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

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B-199522

March 2, 1981

The Honorable William D. Ford, Chairman
Committee on Post Office and Civil Service
House of Representatives

Dear Mr. Chairman:

On February 5, 1981, you asked for our views as to whether the current Continuing Resolution which establishes a pay cap would have to be amended for congressional approval of the President's pay recommendations to take immediate effect.

The answer is "no" on the basis that approval of salary increases would, absent any compelling legislative history to the contrary, operate as a repeal of the continuing appropriation pay limitations. In brief this answer is based on four propositions.

1. The statute under which congressional approval of presidential pay recommendations would occur provides that upon proper approval all prior inconsistent provisions of law are to be considered modified, superseded or rendered inapplicable.

2. Limitations on pay contained in appropriation acts have consistently been construed as pay rescissions for all those affected rather than as accounts due but not payable for lack of available funds.

3. Congressional approval of pay raises would be inconsistent with any prior law limiting pay below the level approved.

4. On the basis of the inconsistency, prior pay limitations thus would be inoperative.

A detailed explanation of these propositions follows.

Under section 225 of the Postal Revenue and Federal Salary Act of 1967, Pub. L. 90-206, Dec. 16, 1967, as amended by sec. 401, Pub. L. 95-19, Apr. 12, 1977, 2 U.S.C. 351-361, the President's recommendations for raises in Legislative, Judicial and Executive pay become effective "at the beginning of the first pay period which begins after the thirtieth day

following" approval by both Houses of Congress of the proposed raises. Prior to leaving office President Carter proposed pay raises pursuant to those provisions. Congressional action must be taken within 60 days of the President's submission of recommendations. Thus, if raises in Executive pay are approved under procedures prescribed in section 225, they will become effective in April 1981 (May 1 for those paid by the month). However, a question has been raised as to whether the provisions of section 101(c) of the Continuing Resolution of December 16, 1980, Pub. L. 96-536, 94 Stat. 3167, would prevent implementation of such raises before June 5, 1981.

Section 101(c) states in pertinent part:

> "* * * the provisions of section 306(a), (b), and (d) of H.R. 7593 (providing salary pay cap limitations for executive, legislative, and judicial employees and officials) shall apply to any appropriation, fund, or authority made available for the period October 1, 1980, through June 5, 1981, by this or any other Act. * * *"

Subsection 306(a) of H.R. 7593 provides, in essence, that funds appropriated for the fiscal year ending September 30, 1981, by any Act may not be used to pay the salary or pay of any individual in the legislative, executive, or judicial branch at a rate in excess of the rate payable September 30, 1980, if the rate of salary is equal to or above the rate for Level V of the Executive Schedule.

Subsection 306(b) provides a similar pay cap for new appointees and persons promoted and subsection (d) relates to the computation base for employee benefits.

The provision on implementation of section 225 increases, subsection (j) as amended, is in pertinent part:

> "The recommendations of the President transmitted to the Congress immediately following a review conducted by the Commission * * * shall, if approved by the Congress as provided in section 359, be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith--

> "(A) all provisions of law enacted prior to the effective date * * *
>
> "(B) any prior recommendations of the President which take effect under this chapter" [Underscoring denotes words from the 1977 amendment in Pub. L. 95-19].

That language is broad. It was certainly meant to provide for the immediate implementation of new rates when approved. The question is whether under this language the new rates supersede and render inapplicable the restriction contained in section 101(c), Pub. L. 96-536 (the Continuing Resolution).

It might be argued that the new rates become legally effective, but that they could not be paid without further action by Congress. That is, some action must be taken to overcome the specific limitation on existing appropriations precluding their use to pay salaries at the increased rates even though those rates are the legal rates.

In that connection, the last time this situation presented itself--in 1976 and early 1977--the "pay cap" included in the Legislative Appropriation Act, 1977, Pub. L. 90-440, 90 Stat. 1446, included wording similar to that in Pub. L. 96-536, but added:

> "except increases submitted by the President pursuant to section 225 of the Federal Salary Act of 1967" [i.e., 2 U.S.C. 351-360]

Also in January 1981 in proposing increases under section 225 of the 1967 law, President Carter advised Congress "In addition, if you wish to accept my recommendation to make the current legal rates payable now, you should amend section 101(c) of Pub. L. 96-536 accordingly.

In United States v. Will et al. decided December 15, 1980, 49 LW 4045, et seq., the court fully considered the effect of lanaguage enacted to prevent implementation of salary increases in the years 1976 through 1979. Language in terms of appropriation limitations denying increases was enacted in 1976, 1978 and 1979. However the court considered these provisions to be substantive legislation revoking the increases that would otherwise have gone into effect. In that connection the court said:

> "The statutes in Years 1, 3, and 4 although phrased in terms of limiting funds, * * * nevertheless were intended by Congress to block the increases the Adjustment Act otherwise would generate. Representative Shipley introduced the rider in relation to Year 1 to 'preven[t] the automatic cost-of-living pay increase * * *' 122 Cong. Rec. 28872. Floor remarks in both Houses reflected this view. In Year 3, the House Report characterized the statute as a 'change [in] the application of existing law,' H. R. Rep. No. 95-1254, p. 31 (1978), and described its effect as creating a one-year 'pay freeze,' id., at 35. The Senate Report stated that the statute would 'continu[e] * * * the so called "cap"' on salaries for the next fiscal year. S. Rep. No. 95-1025, p. 50 (1978). Floor debate once again expressed agreement with this construction. The House Report on the statute for Year 4 characterized it as 'reduc[ing] Federal executive pay increases from the mandatory entitlement of 12.9 per centum to 5.5 per centum.' H. R. Rep. No. 96-500, at 7 (1979). The report referred to the bill as a change in existing law. See id., at 3. Later the Conference Report stated that the statute 'restricts Cost-of-Living increases to 5.5 percent' for the fiscal year just begun. H. R. Conf. Rep. No. 96-513 at 3 (1979). The floor debates also confirm this understanding.
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> "These passages indicate clearly that Congress intended to rescind these raises entirely, not simply to consign them to the fiscal limbo of an account due but not payable. The clear intent of Congress in each year was to stop for that year the application of the Adjustment Act. The issue thus resolves itself into whether Congress could do so without violating the Compensation Clause." [Footnotes omitted.]

Section 306 of H.R. 7593 was to have an effect similar to that of the prior appropriation limitations. See

H. Report No. 96-1098, page 43; Remarks of Representative Conte on July 21, 1980, page H 6301 of the Congressional Record. Further, in the Continuing Resolutions of October 1, 1980, Pub. L. 96-369 and December 16, 1980, Pub. L. 96-536 which made section 306 applicable to all funds appropriated or payable under those resolutions, the effect of that section is consistently referred to as providing a pay cap.

Thus, it appears that the legislation which now prevents salaries in senior executive, legislative and judicial positions from being increased above the rates applicable on September 30, 1980, is not an appropriation limitation but rather modifies other laws under which increases would be paid.

Under present law the Congress must take affirmative approval action before the section 225 pay recommendations of the President become effective. If Congress takes such action it would result in the substantive pay restriction aspect of the continuing resolution being superseded since the resolution would be inconsistent with the approval given by the Congress to the pay increase under section 225. Thereafter, the Continuing Resolution could only have the effect of an appropriation restriction on the use of funds until June 5, 1981. However, our view is that the congressional action under section 225, in the absence of any indication to the contrary, is to be construed as superseding the restrictions of section 101(c) both substantively and in its appropriation limitation aspects. Since that section is viewed as a substantive revision of existing law even though phrased in terms of an appropriation limitation, the repeal of that provision by action under section 225 also terminates any appropriation limitation which would otherwise result from the language in that section.

Also for consideration is whether the pay cap would be raised for individuals who are not specifically subject to the pay rates fixed under section 225, but who are subject to the pay cap under 5 U.S.C. 5308 and similar provisions of law which prohibit paying employees at rates in excess of that for Level V of the Executive Schedule. To consider these employees subject to the appropriation limitation would require a holding that the pay cap as enacted by the House in section 306 of H.R. 7593 and the Continuing Resolutions was severable in that the part

relating to section 225 rates could be repealed (as concluded above), while the part relative to the derivative rates remains on the books. The pay cap as stated in 306(a) is made applicable to section 225 position by item (1) and to the derivative positions by item (2) of section 306(a). The pay cap has been treated by Congress as one limitation applicable to the higher paid officers and positions of the Government. No distinction is drawn between individuals whose pay is set under section 225 and those whose pay is limited to the lowest pay fixed under that section.

Accordingly, it would appear to be more in keeping with the provisions of law involved, with the legal effect of congressinal action as interpreted by the Supreme Court, and with congressional intent itself to hold that action under 225 by the Congress supersedes the pay cap provisions of section 306 as they are made applicable to the pay of all Government employees by section 101(c) of Public Law 96-536.

Accordingly, no action need be taken with respect to the pay cap in section 101(c) of Pub. L. 96-536 for pay increases approved under section 225 of the 1967 act or derivative increases to become effective at the time specified in that section.

Sincerely yours,

Comptroller General
of the United States