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LOBBYING - APPROPRIATION PROHIBITION - PROMOTING PUBLIC SUPPORT OR OPPOSITION DIGEST: SECRETARY OF THE AIR FORCE DID NOT VIOLATE APPROPRIATIONS RESTRICTIONS IN THE DOD 1984 APPROPRIATION ACT AGAINST THE USE OF FEDERAL FUNDS FOR LOBBYING AND CONTRACTOR ADVERTISING WHEN HE URGED GOVERNMENT CONTRACTORS IN A SPEECH TO SPONSOR ADVERTISEMENT FOR A STRONGER DEFENSE ESTABLISHMENT. THE SECRETARY WAS URGING CONTRACTORS TO USE THEIR PROFITS (NOT FEDERAL FUNDS) FOR SUCH PURPOSE.

THE HONORABLE FORTNEY H. (PETE) STARK: HOUSE OF REPRESENTATIVES

WE REFER TO YOUR NOVEMBER 20, 1984 LETTER REQUESTING AN OPINION FROM THIS OFFICE ON THE LEGALITY OF CERTAIN REMARKS MADE BY THE HONORABLE VERNE ORR, SECRETARY OF THE AIR FORCE, IN A SPEECH ON SEPTEMBER 18, 1984, BEFORE THE AIR FORCE ASSOCIATION. IN THAT SPEECH, SECRETARY ORR URGED DEFENSE CONTRACTORS TO DIRECT THEIR ADVERTISING CAMPAIGNS TOWARDS CONVINCING THE PUBLIC OF THE NEED FOR A STRONG DEFENSE, INSTEAD OF PROMOTING PARTICULAR WEAPONS SYSTEMS MANUFACTURED BY THEIR CORPORATIONS. WE HAVE EXAMINED THE SECRETARY'S REMARKS IN LIGHT OF APPLICABLE LAWS AND REGULATIONS AND HAVE CONCLUDED THAT THE REMARKS DID NOT CONSTITUTE A VIOLATION.

YOU HAVE ASKED US WHETHER SECRETARY ORR'S REMARKS VIOLATED ANY ANTI LOBBYING LAWS. BASICALLY THERE ARE TWO ANTI-LOBBYING LAWS THAT ARE RELEVANT TO THIS SITUATION. ONE IS CONTAINED IN 18 U.S.C. SEC. 1913, WHICH READS AS FOLLOWS:

"SEC. 1913. LOBBYING WITH APPROPRIATED MONEYS

"NO PART OF THE MONEY APPROPRIATED BY ANY ENACTMENT OF CONGRESS 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 LEGISLATION 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 DEEMED 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."

TO OUR KNOWLEDGE, THERE HAS NEVER BEEN A PROSECUTION UNDER THIS STATUTE. MOREOVER, A REVIEW OF THE CASE LAW INDICATES THAT ONLY A FEW FEDERAL COURT DECISIONS HAVE CITED THE STATUTE. SEE FOR EXAMPLE, NATIONAL ASSOCIATION FOR COMMUNITY DEVELOPMENT V. HODGSON, 356 F.SUPP. 1399 (D.D.C. 1973) WHERE THE COURT DENIED A MOTION TO DISMISS A CAUSE OF ACTION BROUGHT TO ENFORCE 18 U.S.C. SEC. 1913 AND AMERICAN PUBLIC GAS ASSOCIATION V. FEDERAL ENERGY ADMINISTRATION, 408 F.SUPP. 640 (D.D.C. 1976) AND AMERICAN TRUCKING ASSOCIATION V. DEPARTMENT OF TRANSPORTATION, 492 F.SUPP. 566 (D.D.C. 1980), WHERE THE COURTS DENIED INJUNCTIONS AGAINST THESE AGENCIES DISTRIBUTING PUBLICATIONS FAVORING DEREGULATION OF THE INDUSTRIES REPRESENTED BY THE PLAINTIFF ASSOCIATIONS.

SINCE THE ABOVE STATUTE CONTAINS FINE AND IMPRISONMENT PROVISIONS, ITS ENFORCEMENT IS THE RESPONSIBILITY OF THE DEPARTMENT OF JUSTICE. IN 1978, THE ATTORNEY GENERAL REQUESTED HIS LEGAL COUNSEL TO RENDER AN OPINION ON THE PROPRIETY OF COMMENTS BY JUDICIAL OFFICERS ON LEGISLATION DIRECTLY AFFECTING THE JUDICIARY IN LIGHT OF THE RESTRICTIONS CONTAINED IN 18 U.S.C. SEC. 1913. THE MEMORANDUM OPINION FOR THE ATTORNEY GENERAL (APPLICABILITY OF ANTI-LOBBYING STATUTE (18 U.S.C. SEC. 1913) - FEDERAL JUDGES, 2 OPS O.L.C. 30, 31 (1978)) STATED THAT:

"THE LIMITED LEGISLATIVE HISTORY DEMONSTRATES THAT ITS ENACTMENT WAS SPURRED BY A SINGLE, PARTICULARLY EGREGIOUS INSTANCE OF OFFICIAL ABUSE- THE USE OF FEDERAL FUNDS TO PAY FOR TELEGRAMS URGING SELECTED CITIZENS TO CONTACT THEIR CONGRESSIONAL REPRESENTATIVES IN SUPPORT OF LEGISLATION OF INTEREST TO THE INSTIGATING AGENCY. SEE 58 CONG.REC. 403 (1919). THE PROVISION WAS INTENDED TO BAR THE USE OF OFFICIAL FUNDS TO UNDERWRITE AGENCY PUBLIC RELATIONS CAMPAIGNS URGING THE PUBLIC TO PRESSURE CONGRESS IN SUPPORT OF AGENCY VIEWS."

THERE WAS NOTHING IN SECRETARY ORR'S REMARKS THAT INDICATED HE WAS ATTEMPTING TO INFLUENCE THE CONGRESS REGARDING ANY LEGISLATION. HIS OBJECTIVE WAS TO PERSUADE THE PUBLIC OF THE NEED FOR A STRONG NATIONAL DEFENSE POSTURE AND NOT TO URGE THE PUBLIC TO PRESSURE CONGRESS. THEREFORE, WE DO NOT BELIEVE THE SECRETARY'S REMARKS VIOLATE THE PROVISIONS OF 18 U.S.C. SEC. 1913, AS IT HAS BEEN CONSTRUED BY THE DEPARTMENT OF JUSTICE.

ANOTHER RELEVANT ANTI-LOBBYING STATUTE IS EMBODIED IN SECTION 777 OF THE DEPARTMENT OF DEFENSE APPROPRIATION ACT, 1984, PUB.L. NO. 98-212, DECEMBER 8, 1983, 97 STAT. 1421, WHICH PROVIDES:

"SEC. 777. NONE OF THE FUNDS MADE AVAILABLE BY THIS ACT SHALL BE USED IN ANY WAY, DIRECTLY OR INDIRECTLY, TO INFLUENCE CONGRESSIONAL ACTION ON ANY LEGISLATION OR APPROPRIATION MATTERS PENDING BEFORE THE CONGRESS."

SECTION 777 WAS FIRST INCLUDED IN A FISCAL YEAR 1983 CONTINUING RESOLUTION PROVIDING FUNDS FOR DOD. SEE PUB.L. NO. 97-377, SEC. 796, 96 STAT. 1830, 1865 (1982). WE ARE UNABLE TO FIND ANY GUIDANCE IN THE LEGISLATIVE HISTORY OF EITHER ACT WHICH WOULD HELP DETERMINE THE INTENDED BREADTH OF SECTION 777'S PROHIBITION ON INFLUENCING CONGRESSIONAL ACTION. HOWEVER, THE PLAIN MEANING OF THE STATUTE PROHIBITS ATTEMPTS TO INFLUENCE CONGRESSIONAL ACTION ON LEGISLATION PENDING BEFORE THAT BODY. PREVIOUSLY MENTIONED THE SECRETARY IN HIS REMARKS DID NOT REFER TO LEGISLATION, NOR DID HE URGE ANYONE TO CONTACT MEMBERS OF CONGRESS. ACCORDINGLY, WE DO NOT BELIEVE THE SECRETARY'S REMARKS VIOLATED SECTION 777,

INASMUCH AS THEY CANNOT BE CLASSIFIED AS AN ATTEMPT TO INFLUENCE ACTION BY THE CONGRESS ON PENDING LEGISLATION.

YOU INDICATE THAT YOU ARE CONCERNED THAT THE ADVERTISING COSTS OF DEFENSE CONTRACTORS WILL BE PASSED ON TO THE GOVERNMENT AS A PART OF DEFENSE CONTRACT COSTS. SPECIFICALLY YOU QUESTION WHETHER SECRETARY ORR MAY HAVE VIOLATED THE LAW BY URGING CONTRACTORS TO EXPEND FEDERAL FUNDS FOR ADVERTISING TO PROMOTE LEGISLATION FOR A LARGER DEFENSE BUDGET. WE DO NOT BELIEVE THE ACTIONS OF THE SECRETARY WERE IMPROPER, BECAUSE EXISTING LAW AND REGULATIONS EXPLICITLY PROHIBIT THE REIMBURSEMENT OF SUCH ADVERTISING COSTS TO DEFENSE CONTRACTORS AND THEREFORE NO FEDERAL FUNDS WOULD BE INVOLVED IN CONTRACTOR ADVERTISING IN ACCORDANCE WITH SECRETARY ORR'S SUGGESTION.

A GENERAL PROVISION OF THE DOD APPROPRIATION ACT, 1984, CONTAINED IN SECTION 728 (10 U.S.C. SEC. 138 NOTE) PROHIBITS THE USE OF DOD APPROPRIATIONS TO PAY FOR ADVERTISING COSTS AS FOLLOWS:

"SEC. 728. NO PART OF THE FUNDS APPROPRIATED HEREIN OR IN SUBSEQUENT APPROPRIATION ACTS FOR THE DEPARTMENT OF DEFENSE SHALL BE AVAILABLE FOR PAYING THE COSTS OF ADVERTISING BY ANY DEFENSE CONTRACTOR, EXCEPT ADVERTISING FOR WHICH PAYMENT IS MADE FROM PROFITS, AND SUCH ADVERTISING SHALL NOT BE CONSIDERED A PART OF ANY DEFENSE CONTRACT COST. THE PROHIBITION CONTAINED IN THIS SECTION SHALL NOT APPLY WITH RESPECT TO ADVERTISING CONDUCTED BY ANY SUCH CONTRACTOR IN COMPLIANCE WITH REGULATIONS WHICH SHALL BE PROMULGATED BY THE SECRETARY THE DEFENSE, SOLELY FOR (1) THE RECRUITMENT BY THE CONTRACTOR OF PERSONNEL REQUIRED FOR THE PERFORMANCE BY THE CONTRACTOR OF OBLIGATIONS UNDER A DEFENSE CONTRACT, (2) THE PROCUREMENT OF SCARCE ITEMS REQUIRED BY THE CONTRACTOR FOR THE PERFORMANCE OF A DEFENSE CONTRACT, OR (3) THE DISPOSAL OF SCRAP OR SURPLUS MATERIALS ACQUIRED BY THE CONTRACTOR IN THE PERFORMANCE OF A DEFENSE CONTRACT."

WHILE THE ABOVE-QUOTED RESTRICTION PRECLUDES THE USE OF FEDERAL FUNDS FOR MOST DEFENSE CONTRACTOR ADVERTISING COSTS, IT ACKNOWLEDGES THAT CONTRACTORS ARE FREE TO USE THEIR PROFITS FOR SUCH PURPOSES. PRESUMABLY, THE SECRETARY WAS URGING DEFENSE CONTRACTORS TO USE THEIR PROFITS FOR THE ADVERTISING HE DESCRIBED. THE SECRETARY'S REMARKS WOULD NOT VIOLATE THE ABOVE PROVISION OR ANY OTHER LAW OR REGULATION OF WHICH WE ARE AWARE.

THE ABOVE RESTRICTION BY ITS TERMS APPLIES NOT ONLY TO THE APPROPRIATIONS CONTAINED IN THE DOD 1984 APPROPRIATION ACT, BUT IN ALL "SUBSEQUENT APPROPRIATION ACTS FOR THE DEPARTMENT OF DEFENSE." THIS CLAUSE SERVES TO MAKE THIS RESTRICTION A PERMANENT PROVISION OF THE LAW, RATHER THAN A TEMPORARY APPROPRIATION RESTRICTION THAT MUST BE INCLUDED IN EACH ANNUAL APPROPRIATION ACT TO BE EFFECTIVE FOR THOSE APPROPRIATIONS. NORCROSS V. UNITED STATES, 142 CT.CL. 763 (1958). THIS PROVISION HAS ALSO BEEN IMPLEMENTED IN THE CONTRACT COST PRINCIPLES CONTAINED IN SECTION 31.205-1 OF THE FEDERAL ACQUISITION REGULATIONS, WHICH IS APPLICABLE TO ALL GOVERNMENT CONTRACTORS.

ACCORDINGLY, WE CONCLUDE THAT SECRETARY ORR DID NOT VIOLATE EXISTING LAW OR REGULATIONS IN URGING DEFENSE CONTRACTORS TO USE THEIR PROFITS FOR ADVERTISING FOR A STRONGER DEFENSE.