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

B-207467

January 18, 1983

The Honorable George J. Mitchell
United States Senate

Dear Senator Mitchell:

By letter dated June 17, 1982, you requested our views on whether President Reagan's receipt of a pension from the State of California violates article II, section 1, clause 6 of the United States Constitution. Among other things, that clause prohibits the President from receiving any emolument from any state during the period for which he has been elected.

The question presented is not one to which there is an unequivocal answer. Persuasive arguments may be made both for and against the proposition that the President's retirement allowance is an emolument whose receipt is prohibited by the Constitution. Nonetheless, having examined the issue and considered the views of both the Department of Justice and opposing citizens groups, we are of the opinion that the President's acceptance of a retirement allowance from the State of California does not violate the prohibition contained in article II, section 1, clause 6.

BACKGROUND

President Reagan's financial disclosure report, filed May 14, 1982, showed that he received in 1981 from the State of California as a retirement allowance, based upon his two terms as Governor. According to the Justice Department, then-Governor Reagan became a member of the California Legislator's Retirement System as an elective constitutional officer under section 9355.4 of the California Government Code. The Legislator's Retirement System is a contributory, non-fully funded system whose benefits are based upon length of service. Cal. Govt. Code §§ 9355.4, 9357-59 (Deering 1973 and Supp. 1982). Under California law, retirees in the system who have fulfilled the necessary prerequisites have a vested right to their allowances. That right may not be withdrawn except under a previously-existing provision of the plan. Betts v. Board of Admin. of Pub. Employees' Ret. Sys. 21 Cal. 3d 859, 863, 582 P.2d 614, 617, 148 Cal. Rptr. 158, 160-61 (1978).

Several months after the President took office, his Counsel requested an opinion from the Justice Department about whether the President's receipt of retirement benefits violated article II, section 1, clause 6. That opinion, provided to us with the comments of the Deputy Counsel to the President, concluded that retirement benefits are not emoluments in

the constitutional sense. According to the Justice Department, the purposes of article II, section 1, clause 6 "would not bar the receipt by President Reagan of a pension in which he acquired a vested right six years before he became President, for which he no longer has to perform any services, and of which the State of California cannot deprive him." Memorandum from Deputy Assistant Attorney General Simms to Hon. Fred Fielding, at 4 (June 23, 1981). In addition, the Justice Department stated that the term "emolument" in the constitutional prohibition does not apply to pension benefits because such benefits are considered by the California courts to be "incidents of the pensionable status." Interests of this kind were not contemplated by the drafters of the prohibition, and consequently do not fall within its terms. Id. at 7.

DISCUSSION

The sixth clause of section 1, article II of the United States Constitution provides that:

> "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." (Emphasis added.)

The term "emolument" refers to "[a]ny perquisite, advantage, profit, or gain arising from the possession of an office." Black's Law Dictionary 470 (5th ed. 1979), citing McLean v. United States, 226 U.S. 374, 381-82 (1912); 34 Comp. Gen. 331, 333-34 (1955). It is a comprehensive term which embraces "'every species' of pecuniary profit derived from the discharge of the duties of * * * office * * *." Hoyt v. United States, 51 U.S. (10 How.) 109, 135 (1850).

Generally courts have been consistent in describing a right to a pension as a part of the compensation of the office the holding of which gives rise to that right. See Betts v. Board of Admin. of Public Emp. Ret. System, 21 Cal. 3d 859, 863, 582 P.2d 614, 617, 148 Cal. Rptr. 158, 161 (1978) ("[a] public employee's pension constitutes an element of compensation * * *"). See also Boryszewski v. Brydges 37 N.Y.2d 361, 367, 334 N.E.2d 579, 583, 372 N.Y.S.2d 623, 629 (1975) ("retirement benefits constitute as real and substantial a form of compensation as does a pay check. The only significant difference lies in the time of

payment").1/ On the other hand, there have been few cases that have considered whether pensions are emoluments of the office from which they arise, and those that have are conflicting. In several instances involving provisions of state constitutions limiting "allowances" or "emoluments,"2/ state courts have found that pensions are not emoluments on the basis that pensions were not contemplated by the writers of state constitutions, or that they are contingent benefits rather than actual pecuniary gains. See Campbell v. Kelly, 202 S.E.2d 369, 375-77 (W. Va. 1974); State ex rel. Todd v. Reeves, 82 P.2d 173, 175 (Wash. 1938). Yet, at least one state has concluded that judicial pensions are emoluments within the meaning of a similar constitutional provision. Carper v. Stiftel, 384 A.2d 2, 6-7 (Del. 1977).

It is our view, however, that this conflict need not be resolved in the present case: we conclude that the term emolument in article II, section 1, clause 6 does not extend to payments for services rendered prior to the occupancy of, and having no connection with the Presidency.

1/ The Justice Department, however, apparently takes the position, based upon a reading of California court decisions, that pension benefits are not elements of compensation (and consequently never fall into the category of emoluments), but are instead incidents of "the pensionable status." See Memorandum of Deputy Assistant General Counsel Simms to Hon. Fred Fielding, at 7 (June 23, 1981), citing Sweesy v. Los Angeles Cty. Peace Officers' Ret. Bd., 17 Cal. 2d 356, 361-63, 110 P.2d 37, 39-40 (1941). The latter concept, however, was used by the California courts to avoid applying a state constitutional provision in such a way as to prevent increases in retirement benefits subsequent to actual retirement. It is clear to us that the California courts, as do the courts of many other jurisdictions, continue to view retirement benefits as deferred compensation. See Betts v. Board of Admin. of Pub. Emp. Ret. System, supra.

2/ Many state constitutions prohibit legislators or other officials from receiving compensation or emoluments other than those set by the Constitution or by law. See, e.g., N.J. Const. art IV, § 4, par. 7. A related type of provision, intended to discourage self-dealing, is that which prohibits an individual from accepting any position the emoluments of which were increased by an act of the legislature during a period when the officer was a member. See Wash. Const., art. II, § 13. Moreover, similar to article II, section 1, clause 6 is the Federal Constitution's prohibition of the receipt by any officer of the United States of any "emolument" from any foreign state without the consent of the Congress. U.S. Const. art. I, § 9, cl. 8.

With respect to the intent of clause 6, The Federalist No. 73 states:

> "The legislature, on the appointment of a President, is once [and] for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating on his necessities nor corrupt his integrity by appealing to his avarice. Neither the Union nor any of its members will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution." The Federalist No. 73 (A. Hamilton).

It is evident from this statement that the prohibition in clause 6 was intended to prevent the President from being subject to influence in carrying-out his duties by changes made to the remuneration given for the performance of those duties, or by rewards given for additional services performed as President. Consequently, it seems to us that the term "emolument" cannot be considered to extend to benefits that have been earned or to which entitlement arose before his occupancy of that office, and that clearly have no connection, either direct or indirect, with the Presidency. To do so would unfairly penalize the President.3/

The pension payments President Reagan receives from the State of California cannot be construed as being in any manner received in consequence of his possession of the Presidency. The payments are made solely in connection with an entitlement previously earned by reason of his service to that State. The amount of his entitlement is set by statute, and is no different from that to which others with similar governmental service records would be entitled.

3/ We should point out, however, that we would view as prohibited under article II, section 1, clause 6 any type of additional benefit, contractual or otherwise, received by the President from a state or Federal body as having been earned prior to his occupancy of the Office, yet made in anticipation of that event.

We note in addition that the President's receipt of pension benefits poses none of the dangers that the constitutional prohibition was intended to avoid. Thus, as the pension is fully vested under California law, it is highly unlikely that the President could be swayed in his dealings with the State of California by the prospect of having his pension diminished or rescinded by the State. Similarly, because of the nature of the modern statutory retirement system, it is doubtful that the State could "appeal to his avarice" by rewarding sympathetic actions with increased pension benefits. Moreover, acceptance of pension benefits requires no obligation to the State for future services. The benefits are in fact akin to a form of insurance, a vested right derived from contract or statute.[4/]

4/ Modern retirement plans have in fact been described by the United States Supreme Court as a form of insurance. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 721 (1978). It is also of interest to note that Federal conflict of interest laws specifically permit Federal officers and employees to receive pensions from previous employers in addition to their normal salaries. See 18 U.S.C. § 209(b) (1976).

The view that we express here is not entirely consistent with previous decisions of this Office, which have construed the term emolument somewhat more broadly. For example, in 37 Comp. Gen. 138, 140 (1957) we held that a newly-appointed court crier's receipt of a military pension from the British Government was prohibited by article I, section 9, clause 8. Our view was that the pension was either a gratuity or deferred compensation: if a gratuity, it was prohibited as a "present;" if deferred compensation, it was prohibited as an emolument. In another case, we held that President Kennedy was not entitled to collect retired pay as a Lieutenant, United States Naval Reserve (Retired), during the period that he occupied the Office of President of the United States. See B-153438, November 10, 1964 (letter from General Counsel Keller, GAO, to Assistant Attorney General Schlei). Our opinion was based upon alternative statutory and constitutional grounds; with regard to the latter, we were of the opinion that retired pay was an additional "emolument" receipt of which was prohibited by article II, section 1, clause 6.

To the extent that these decisions are contrary to the views expressed here, we consider our present views to prevail.

For these reasons, we do not consider the prohibition in article II, section 1, clause 6 to be applicable to pension benefits such as those received by President Reagan from the State of California. We therefore have no objection to his continued acceptance of such benefits during his term of Office.

We hope that the foregoing will be of assistance to you.

Sincerely yours,

for Milton J. Socolar
Comptroller General
of the United States