United States General Accounting Office

GAO

Testimony

Before the Committee on Government Reform
and Oversight
House of Representatives

For Release on Delivery
Expected at
9:30 am EDT
Wednesday
May 15, 1996

H.R. 3078, The Federal Agency Anti-Lobbying Act

Statement of Robert P. Murphy, General Counsel

GAO/T-OGC-96-18

Chairman Clinger, Ms. Collins, and Members of the Committee:

I am pleased to appear before you today to discuss H.R. 3078, a bill to amend title 31, United States Code, to prohibit the use of appropriated funds by federal agencies for lobbying activities, and to discuss the role of the General Accounting Office (GAO) in investigating alleged violations of anti-lobbying restrictions. Twelve years ago GAO recommended enactment of a restriction similar to that proposed in H.R. 3078. We are aware of no reason why permanent government-wide legislation is less necessary today.

In 1984, we were asked by the predecessor of this Committee to review the adequacy of current laws and regulations that govern executive branch efforts to influence the legislative process.[1] We concluded that the applicable statutes and written guidelines on agency lobbying were "unclear, imprecise, and judicially unenforceable except in rare cases of extreme violation." Our concern about appropriation act restrictions on lobbying was that none had been enacted into permanent law, and as a result there were no clear guidelines as to what constituted improper behavior.

Based on a series of interviews of legislative and executive branch officials, we suggested continuing the existing framework of controls, but enacting into permanent law the

---

[1]No Strong Indication That Restrictions On Executive Branch Lobbying Should Be Expanded, GGD-84-46 (March 20, 1984).

restriction regularly found in some appropriation acts. We proposed language similar to, although somewhat narrower than the prohibition in H.R. 3078. We believed that our proposed language would encourage agencies to issue interpretive guidance to their employees, and ensure that the restrictions on expenditures of appropriated funds remain in effect even when parts of the government are operating under a continuing resolution.

With this preface, I would like to briefly focus on three issues.

First, I would like to explain GAO's role in investigating alleged violations of the sundry restrictions on lobbying with appropriated funds contained in some but not all of the thirteen regular appropriation acts. Second, I will discuss H.R. 3078's prohibition on lobbying by federal agencies in light of its statutory model, section 303 of recent Department of Interior appropriation acts, and our decisions interpreting and applying section 303. And third, I would like to briefly touch on H.R. 3078's potential impact on our workload.

BACKGROUND

Generally speaking, there are two types of restrictions on the use of appropriated funds for lobbying activities—one criminal and the other civil. In 1919, Congress enacted what is now 18 U.S.C. § 1913, making the use of appropriated funds to lobby Congress a criminal offense. Since 18 U.S.C. § 1913 is a criminal statute, its enforcement is the

responsibility of the Department of Justice and the courts. The Justice Department has construed 18 U.S.C. § 1913 to prohibit the use of appropriated funds for large-scale, high-expenditure indirect or "grass roots" lobbying campaigns. The role of enforcing the criminal laws is the Justice Department's, and GAO does not decide whether a given action violates the statute. In evaluating specific situations, we defer to the Justice Department's interpretation of section 1913 to determine whether to refer a particular matter to the Department for further investigation. To our knowledge no one has ever been indicted under the statute.

The second type of lobbying restriction is civil, typically although not exclusively found in the regular appropriation acts that prohibit the use of appropriated funds for certain lobbying activities. These acts have provided a number of different standards, with varying degrees of specificity and coverage. Attached to this testimony is a summary of the most recent appropriation act provisions. One version of the appropriation act restrictions that we have had the most occasion to apply has been the restriction on the use of appropriated funds "for publicity or propaganda purposes designed to support or defeat legislation pending before Congress." We have construed this provision to allow agencies to directly contact Members of Congress, but to prohibit indirect or grass roots lobbying through appeals to the public to contact their elected representatives.

H.R. 3078 is modeled on another appropriation act restriction that has been included in the Department of the Interior appropriation acts since fiscal year 1979. This provision is

broader than other appropriation act restrictions. It prohibits the use of any funds appropriated in the Department of the Interior appropriation act "for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition" to any pending legislative proposal.

GAO'S ROLE IN INVESTIGATING AND ENFORCING LOBBYING RESTRICTIONS

GAO's role in investigating and enforcing statutory restrictions on the use of appropriated funds for lobbying is tied to GAO's historical role in the appropriation process. Under the Budget and Accounting Act of 1921, GAO's enabling statute, GAO is authorized to investigate "all matters related to the receipt, disbursement, and use of public money" and to "settle all accounts of the United States Government." Although our process for discharging these authorities has evolved significantly over the years, our role in determining whether taxpayer funds have been put to lawful use continues to rely on the 1921 statute.

Over the years, we have considered on a number of occasions whether actions by agencies, their officials, or recipients of agency funds, constitute an improper use of appropriated funds under the language of the various statutory lobbying restrictions. Requests for GAO investigations of alleged violations of the lobbying restrictions usually are made by congressional committees and individual members of the Congress. In some instances, on its own initiative GAO has found and addressed questionable agency

activities which came to light in connection with its audits or evaluations of agency activities and programs.

GAO's investigation and reporting on alleged agency lobbying activities has generally been the full measure of our enforcement of the appropriations act restrictions. Although under our account settlement authority we theoretically can take exception to an improper or illegal expenditure in an accountable officer's account and seek recovery from the accountable officer of the amount improperly spent, as a practical matter this is often not viable.

It is not unusual that the amount of federal funds used in the prohibited activities is small, mingled with otherwise proper expenditures, and extremely difficult if not impossible to separate out from the proper costs. For example, the Department of the Interior estimated that approximately $90 was spent in a recent case of improper lobbying that we investigated. Also, the accountable officers who are personally liable for the improper expenditures are not the agency officials who directed or carried out the prohibited activities. Nor are these accountable officers necessarily in a position to know that the vouchers they are asked to certify or the payments they make are in fact for an unlawful lobbying purpose. Under these circumstances, to seek recovery from these individuals misses the mark. Hence, our real "enforcement" tool is to report the unlawful activities to the Congress for its oversight of executive branch activities. That is the

approach incorporated in H.R. 3078, and it is consistent with the views expressed in our 1984 report.

APPROPRIATION ACT MODEL FOR H.R. 3078

The language of H.R. 3078's prohibition closely conforms to the language of the anti-lobbying restriction contained in the Department of the Interior appropriation acts noted earlier. Section 303 of the recent Department of the Interior appropriation act precludes the use of funds appropriated in that act:

> "for any activity . . . that in any way tends to promote public support or opposition to any legislative proposal . . . on which congressional action is not complete."

Similarly, H.R. 3078 would restrict the use of funds made available to an agency by appropriation:

> "for any activity . . . that is intended to promote public support or opposition to any legislative proposal . . . on which congressional action is not complete."

While the basic restriction is essentially the same, there are some details in H.R. 3078 that are not in section 303 of the Department of Interior appropriation act on which it is modeled. In lieu of section 303's reference to "any activity or the publication or distribution of literature," H.R. 3078 includes a list of examples of prohibited activities drawn from provisions regularly contained in appropriations for the Departments of Labor, Health and Human Services, and Education. In addition, H.R. 3078 specifically includes as a "legislative proposal" the confirmation of the nomination of a public official or the ratification of a treaty. H.R. 3078, unlike the Department of Interior restriction, requires that for the use of appropriated funds to be prohibited the activity must be "intended" to promote public support or opposition to a pending legislative proposal rather than merely have that effect.

We have applied the Department of the Interior restriction in three cases. In two we found violations; in the third we did not. Let me briefly summarize those cases. In a 1979 decision, we concluded that a National Endowment for the Arts (NEA) mass mailing of an information packet implicitly advocated support of the appropriation for NEA's "Living Cities Program," thereby violating what was then section 304 of the applicable Department of Interior appropriation act. 59 Comp. Gen. 115 (1979). Recently, in a 1995 decision, we concluded that remarks made by a Fish and Wildlife Service employee at a press conference called to generate opposition to proposed amendments to the Clean Water Act tended to promote public opposition to the legislative proposal and hence violated the Department of the Interior appropriation act provision. B-262234,

December 21, 1995. I would note that neither the Fish and Wildlife Service nor the Department of the Interior had provided written guidance to employees on section 303; and when the employee in question asked the Interior Regional Solicitor's office about what he could say about the proposed legislation, he was not told about section 303 or what it prohibits.

In the third case, after making a presentation at an arts management conference on the NEA's structure, its functions, and the status of its reauthorization, an NEA official responded to a question from the audience concerning what the audience could do to support the NEA. The NEA official responded that they could contact their elected representatives. Since the official's answer was more in the nature of a civics lesson, informational in nature, rather than an exhortation to contact Congress, we did not view the activity as a violation.

In each of these cases we had to reach a judgment whether under all the facts and circumstances present the activity tended to promote public support or opposition to a pending legislative proposal. Although the Department of the Interior restriction prohibits the use of appropriated funds for explicit appeals to the public to contact their elected representatives in support of or opposition to pending legislation, it also reaches more broadly to restrict appeals to the public that implicitly tend to promote support for or opposition to pending legislative measures. Accordingly, we have had to consider a

variety of factors when analyzing whether a violation has occurred, including the timing, setting, audience, content, and the reasonably anticipated effect of the questioned activity.

One additional factor which is included in H.R. 3078 but was not explicitly included in the Department of the Interior language is whether the federal official intended to generate support for or opposition to legislation. While not in the language of the appropriation restriction, intention can be an important element of our analysis of a possible violation. This is because agencies are often called upon to provide information about their activities and programs in response to public inquiries, and cannot always prevent or even anticipate public response. As we noted in one case:

> ". . . there is a very thin line between the provision of legitimate information in response to public inquiries and the provision of information in response to the same requests which "tends to promote public support or opposition" to pending legislative proposals."

Even a strictly factual response to a question about the status of a program's appropriation could stimulate members of the public to contact Members of Congress. Without inclusion of some element of motivation, we believe that the bare language of the Department of the Interior restriction would establish a standard that might not achieve the control over agency lobbying that the Congress intended. Consequently, in addition to

the effect of a communication governed by the Department of the Interior appropriation language, we have considered whether the communication was intended to promote support or opposition to a legislative proposal. For example, in the NEA "Living Cities Program" case, we concluded that the information package mailed out by NEA "was designed to promote public support for funding the Program." In the case of the NEA official who responded to a public question about what actions members of the audience could take to support NEA, we considered the fact that her response was "incidental to her presentation and was not part of any plan to generate action on the part of her audience."

EFFECT OF ENACTMENT OF H.R.3078 ON GAO'S WORKLOAD

Over the past 20 years, we have issued about 25 reports or decisions concerning whether lobbying restrictions were violated. Some of those in which we found a violation are summarized in an attachment to this testimony. Although initially enactment of H.R. 3078 may lead to an increase in the number of requests for investigations, we do not anticipate that the number of requests will significantly increase. If the statute does produce a large influx of requests beyond our ability to investigate directly, the statute authorizes the Comptroller General to obtain the assistance of the various Inspectors General in investigating alleged violations.

Thank you, Mr. Chairman. This concludes my prepared remarks. I would be happy to answer any questions you may have.

ATTACHMENT 1

RESTRICTIONS ON LOBBYING THE CONGRESS INCLUDED IN FISCAL YEAR 1996 APPROPRIATION ACTS AND FINAL CONTINUING RESOLUTION

"Publicity or Propaganda" Restrictions

1. Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, Final Continuing Resolution for Fiscal Year 1996, Pub. L. No. 104-134 § 601, 110 Stat. 1321, as reported in H.R. Conf. Rep. No. 537, 104th Cong., 2d Sess. (1996).

   Sec. 601. No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress.

2. Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8001, 109 Stat. 636 (1995):

   Sec. 8001. No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress.

3. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 547, 110 Stat. 704, 741 (1996):

   Sec. 547. No part of any appropriations contained in this Act shall be used for publicity or propaganda purposes within the United States not authorized before the date of enactment of this Act by the Congress.

4. Treasury, Postal Service and General Government Appropriations Act, 1996, Pub. L. No. 104-52, § 506, 109 Stat. 468 (1995):

   Sec. 506. No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress.

"Pending Legislation" Restrictions

1. Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8015, 109 Stat. 636 (1995):

   Sec. 8015. 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.

2. Appropriations for the Department of the Interior and Related Agencies, Final Continuing Resolution for Fiscal Year 1996, Pub. L. No. 104-134, § 303, 110 Stat. 1321, as reported in H.R. Conf. Rep. No. 537, 104th Cong., 2d Sess. (1996):

> Sec. 303. No part of any appropriations contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete.

3. Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, 109 Stat 436 (1995):

> Sec. 339. None of the funds in this Act 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: Provided, That this shall not prevent officers or employees of the Department of Transportation or related agencies funded in this Act 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.

<u>Mixed "Publicity or Propaganda"/"Pending Legislation" Restrictions</u>

1. Appropriations for the District of Columbia, Final Continuing Resolution for Fiscal Year 1996, Pub. L. No. 104-134, § 113, 110 Stat. 1321, as reported in H.R. Conf. Rep. No. 537, 104th Cong., 2d Sess. (1996):

> Sec. 113. No part of this appropriation shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature.

2. Appropriations for the Departments of Labor, Health and Human Services, and Education, and Related Agencies, Final Continuing Resolution for Fiscal Year 1996, Pub. L. No. 104-134, § 503, 110 Stat. 1321, as reported in H.R. Conf. Rep. No. 537, 104th Cong., 2d Sess. (1996):

> Sec. 503. (a) No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for

publicity or propaganda purposes, for the preparation, distributions, or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.

(b) No part of any appropriation contained in this Act shall be used to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence legislation or appropriations pending before the Congress.

Lobbying Restrictions using Other Forms, or on Specific Subjects

1. Appropriations for the Legal Services Corporation, Final Continuing Resolution for Fiscal Year 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, as reported in H.R. Conf. Rep. No. 537, 104th Cong., 2d Sess. (1996):

> Sec. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a "recipient")–
>
> . . .
>
> (4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;
> (5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;
>
> . . .
>
> (16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;

2. Appropriations for the Departments of Veterans Affairs and Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices, Final Continuing Resolution for Fiscal Year 1996, Pub. L. No. 104-134, § 222, 110 Stat. 1321, as reported in H.R. Conf. Rep. No. 537, 104th Cong., 2d Sess. (1996):

> Sec. 222. . . . (b) No part of any appropriation contained in this Act shall be used for lobbying activities as prohibited by law.

3. Appropriations for the Department of Health and Human Services, Final Continuing Resolution for Fiscal Year 1996, Pub. L. No. 104-134, 110 Stat. 1321, as reported in H.R. Conf. Rep. No. 537, 104th Cong., 2d Sess. (1996):

> Provided further, . . . that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.

4. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 518, 110 Stat. 704, 727 (1996):

> Sec. 518. . . . Provided, That none of the funds made available under this Act may be used to lobby for or against abortion.

ATTACHMENT 2

VIOLATIONS OF ANTI-LOBBYING RESTRICTIONS IDENTIFIED BY THE GENERAL ACCOUNTING OFFICE 1976-1996

1976

B-128938 (7/12/76)
An article in a newsletter published by the Planning and Conservation Foundation criticizing pending legislation and urging people to contact their representatives in Congress violates appropriation act lobbying restriction if paid for by Environmental Protection Agency.

1979

B-192746 (3/7/79)
The Maritime Administration violated an appropriation act restriction by contributing funds and administrative support to an organization that it knew was engaged in grass-roots lobbying activities.

CED-79-91 (5/15/79)
Participation by the Maritime Administration and its employees in National Maritime Council advertising campaign that encouraged the public to contact Members of Congress on pending legislation constituted violation of lobbying restriction.

59 Comp. Gen. 115
Information packet published by the National Endowment for the Arts violated the restriction of section 304 of Interior Appropriations Act that prohibits distribution of literature that in any way tends to support public support or opposition to pending legislation.

1981

60 Comp. Gen. 423
A campaign organized by the Legal Services Corporation (LSC) and its recipients in support of its reauthorization and funding constituted grass-roots lobbying contrary to the applicable lobbying restriction.

B-202787 (5/1/81)
A letter written by a recipient of a grant from the Community Services Administration urging members of the public to contact their Member of Congress urging support for the continuation of CSA constituted grass-roots lobbying in violation of an appropriation act lobbying restriction.

B-202975 (11/3/81)
A newsletter prepared and distributed by a subgrantee of the Urban Mass Transportation Administration urging members of the public to contact their elected representatives to urge continued financial support for the "people mover" program violated an appropriation act restriction on lobbying.

1982

GAO/AFMD-82-123 (9/29/82)
Extensive and cooperative effort by officials of the Air Force, the Office of the Secretary of Defense, and defense contractors to influence individual Members of Congress and the House-Senate conference with respect to the procurement of C-5B aircraft constituted violation of the appropriations restriction prohibiting the use of funds for publicity and propaganda purposes designed to affect pending legislation.

1983

B-212235 (11/17/83)
An article in a Department of Commerce publication by an employee of the Department, which concluded with a suggestion that persons might contact their Member of Congress to show support of an Administration bill, violated an anti-lobbying restriction in the agency's appropriation act.

1986

B-223098 (10/10/86)
Editorials prepared by the Small Business Administration and distributed to newspapers violated the "publicity and propaganda" restriction in an appropriation act. However, the SBA activities did not amount to grass-roots lobbying and therefore did not violate 18 U.S.C. § 1913.

B-222758 (6/25/86)
Hiring of a public affairs officer by the Chemical Warfare Review Commission to communicate with Members of Congress concerning pending legislation violated the lobbying restriction in the DOD appropriation act. The restriction prohibited the use of appropriations "in any way, directly or indirectly, to influence congressional action" on pending legislation.

1987

66 Comp. Gen 707
Covert propaganda activities by the Department of State intended to influence the media and the public to support the Administration's policies violated a lobbying and publicity restriction in the Commerce-State appropriation act.

1993

GAO/HRD-93-100 (5/4/93)
Two meetings scheduled by a grantee of the Office for Substance Abuse Prevention, Department of Health and Human Services, designed to generate public support for the Office violated an appropriation act lobbying restriction. Two publications by the Office, which acted as a clearing house for information, did not violate the anti-lobbying restriction.

1995

B-262234 (12/21/95)
Participation by a Fish and Wildlife employee in a press conference sponsored by Clean Water Action designed to encourage opposition to pending legislation constituted a violation of the limitation in section 303 of the Interior appropriation act. This restriction extends to explicit and implicit appeals to the public designed to promote support or opposition to pending legislation.

1996

GAO/RCED-96-72
Use by the State of Nevada of grant funds to produce a video tape, which concluded with an exhortation to write the viewers Congressman and stop the "steamrolling" of Nevada, constituted a violation of an appropriation act lobbying restriction. Language in the video was more than informational; it constituted grass-roots lobbying intended to influence legislation.

Ordering Information

The first copy of each GAO report and testimony is free. Additional copies are $2 each. Orders should be sent to the following address, accompanied by a check or money order made out to the Superintendent of Documents, when necessary. VISA and MasterCard credit cards are accepted, also. Orders for 100 or more copies to be mailed to a single address are discounted 25 percent.

Orders by mail:

U.S. General Accounting Office
P.O. Box 6015
Gaithersburg, MD 20884-6015

or visit:

Room 1100
700 4th St. NW (corner of 4th and G Sts. NW)
U.S. General Accounting Office
Washington, DC

Orders may also be placed by calling (202) 512-6000 or by using fax number (301) 258-4066, or TDD (301) 413-0006.

Each day, GAO issues a list of newly available reports and testimony. To receive facsimile copies of the daily list or any list from the past 30 days, please call (202) 512-6000 using a touchtone phone. A recorded menu will provide information on how to obtain these lists.

For information on how to access GAO reports on the INTERNET, send an e-mail message with "info" in the body to:

info@www.gao.gov

or visit GAO's World Wide Web Home Page at:

http://www.gao.gov

United States
General Accounting Office
Washington, D.C. 20548-0001

Bulk Rate
Postage & Fees Paid
GAO
Permit No. G100

Official Business
Penalty for Private Use $300

Address Correction Requested