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Violation of the Use of Appropriated Funds for Certain Lobbying Activities

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B-192658 September 1, 1978

The Honorable John J. Rhodes Minority Leader House of Representatives

Dear Mr. Rhodes:

This is in response to your August 10, 1978, letter requesting our opinion on whether a communication you received from the Director, Office of Management and Budget (OMB), constituted a violation of 18 U.S.C. Sec. 1913, which prohibits the use of appropriated funds for certain lobbying activities designed to support or defeat legislation pending before Congress.

The OMB communication, dated August 7, 1978, and addressed to all the Members of the House of Representatives, stated that a Resolution of Disapproval of Reorganization Plan No. 2 of 1978, concerning reorganization of the Civil Service, was scheduled to be brought to the Floor by the House Committee on Government Operations. It appealed to each member to vote against the Disapproval Resolution. The Resolution was subsequently defeated.

The use of appropriated funds for lobbying activities designed to support or defeat legislation pending before Congress is prohibited by two different kinds of statutory provisions--18 U.S.C. Sec. 1913 of the Criminal Code statue which you cited, and section 607(a) of the Treasury, Postal Service And General Government Appropriation Act, 1978, Pub. L. No. 95-81 (July 31, 1977), 91 Stat. 341, 355, which is a restriction on the use of appropriations for lobbying activities. In addtion to the two statutes cited above, there is another anti-lobbying statute, the Federal Regulation of Lobbying Act, 2 U.S.C. Sec. 261-270, which requires the registration of certain persons and organizations engaged in activities described in the Act. This Act is generally considered to be inapposite to legislative activities of Government agencies and therefore is not pertinent to the facts of this case.

The statute you mentioned, 18 U.S.C. Sec. 1913, is set forth below:

"No part of the money appropriated by any enactment of Cognress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legilation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of

Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

"Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment."

The above quoted statute originated as part of the Third Deficiency Appropriation Act of 1919. 41 Stat. 68. In construing a statute, our task is to effect the intention of the Congress, which is to be searched for in the words the Congress has employed and in the legislative history. Sears, Roebuck & Co. v. United States. 504F, 2d 1400 (C.C.P.A. 1974). The only court case that has construed this statute, National Association for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973), does not shed light on this point. On the contrary, the court in Hodgson said that the "obscurity" of Sec. 1913 " may render impossible a precise judgment concerning the intent of Congress." Accordingly, we have reviewed the legislative history of the provision in an effort to discern such Congressional intent as may be available.

The remarks of Representative Good, the sponsor of the legislation, are particularly instructive as to the kind of administration practices that the legilation was designed to prohibit. During the Floor debate, he explained the purpose of the legislation as follows:

"The bill also contains a provision which I am frank to say is subject to a point of order. It is new legislation, but it will prohibit a practice that has been indulged in so often, without regard to what administration is in power--the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. [Applause.] The gentleman from Kentucky Mr. Sherley, former chairman of this committee, during the closing days of the last Congress was greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to wire Congressman Sherley for this appropriation and for that. * * * Now, it was never the intention of Congress to appropriate money for this purpose, and section 5 of the bill will absolutely put a stop to that sort of thing. [Applause.]" 58 Cong. Rec. 403 (1919).

Although it is certainly true that comments made by individual Congressmen as to the meaning of a statutory provision are not necessarily controlling in construing the provision, statements by a sponsor of that provision are generally deemed persuasive as to Congressional intent. Mitchell v. Kentucky Finance Co., 359 U.S. 290, 295, (1959); United States v. International Union, UAW. 352 U.S. 567, 585-587, (1957); United States v. Wrightwood Dairy Col, 315 U.S. 110, 125, (1942). From the explanatory remarks of Representative Good, it thus appears that the primary purpose of section 1913 was to prohibit Government officials from making appeals to the public to in turn contact their representatives with respect to legislation. The language of section 1913, however, is not explicitly so limited. However, in informal contacts with the Justice Department, the agency charged with enforcement of this statute, we were

advised that the Department views section 1913 as prohibiting the type of "indirect lobbying" described above. With regard to direct contact with Members of Congress, the Department stated in a 1962 letter:

"Personal contacts with Members of Congress by executive officers are both sanctioned and required by article II, section 3 of the Constitution, which provides in significant part that the President 'shall from time to time * * * recommedn to their [Congress'] consideration such measures as he shall judge necesasry and expedient.' The power to recommend measures to Congress would appear clearly to comprehend and include the power to urge arguments upon individual Members of Congress in support of such mearsures. Necessarily the President must entrust part of this function to subordinate officers within the executive branch. Our Federal Government could not function efficiently if the President and his subordinates could not do so." 103 Cong. Rec. Sec. 451 (1962).

The enforcement of penal statutes such as 18 U.S.C. Sec. 1913 rests primarily with the Department of Justice and the courts. Since the enforecement of penal statutes is beyond our jurisdiction, we would have no authority to make binding determinations under them. We have thus limited our role in this area for the most part to determining whether appropriated funds were used in any given instance and referring mattes to the Department of Justice where deemed appropriate or when requested to do so. Accordingly, it is our customary policy to refrain from venturing an opinion as to whether Sec. 1913 has been violated in the absence of some initial determination by the Justice Department or the courts. In view of the foregoing, however, it appears most unlikely that the Justice Department would view the August 7 OMB letter as consituting a violation of Sec. 1913.

On the other hand, it is our responsibility to determine the availability of Federal appropriations for certain expenditures. As noted above, section 607(a) of Public Law 95-81 (July 31, 1977), 91 Stat. 355, the Treasury, Postal Service and General Government Appropriation Acat, 1978, prohibits the use of appropriated funds for certain lobbying activities. Section 607(a) provides as follows:

"Sec. 607(a). No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

In interpreting "publicity and propaganda: provisions such as section 607(a), this Office has consistently recognized that any agency has a legitimate interest in communicating with the public and with the Congress regarding its policies and activities. If any policy or activity of an agency is affected by pending or proposed legislation, discussion by officials of that policy or activity will necessarily, either explicitly or by implication, refer to such legilation and will presumably be either in support of or in opposition to it. An interpretation of section 607(a) which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy or activities, a result we do not believe was intended.

We believe, therefore, that Congress did not intend, by the enactment of section 607(a) and like measures, to preclude all expression by agency officials of views on pending legislation. Rather, the prohibition of section 607(a), in our

view, applies primarily to expenditures involving direct appeals addressed to the public suggesting that they contact their elected representatives and indicate their support of or opposition to pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. We have generally not viewed expenditures incurred in connection with direct contact with Members of Congress as violating this provision. The foregoing general considerations form the basis for our determination in any given instance of whether there has been a violation of section 607(a). 56 Comp. Gen. 889 (977); B-128938, July 12, 1976.

The Director of OMB is the President's chief budget officer and the official primarily responsible for coordinating the President's legislative program. The August 7 OMB letter was a communication from this official concerning a program of importance to the Administration. While it was obviously an attempt to influence legislation, it was directed solely to Members of the House. There is no indication that it was disseminated to members of the public. In these circumstances, we do not believe section 607(a) has been violated. With respect to 18 U.S.C. Sec. 1913, while, as indicated, we would be inclined to view the communication as permissible, the question must ultimately be determined by the Department of Justice since that Department has the primary authority to take enforcement action under the statute.

We hope this is responsive to your request.

Sincerely yours,

(Signed) ELMER B. STAATS Comptroller General of the United States