports.[17]

[17] *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 Law & Contemp. Prob. 273, 289 (1993).