



## **Exploring the Scope of the Feed and Forage Act of 1861 Implications for FY 2007 Funding for the Wars in Iraq and Afghanistan**

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Congress and the president are at odds over language in a supplemental appropriations bill that would provide funding to sustain military campaigns in Iraq and Afghanistan. The White House has warned that if an agreement is not reached soon, U.S. soldiers will lack funding to meet their needs.<sup>1</sup>

However, a prolonged stalemate may not necessarily generate funding shortages that would put soldiers in jeopardy. On May 8, 2007, *National Journal* published a column by budget expert Stan Collender that raised the possibility of the president invoking a relatively unknown law – the Feed and Forage Act – to pay for ongoing military campaigns even if an appropriations bill is not enacted.<sup>2</sup> The authority granted under this law seems to contradict statements by the Bush administration regarding the harm to soldiers caused by a longer debate over war policy. Collender wrote:

Food [*sic*] and Forage turns the federal budget world on its head. The standard procurement process is for obligations to be incurred by a federal department or agency only after an appropriation is enacted. Food and Forage allows funds to be obligated before the appropriation is in place.

In other words, the deadlines the White House keeps using for the Iraq supplemental are irrelevant. Indeed, the Pentagon may have already begun to obligate funds for this purpose while the debate on the supplemental is continuing.

Indeed, the Feed and Forage Act gives the Department of Defense (DOD) the unusual power to obtain goods and services prior to the enactment of an appropriations bill. Some restrictions apply, and the scope of the authority it grants is unclear. But these powers could be interpreted in a way that is sufficiently broad to sustain ongoing military operations for significant periods of time in the absence of enacted appropriations. So long as the president invoked this authority in a timely manner, the needs of deployed soldiers could be provided for even if negotiations over the supplemental appropriations bill were prolonged significantly.

### **The Feed and Forage Act of 1861**

The Feed and Forage Act was enacted during the U.S. Civil War in 1861 (41 U.S.C. 11). It reads:

*§ 11. No contracts or purchases unless authorized or under adequate appropriation; report to the Congress*

*(a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not*

<sup>1</sup> The White House, "President Discusses Economy, War on Terror During Remarks to the National Cattleman's Association," The White House, <http://www.whitehouse.gov/news/releases/2007/03/20070328-2.html>.

<sup>2</sup> Stan Collender, "The Truth About The Iraq Supplemental," *National Journal*, May 8, 2007, <http://nationaljournal.com/members/buzz/2007/budget/050807.htm>.

*operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.*

*(b) The Secretary of Defense and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy shall immediately advise the Congress of the exercise of the authority granted in subsection (a) of this section, and shall report quarterly on the estimated obligations incurred pursuant to the authority granted in subsection (a) of this section.<sup>3</sup>*

The act itself is short on details, creating uncertainty concerning the circumstances under which this power can be invoked and what items can be purchased under this authority.

### **Historical Examples of the Use of the Feed and Forage Act**

Despite its age, the Feed and Forage Act has been invoked in a modern context. Generally, this authority has been used for ongoing conflicts, rather than to initiate an offensive action.<sup>4</sup> The following are recent examples of when it has been invoked and/or used:

- In 1968, 1969, and 1972, the Department of Defense used it to support the Vietnam War and other military operations in Southeast Asia.<sup>5</sup>
- In 1990, the Department of Defense, under Secretary of Defense Dick Cheney's leadership, invoked the act to make obligations during Operation Desert Shield – the military action leading up to the start of the Persian Gulf War. A total of \$1.6 billion was obligated.<sup>6</sup>
- In 1994, the act was invoked to support a mission to restore democracy in Haiti. DOD obligated \$126.3 million more than was appropriated for the year. \$123 million was obligated under Army operation and management, which is an account in the DOD budget that covers a wide assortment of expenditures, while about \$3 million helped activate Army reservists.<sup>7</sup>
- In 2001, the Bush administration invoked the act immediately after the September 11 terrorist attacks occurred, as Stan Collender wrote in his May 8 column. However, Congress acted swiftly enough that an appropriations bill was enacted prior to DOD obligating any funding under the act's authority.<sup>8</sup>

### **Defense Department and GAO Imply Broader Procurement Authority**

The act gives the military, at its own discretion and in the absence of appropriations, some power to obligate the federal government to purchase goods and services during emergencies for use through the end of the fiscal year. While the authority of DOD to procure certain products and services is well established in the act, the scope and variety of items available for purchase is not.

The Department of Defense clarifies the language of the act somewhat in its Financial Management Regulations by constraining the set of circumstances under which this authority can be invoked (DOD Financial Management Regulation, Volume 3, Chapter 12).

The Department shall limit its use of the authority in 41 U.S.C 11 to emergency circumstances. The exigencies of those circumstances must be such that immediate action is imperative and action cannot be

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<sup>3</sup> Legal Information Institute, "U.S. Code Collection," Cornell Law School, [http://www4.law.cornell.edu/uscode/html/uscode41/usc\\_sec\\_41\\_0000011----000-.html](http://www4.law.cornell.edu/uscode/html/uscode41/usc_sec_41_0000011----000-.html).

<sup>4</sup> Louis Fisher, "Department of Defense Readiness Preservation Authority," (Congressional Research Service, April 1995) 3.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Government Accounting Office, "Peace Operations: DOD's Incremental Costs and Funding for Fiscal Year 1994," (Government Accounting Office, April 1995) 11.

<sup>8</sup> Robert A. Sunshine, "Issues in Budgeting for Operations in Iraq and the War on Terrorism," (Congressional Budget Office, January 18, 2007) 4-5.

delayed long enough to obtain sufficient funds to cover the procurement or furnishing of those items in paragraph 120102.A., above, needed for the fiscal year."<sup>9</sup>

Despite this additional guidance, DOD does not elaborate on the items that can be obtained by invoking the act any more so than the original version in the U.S. Code. It also does not expand upon conditions or circumstances that would constitute an "emergency," relying instead on case-by-case determinations.

The regulation does state that the Defense Department cannot "liquidate" an obligation by itself. The DOD is only authorized to obtain what it needs by consent from private contractors. It has to wait for Congress to appropriate funds before money can be exchanged.

#### 1994 GAO Report Supports Broad Interpretation

A report by the GAO from 1994 – "Analysis of Options for Funding Contingency Operations" – discusses the Feed and Forage Act as one of a few options providing flexibility for the Defense Department in funding military operations. The GAO report states the act gives DOD the "availability of broad scope and *virtually unlimited contract authority*" to conduct operations (emphasis added).<sup>10</sup>

Interestingly enough, the report also contains insights into how the Department of Defense viewed the scope of the act.<sup>11</sup> The GAO report cited DOD officials who believed that all needs that occur in an emergency could be met by invoking the Feed and Forage Act as it is written:

DOD officials stated that they see no need to change the language of the Feed and Forage Act. These officials believe that the language is sufficiently broad and gives them the needed flexibility to interpret the law as needed within its intent. They also believe that any attempt to update the language to more specifically identify areas of items available for purchase would only narrow that flexibility.<sup>12</sup>

Indeed, the powers enumerated under the act were sufficient to obligate \$1.6 billion in meeting the immediate needs that resulted from Operation Desert Shield only a few years before the report was written. "[DOD officials] were not aware of any instances during the Operation Desert Shield where the services were unable to purchase necessary items because of the language of the act."<sup>13</sup>

In addition to this GAO report, numerous budget experts, including Stan Collender, believe that the act can be used to authorize procurement of specific items beyond those enumerated in the text of the law. The GAO/DOD interpretation of the law raises the possibility the Pentagon could procure items far beyond simple necessities such as food and clothing so long as they meet the internal guidelines set down in the DOD Financial Management Regulations.

#### **CBO and Supreme Court Give Narrow View of Procurement Authority**

While not commenting on the circumstances under which the act can be used, the Congressional Budget Office (CBO) sees some limits to what can be purchased. On January 17, 2007, Robert Sunshine, the assistant director of CBO, testified before Congress that:

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<sup>9</sup> Office of the Undersecretary of Defense (Comptroller), "Policies and Procedures Governing the Use of the Authority of Section 3732, Revised Statutes (Now 41 U.S.C. 11)," Department of Defense, [http://www.defenselink.mil/comptroller/fmr/03/03\\_12.pdf](http://www.defenselink.mil/comptroller/fmr/03/03_12.pdf).

<sup>10</sup> General Accounting Office, "DOD Budget: Analysis of Options for Funding Contingency Operations" (General Accounting Office, April 1994) 2.

<sup>11</sup> General Accounting Office, "DOD Budget: Analysis of Options for Funding Contingency Operations" (General Accounting Office, April 1994) 13.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

The authority of the Feed and Forage Act is limited to obligations for items meant to sustain troops in the field, such as subsistence, clothing, fuel, quarters, transportation, and medical supplies. It *cannot be used* to purchase additional weapons or to support military hardware (emphasis added).<sup>14</sup>

His testimony states that items meant to sustain soldiers during an ongoing military engagement could be purchased with this authority. These items include but are not limited to those outlined in the original law (ie clothing, fuel, etc.). Sunshine states this authority does not extend to items such as additional weapons or military hardware because they are not related to maintaining soldiers in combat zones. However, this statement appeared in a footnote of Sunshine's testimony, and it seems that a definitive interpretation of CBO's view would require additional explanation.

#### Supreme Court Dissent Reads Law Literally

There is additional precedent for a narrow interpretation of the law. The Feed and Forage Act is referenced in an 1868 Supreme Court case that found that the Secretary of War had lacked the authority to agree to financial arrangements that promised future payment. Despite this verdict, Louis Fisher of the Congressional Research Service cites a description of the purpose of the act within the dissenting opinion in this case:

It will thus be seen that the contracts for the subsistence and clothing of the army and navy, by the secretaries, are not tied up by necessity of an appropriations or law authorizing it. The reason of this is obvious. The army and navy *must be fed, and clothed, and cared for* at all times and places, especially when in distant service (emphasis added).<sup>15</sup>

Taken together, these two interpretations of the law (as well as a literal reading of the original language) would point to the military having authority to provide for the humanitarian needs of soldiers during an ongoing conflict when appropriations are lacking, but not the authority to procure goods and services directly related to continuing soldiers war-fighting capabilities.

#### **Current Political Rhetoric Can Be Avoided Because of the Feed and Forage Act**

The interpretation of the level of authority granted to the Department of Defense for procurement under the Feed and Forage Act has varied widely since the law was enacted in the mid-19th century. Yet even from the most narrow view, the executive branch has the authority to procure some items in advance of congressional appropriations in emergency situations for ongoing military conflicts under the law.

Further, interpreting the Feed and Forage Act broadly probably gives great flexibility to Department of Defense officials to obtain anything they deem necessary, *so long as* it is for a short-term need that occurred in an emergency, could not be feasibly obtained through normal procedures, and was used in the fiscal year in which it was obtained. This interpretation would give Congress and the president much more, if not unlimited, time to negotiate a compromise over disputed language in the FY 2007 war supplemental appropriations bill.

With this understanding, it seems more than plausible that President Bush could use the powers in the Feed and Forage Act to sustain U.S. soldiers in Iraq and Afghanistan once other sources of funding have run out. The flexibility granted to the executive branch under this law should allow all those involved to leave behind the partisan rhetoric that positions U.S. soldiers between opposing sides of the debate. Congress and the president could then engage in a comprehensive debate about current war policies.

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<sup>14</sup> Robert A. Sunshine, "Issues in Budgeting for Operations in Iraq and the War on Terrorism," (Congressional Budget Office, January 18, 2007) 4-5.

<sup>15</sup> Louis Fisher, "Department of Defense Readiness Preservation Authority," (Congressional Research Service, April 1995) 3.