



EXCESS - NO CIRCULATION -
 COMPTROLLER GENERAL OF THE UNITED STATES
 WASHINGTON, D.C. 20548

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The Honorable Charles A. Vanik
 House of Representatives

Dear Mr. Vanik:

In a letter to us you have expressed concern regarding the lack of congressional control over expenditures by the Department of Defense, particularly "pipeline" funding available to that Department under no-year and multiple-year appropriations. You request our advice as to what appropriations made to the Department of Defense may be in violation of Article I, section 8, clause 12 of the Constitution, which limits appropriations "to raise and support armies" to a period of two years.

Concerning the constitutional question, we do not consider it our prerogative or duty to question the constitutionality of laws enacted by the Congress. Rather, until the courts have taken final action holding a particular act unconstitutional, it is our view that full effect should be given thereto by our Office according to its terms. However, we hope that the information provided hereinafter may be of interest to you.

As you state, the military departments do have available considerable so-called "pipeline" obligational authority, in addition to obligational authority provided in appropriations limited to one fiscal year. Principal sources of extended obligational authority are found in appropriations for military construction, procurement, and research and development. For example, the Military Construction Appropriation Act, 1973, approved October 25, 1972, Pub. L. 92-547, 86 Stat. 1156, provides obligational authority for construction by the military departments to remain available until expended. Title IV of the Department of Defense Appropriation Act, 1973, approved October 26, 1972, Pub. L. 92-570, 86 Stat. 1184, 1190, makes appropriations for construction, procurement, production, etc., of weapons systems, aircraft, combat vehicles and other equipment, to remain available for obligation until the end of fiscal year 1975. Title V of this act, 86 Stat. 1194, makes appropriations for research and development, etc., to remain available for obligation until the end of fiscal year 1974. On the other hand, military personnel and operation and maintenance appropriations are made on a single fiscal year basis.

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See titles I and II of the Department of Defense Appropriation Act, 1973, 86 Stat. 1184, 1186.

The periods of availability indicated above are representative of appropriation language used in recent years for each of the object categories cited. Of these categories, only the no-year military construction appropriations and the three-year procurement appropriations would come within the potential application of the constitutional two-year limitation.

Article I, section 8, clause 12 provides:

"The Congress shall have power

* * * * *

"To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years * * *."

The two-year limitation was conceived in response to a suspicion of standing armies in time of peace. See generally, The Federalist, Nos. 24-26. Its purpose and intended effect were explained by Alexander Hamilton in the Federalist, No. 26, as follows:

"The legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not at liberty to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party, in different degrees, must be expected to infect all political bodies, there will be, no doubt, persons in the national legislature willing enough to arraign the measures and censure the views of the majority. The provision for the support of a military force will always be a favorable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the

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national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only be the VOICE, but, if necessary, the ARM of their discontent." (Emphasis in original.)

While the general objective of the limitation is thus made clear, no elaboration was provided concerning the scope of its application. We are not aware of any judicial precedent applying Article I, section 8, clause 12 or even interpreting this language to a significant degree. The only discussion of the scope of the constitutional limitation which we have found is contained in two Attorney General opinions and several congressional references.

The scope of the limitation was apparently first considered in a 1904 opinion by Solicitor General Henry M. Hoyt. 25 Op. Atty. Gen. 105. This opinion concerned, in effect, the proposed procurement of certain guns and accessories from appropriations for armament of fortifications, which were made available until expended. While recognizing that the proposed procurement would extend beyond two years, Solicitor General Hoyt concluded that the appropriations involved were not to the use of raising and supporting armies within the application of the constitutional limitation. In arriving at this conclusion, the opinion reasoned:

"* * * To raise and support an army is one thing. To render it effective, by equipping it with guns, ammunition, and other means for attack and defense, is another; and the word 'equip' was, in military parlance, so common and well known as to preclude the idea that the framers of the Constitution intended the words 'raise and support' as including, or as the equivalent of, 'raise, support, arm or equip,' and thus to limit appropriations for forts, fortifications, heavy ordnance, arms, ammunition, and other means for the public defense to such as must be expended within two years.

"Furthermore, it is not necessary to extend the meaning of the words 'to raise and support' beyond their ordinary signification in order to include the power to

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arm and equip armies when they are raised and supported. That power follows as of course from the power to declare war; to raise and support armies; to provide forts, magazines, and arsenals; and to levy and collect taxes to provide for the common defense.

"That the inhibition was not intended to go beyond the ordinary meaning of the term 'raise and support,' nor to forbid Congress, in time of peace, to prepare for war by erecting and arming forts and fortifications, providing arsenals, heavy artillery, arms, ammunition, and other means for the common defense and public safety, even though this should require appropriations for more than two years, is manifest: First, from the fact that, had a matter of such vast importance been actually intended, it would have been expressed with the clearness and precision which characterizes the whole of the Constitution, and would not have been left to what is, at best, a very doubtful inference from an ambiguous expression; and, second, it is manifest from the broad, unlimited powers conferred upon Congress in other parts of that instrument.

"Thus, the power to declare war is also the power to prepare for, maintain, and carry on war, offensive and defensive; of constructing and arming forts and fortifications, providing heavy artillery, arms, ammunition, and all other means of warfare. This may and often does require appropriations for more than two years. The power to do these things was not intended to be taken away or restricted by the inhibition of appropriations to raise and support armies. The two purposes were different. The one was to raise and support armies, and to guard against excess in this the power was limited; the other was to arm, equip, and render effective such armies as we might have within the previous limitation, and to provide for the common defense. And, as to this latter purpose, no restriction is imposed.

"Clause 17, section 8, Article I, which gives to the Government exclusive jurisdiction over all places purchased by the consent of a State, 'for the erection of forts, magazines, arsenals, dockyards, and other needful

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buildings,' confers upon Congress an unlimited power to procure sites for, erect, arm and supply, at will, these forts, magazines, arsenals, and other needful buildings for military purposes; and the fact that, in order to do these things, appropriations for more than two years would be required, in no wise detracts from or restricts the exercise of this power.

"The constitutional provision that 'no money shall be drawn from the Treasury, but in consequence of appropriations' equally forbids the making of contracts or promises for the payment of money for which no appropriation has been made; so that, if appropriations 'to raise and support armies' embraced appropriations for forts, magazines, arsenals, cannon, arms, etc., Congress would be without power to contract for the completion or supply of any of these except such as could be completed or supplied within two years after the appropriation therefor.

"The wide and unlimited power to levy and collect taxes, etc., to 'provide for the common defense and general welfare' fully authorizes Congress to provide forts, magazines, arsenals, guns, ammunition, and military stores and supplies, without reference to whether or not the appropriations therefor extend over more than two years; and, in reading this and the other clauses referred to, it is impossible to suppose that the powers thus conferred without condition or restriction were, in fact, intended to be limited and qualified by the clause here considered."

By way of summary, Solicitor General Hoyt stated his views as to the scope of the constitutional provision as follows:

"I have no hesitation in reaching the conclusion that the appropriations forbidden by Article I, section 8, clause 12 of the Constitution are those only which are to raise and support armies in the strict sense of the word 'support,' and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense, or which may be provided as a measure of precaution irrespective of the existence or magnitude of any present army."

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The interpretation advanced by Solicitor General Hoyt was cited with approval during congressional consideration of lend-lease legislation in 1941. Section 3 of H.R. 1776, 77th Congress--ultimately enacted on March 11, 1941, ch. 11, 55 Stat. 31--authorized the sale or leasing of defense articles to foreign governments. Section 6(b) provided for the use of the proceeds of such transactions to finance further production of defense articles. Addressing the latter provision, the House committee report on H.R. 1776 observed:

"Paragraph (b) of section 6 provides, in effect, a revolving fund, so that any moneys collected from the disposition of articles pursuant to the bill can be used for two years to manufacture or procure equipment under the bill. This is a customary and valid provision. Article I, section 8, clause 12 of the Constitution provides that Congress shall have the power--

'To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;'

It is well known that the purpose of this constitutional provision is to prevent a large standing army without the constant check and surveillance of the Congress through the means of appropriations. See The Federalist, No. XXVI. It should be noted that this provision of the Constitution, neither by its terms nor its spirit, applies to appropriations for military equipment or defense articles. See (1904) 25 Op. Atty. Gen. 105. It has long been customary for the Congress to provide for revolving funds in connection with military and naval equipment. During the World War there were innumerable statutes making provision for similar revolving funds. A similar provision is contained in the Act of October 10, 1940 (Public Res. No. 829, 76th Cong.--the Requisitioning Act). A provision virtually identical for present purposes was included in the Act of June 15, 1940 (Public Res. No. 83, 76th Cong.). This is the Act authorizing material aid to the American republics." H. Rept. No. 18, 77th Cong., 1st sess., at 10.

The Senate committee report contained a similar comment. S. Rept. No. 45, 77th Cong., 1st sess., at 7.

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Finally, a 1948 opinion by Attorney General Tom C. Clark to the Secretary of the Air Force, 40 Op. Atty. Gen. 555, concurred in advice by that Department's general counsel that "there appears to be no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended." Attorney General Clark reaffirmed Solicitor General Hoyt's earlier opinion, and also alluded to the congressional practice consistent with this position.

The materials discussed above clearly accord a very strict construction to the concept of appropriations "to raise and support armies" for purposes of the constitutional limitation. Under this approach, it appears that only appropriations for personnel and for operations and maintenance would be considered appropriations to raise and support armies. However, as noted previously, these appropriations are made available only for one fiscal year.

While the Attorney General opinions cited herein are not, of course, definitive, the construction of Article I, section 8, clause 12 formulated therein has been followed by the Congress and apparently remains unchallenged. We are not aware of any military appropriations which would violate the constitutional two-year limitation as construed in these opinions.

Sincerely yours,
"raise and support" armies
limitations

(SIGNED) **ELMER B. STAFFS**
DEFENSE DEPARTMENT
Raise and support armies
Funding
Comptroller General
of the United States

CONSTITUTIONALITY OF ACTS
Acceptance by General Accounting Office