

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

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B-157984

November 26, 1965

FILE COPY - COMP GEN

Dear Senator Hickenlooper:

Attention: Mr. George A. Pavlik

Your letter of November 4, 1965, concerns section 201 of the Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073. This section reads as follows:

"Sec. 201 (a) The Secretary of the Army, acting through the Chief of Engineers, is authorized to construct, operate, and maintain any water resource development project, including single and multiple purpose projects involving, but not limited to, navigation, flood control, and shore protection, if the estimated Federal first cost of constructing such project is less than \$10,000,000. No appropriation shall be made to construct, operate, or maintain any such project if such project has not been approved by resolutions adopted by the Committees on Public Works of the Senate and House of Representatives, respectively. For the purpose of securing consideration of such approval the Secretary shall transmit to Congress a report of such proposed project, including all relevant data and all costs.

"(b) Any water resource development project authorized to be constructed by this section shall be subject to the same requirements of local cooperation as it would be if the estimated Federal first cost of such project were \$10,000,000 or more." (Emphasis added.)

You state that President Johnson in signing the above-cited act declared he would not obey the provision directing submission of the projects to the Public Works Committees of Congress for approval and that, in effect, he appears to be attempting an item veto.

You state, in effect, that in your estimation the provision in question is clearly constitutional and point out that similar language appears in the small watershed section of the Soil Conservation Act and the Public Buildings Act of 1959. You express the view that if the requirement to submit projects to the respective congressional Public Works Committees is held by proper authority to be unconstitutional and void, then the whole section fails with it, because Congress would not

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have made the authorization to construct, operate and maintain water resource development projects of less than \$10,000,000 Federal first cost but for its determination that such projects be first approved by the appropriate congressional committees. You state that if this section is invalid similar authorizations in other acts would also be invalid.

It is your opinion that any attempt by the Administration to utilize the authorization contained in section 201 without following the procedures and limitations set forth therein would be unconscionable and would subject the officers involved to charges of acting without even the color of authority.

You request our comments and opinion on this matter.

The General Accounting Office is an arm of the Congress. As such, in matters coming within its cognizance, we do not consider it our prerogative or duty to question the constitutionality of laws enacted by the Congress. Rather, until the courts have held a particular act or section of an act unconstitutional, we deem it our duty to apply the laws according to the intent of the Congress leaving to the courts the question of passing upon the constitutionality of a statute where question of its constitutionality is appropriately raised.

The Flood Control Act of 1965 is an authorization act. Section 201 would appear to contemplate subsequent legislation by the Congress actually appropriating funds for any project authorized by that section, since it is provided therein that no appropriation shall be made for a project if such project has not been approved by resolutions adopted by the Senate and House Committees on Public Works. Thus, if the Secretary of the Army does not transmit a report to the Congress for the purpose of securing the required approval of a project and the project is not approved as required by section 201, the present legislation directs that no appropriation shall be made. Further, an appropriation item for a project not approved as required by the authorization act might be subject to a point of order but this, of course, is a matter for decision by the House of Congress involved. However, if, notwithstanding the lack of the required committee approval of a section 201 project, the Congress appropriates funds for such a project, this Office would not question the use of such funds to construct, operate, and maintain the project since the later law would govern. If on the other hand, an appropriation for the project is not made, there would be no authority for the Secretary to incur obligations for its construction. See 31 U.S.C. 665(a).

For your information we would like to point out that the President, in the statement he made upon signing the legislation involved here, indicated that the authority provided by section 201 (a) would not be exercised and that he would seek repeal of the committee approval requirement when Congress convenes again. In signing the act involved, the President stated, as far as pertinent here, that (Weekly Compilation of Presidential Documents, November 1, 1965, pages 432, 433):

"However, I do not support and I do not plan to implement section 201(a) of this legislation.

\* \* \* \* \*

"But, after counseling with legislative leaders, I have chosen not to veto, for these reasons:

"Unlike the bills earlier this year, section 201(a) permits, but does not require, the executive branch to use the objectionable procedure in order to carry out its responsibilities. Therefore, I believe that by refusing to use the procedure, by noting my objections to it, and by seeking its repeal in the next session of Congress, it is possible to approve the remainder of the bill without yielding to encroachment.

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"One point is clear: Enactment of the bill will not commit the executive branch to participate in the procedure to which I have objected. And as soon as the Congress convenes again, I will request it to repeal the provision.

"In the meantime, I have instructed the Secretary of the Army to refrain from exercising the authority which section 201(a) attempts to vest in him."

We trust the foregoing serves the purpose of your inquiry.

Sincerely yours,

FRANK H. WEITZEL

Acting Comptroller General  
of the United States

The Honorable B. B. Hickenlooper  
United States Senate