anti-lobbying

THE WHITE HOUSE

WASHINGTON

February 23, 1981

MEMORANDUM FOR MEMBERS OF THE WHITE HOUSE OFFICE STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Support of Administration Legislative Programs

This memorandum is intended to alert members of the White House staff to proscriptions on lobbying activities imposed by federal law and to provide general guidelines to staff members working in this area so as to insure compliance with those laws.

Simply stated, the so-called "Anti-Lobbying Act" (18 U.S.C. §1913) prohibits the use of appropriated funds, directly or indirectly, to pay for "any personal service, advertisement, telegram, telephone, letter, printed or written matter or other device" intended to influence a Member of Congress in acting upon legislation, before or after its introduction. There is also an appropriation rider, which has appeared in appropriation bills since 1951, barring the use of appropriated funds for "publicity or propaganda purposes" designed to support or defeat legislation pending before Congress.

Interpretations of 18 U.S.C. §1913 by the Department of Justice make it clear that an employee of the Executive Branch, while acting in his or her official capacity, may communicate with a member of Congress for the purpose of providing information or soliciting that member's support for the Administration's position on matters before Congress, whether or not such contact is invited and whether or not specific legislation is pending. Thus, the ordinary and traditional inter-action between the Executive and Legislative Branches is permitted. Likewise, it is not improper for an Executive Branch employee to provide legitimate informational background and material to the public in support of an Administration policy effort.

Problems arise where employees of the Executive Branch become involved, directly or indirectly, in efforts to induce or encourage members of the public to lobby members of Congress on Administration programs or legislation. Unfortunately, the line separating proper and improper conduct is imprecise

and the propriety of an activity may well depend on each individual situation. The following comments and examples are intended to provide general guidance for the more frequently encountered contacts and activities:

1) Executive Branch officials may speak freely in meetings with individuals or groups, at public forums, at news conferences, and during news interviews, but where these appearances of personnel become so excessive as to be deemed to be a publicity campaign, the activity might be challenged. Any undue degree of direct contact with the private sector by persons who do not ordinarily engage in such activities is evidence of prohibited conduct.

2) Appropriated funds should not be used to produce written, printed or electronic communications for distribution with the intent to induce members of the public to lobby members of Congress. For example, an organized mailing to members of the public initiated by Executive Branch personnel, stating the Administration's position and asking the recipients to contact their Senators and Representatives in support of that position should be avoided. Moreover, asking recipients to contact their elected representatives should also be avoided in communications sent in response to inquiries received by the Executive Branch. However, responses to incoming communications may include information which responds to the specific inquiries as well as explanations of the Administration's position on matters of public policy, including proposed legislation.

Massive distribution by the Executive Branch of unsolicited copies of a public document, such as the reprint of a public official's speech or other informational materials, may raise a question even though the contents are only informational and do not suggest that the recipients contact members of Congress. Normal unsolicited distribution of press releases, public officials' speeches, fact sheets and other informational materials to persons, because of governmental or organizational position or expression of interest in the subject matter, would not ordinarily create a problem. Each such proposed distribution must be separately judged based on the purpose and content of the communication and the number and kind of people who will receive the information.

3) Officials and employees of the Executive Branch may properly have regular contact with non-governmental organizations which have among their purposes lobbying members of Congress or attempting to influence the general public to lobby the Congress. However, in these dealings, the officials should not or even appear to dominate the group or use the group as an arm of the Executive Branch.

(a) Examples of the kinds of activities in which Executive Branch officials might participate in dealing with independent outside organizations include:

(i) exchange information, as long as it is not privileged.

(ii) make suggestions, respond to or raise particular inquiries, or discuss the merits of various legislative strategies and related matters, so long as the Executive Branch officials do not suggest organization of grass roots pressure;

(iii) address meetings (non-fundraisers) sponsored by such organizations:

(iv) Upon the request of an independent organization provide to it for reproduction and distribution by the organization:

-- sample copies of documents prepared by Executive Branch officials (such as press releases, public officials' speeches, fact sheets) that are otherwise available for public distribution.

-- letters on specific subjects written by Executive Branch officials.

(Note that the materials must not suggest that the recipients contact Members of Congress urging support of particular positions; also the decision to publish or distribute any such material must be left to the independent organization.)

(b) Examples of the kinds of things which Executive Branch officials should <u>avoid</u> include:

(i) responsibility for the on-going operation of an outside organization;

(ii) requesting that an organization activate its membership at large to contact members of Congress on behalf of a legislative proposal;

(iii) gathering information or producing materials specifically for such an organization which cannot properly or would not ordinarily be gathered or produced as part of the official's regular work;

(iv) producing or providing multiple copies of materials to be distributed by such organizations;

(v) requesting an organization to prepare or distribute any materials that suggest directly or indirectly that the recipients contact members of Congress, or playing any substantial role in advising an organization regarding the content of material it may wish to distribute;

(vi) providing to such organizations lists of or correspondence from persons who favor or oppose particular policy positions;

(vii) involvement in fundraising activities by such organizations (because of the varying forms that such involvement might take, any involvement should be discussed in advance with the Counsel's office).

These legal provisions are not intended to prohibit an on-going dialogue or interaction between the Executive Branch and the public in an educational effort to explain Administration positions, but where that conduct develops into a publicity and propaganda campaign designed or intended to pressure citizen groups into contacting Congressional representatives, the boundary of propriety has been crossed.

18 U.S.C. §1913 is a criminal statute and should be taken seriously. In addition, any specific allegation against White House staff members (Level IV and above) for violation of 18 U.S.C. §1913 potentially could trigger the "Special Prosecutors Act", 28 U.S.C. §591, et seq. The General Accounting Office is also authorized to undertake audits in this area, and any disallowed expenditures would have to be borne by the individual supervising the activity that resulted in the unauthorized use of government funds.

Because §1913 and the Appropriation rider have not often been interpreted it is difficult to be more specific in setting forth guidelines. Any difficult factual situation should be brought to the attention of this office before any action is taken.

Department of Justice
Washington, D.C. 20530

NOV 29 1977

MEMORANDUM TO THE HONORABLE ROBERT J. LIPSHUTZ
Counsel to the President

Re: Anti-lobbying laws

Attached is the detailed review of the statutory restraints on lobbying activity by federal officials that you have requested. Our re-examination of this area of the law has led us to conclude that both 18 U.S.C. § 1913 and the series of "publicity or propaganda" appropriation riders that have been enacted since 1951 were intended to direct Executive branch efforts to affect public opinion with respect to pending legislation away from the creation of a government public relations arm and into the use of more appropriate channels--public forums, the press, and traditional lobbying activities involving citizen groups and members of Congress.

In our view, neither provision will be violated so long as no publicity campaign or other activity that amounts to overreaching by the Executive branch is undertaken; conduct which qualifies as overreaching presents a problem whenever it explicitly or implicitly calls for citizen action in contacting Congressional representatives. Although we have discussed this fairly straightforward rule at some length, we must continue to advise you that particular fact situations may involve close questions of interpretation that necessitate individualized consideration. Each case stands on its facts. While we hope this memorandum will provide general guidance, we will continue to do our best to advise you of the applicability of the anti-lobbying laws to specific proposed activities.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

NOV 29 1977

MEMORANDUM TO THE HONORABLE ROBERT J. LIPSHUTZ
Counsel to the President

Re: Statutory Restraints on Lobbying Activity by Federal Officials

This is in response to your request that we review the provisions of federal law prohibiting the use of appropriated funds for lobbying purposes in order to provide guidance for the White House in its activities in support of the President's legislative program. In doing so, we have re-examined the advice previously given by this Office, and, in some instances, have found that advice to be inconsistent with what we believe to be the correct interpretation of the applicable statutes. Although we have attempted, in the course of the ensuing discussion, to provide general guidance concerning the application of these statutes, we must at the same time express a note of caution; the many situations that arise under the anti-lobbying laws cannot be adequately evaluated in the abstract, but must instead be considered on the basis of their individual facts. This memorandum, therefore, cannot and does not purport to eliminate the need for specific legal advice on specific fact situations.

I. Introduction: Historical Context

The two primary legal constraints on lobbying activity by federal officials--18 U.S.C. § 1913, prohibiting use of federal funds to influence legislation, and a rider barring use of appropriated funds for "publicity or propaganda purposes" that has appeared in appropriation bills since 1951[1] --can best be understood in historical

1/ Section 1913 provides for fine and/or imprisonment and removal from office in the event of violation; failure to comply with the rider will result in GAO's disallowance of the improper expenditure.

context. Since the turn of the century Congress has attempted in various ways to control perceived excesses that have arisen as the Executive branch has evolved. No longer merely providing necessary support for the Presidency, the Executive branch has become a force in its own right,[2] achieving the status of an independent, institutional bureaucracy. The anti-lobbying laws are merely variations on this simpler theme, particular examples of a continuing effort by Congress to check the expanding activities of the federal bureaucracy not directly related to any statutory program or mission.[3]

At the turn of the century, heads of federal agencies frequently engaged in deliberate attempts to expend appropriated funds in less than the authorized available period in order to compel Congress to pass supplemental appropriations bills to maintain essential services. Congress responded by adopting criminal sanctions for such unauthorized expenditures in an effort to instill a renewed appreciation in the agency heads for their individual responsibility under law to observe spending limitations ordained by Congress.[4] In 1913, an effort was made to curtail the open practice of hiring "publicity experts" to enhance agency reputations.[5] The subsequent passage of what is now 18 U.S.C. § 1913 in 1919 demonstrates the inadequacy of the earlier "publicity expert" measure.[6] As the legislative history of section 1913 reveals, agency heads had begun to take more direct action to enhance their bar-

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2/ H.R. Rep. No. 2474, 80th Cong., 2d Sess. 8 (1948).

3/ The 1939 debate on the Hatch Political Activity Act revealed concern about overreaching of another sort, the practice engaged in by officials of requiring their subordinates to contribute to political campaigns. See 84 Cong. Rec. 9594-9674 (1939).

4/ See L. Wilmerding, The Spending Power; A History of the Efforts of Congress to Control Expenditures 137-179 (1943)

5/ See 5 U.S.C. § 3107, Act of October 22, 1913, ch. 32, § 1, 38 Stat. 212. See also 50 Cong. Rec. 4409-4411 (1913).

6/ Third Deficiency Appropriations Act, Fiscal Year 1919, Act of July 11, 1919, ch. 6, § 6, 41 Stat. 68.

gaining position, using federal funds to contact members of the public to urge them to lobby Congress on the agency's behalf.7/ The adoption of the first "publicity or propaganda" appropriation rider in 1951 was also stimulated by perceived bureaucratic excesses, an inordinate flow of government publications and the related growth of the number of personnel employed in connection therewith under titles other than "publicity expert."8/

7/ The legislative history of the provision is quite limited. The following statement by Representative Good, the deficiency bill's floor manager in the House, is the single recorded explanation for the section's inclusion:

> 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. 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 write Congressman Sherley for this appropriation and for that. Now, they use the contingent fund for that purpose, and I have no doubt that the telegrams sent for that purpose cost the Government more than $7,500. 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. 58 Cong. Rec. 403 (1919).

8/ See 97 Cong. Rec. 5474-5475, 6733-6739, 6795-6799 (1951).

A pattern emerges from these somewhat varied statutes. Many of these measures were stop-gaps, arrived at via floor amendment, subject to only limited debate, drawn in language that was acknowledged to be unclear.[9] We believe that they can best be understood as part of a trend, as attempts to accomplish the obvious, not a more subtle or more complex goal. With this in mind, we will first examine the appropriation rider which represents the culmination of that trend.

II. Appropriation Rider

The rider limiting the use of appropriated funds for "publicity or propaganda purposes" has taken several forms. As applicable to the Executive Office of the President it reads:

> 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. 90 Stat. 963, 978 (1976)[10]

9/ See 97 Cong. Rec. 6798 (1951).

10/ The following alternative formulation has also been used:

> No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress. 90 Stat. 937, 961 (1976).

The language of the two formulations differs in three respects. The first rider refers to "this or any other Act," while the second applies only to "this Act." The broad language of the former provision thus appears to govern in any case. The second rider also lacks any direct reference to legislation and any specific limitation to matters "pending" before Congress. It is unlikely that any more far-reaching limitation was intended than that embodied in the first formulation, however. It should be noted that in this regard the rider is technically less restrictive than section 1913, which applies to both pending and as yet unproposed legislation. No such rider is found in the appropriations measure governing the legislative brach. See, e.g., 90 Stat. 1439.

The words "publicity" and "propaganda" have related connotations; they refer to a common goal, the spreading of a partisan message, to a common target, some segment of the public. The rider thus, in terms, addresses mass distribution, the use of federal funds to underwrite a dissemination of some magnitude. While the limited Congressional debate on the earlier riders focused particularly upon publications, there is no need to give the phrase such a limited meaning. What was to be avoided was the uncontrolled development and use of an in-house government public relations machine, whatever its varied manifestations and whatever the qualifications of its supporting personnel.11/

Negative inferences can also be derived from the formulation of the rider and the related debate, especially when read in light of the historical context discussed earlier. There is no suggestion that the practice of government officials in dealing with the press or in giving public speeches was to be curtailed. Constitutional principles support this view. The press needs free access to all available sources--especially to those responsible for arriving at important policy decisions--in order to facilitate the carefully protected democratic dialogue, see Branzburg v. Hayes, 408 U.S. 665 (1972). Moreover, the people need to hear such views in order to remain informed, cf. Kleindeinst v. Mandel, 408 U.S. 753 (1972), and to exercise the franchise intelligently.

There is also no indication that Executive branch "lobbying" of Congress or of particular citizen interest groups was to be curtailed. Such communications are unlikely to rise to the level of "publicity or propaganda" in any event. Moreover, the important role of high-level officials in advocating the President's legislative program to members of Congress has deep roots in history;12/ so, too, does the Presidential practice

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11/ Congress can, of course, authorize employment of such personnel to the extent it deems necessary to accomplish legitimate government objectives.

12/ See N. Small, Some Presidential Interpretations of the Presidency, 164-166 (1970). Such practices date back to the time of Jefferson and Hamilton.

of appealing for public support of Administration positions.[13] Congressional incursion into such realms cannot lightly be assumed. Absent more express language and more evidence of a purpose to so intrude, we believe that the appropriation rider should be read as principally designed to meet the immediate evil perceived by Congress--the unchecked growth of a government public relations arm used to disseminate agency appeals to the public at large--not as an effort to interfere unduly with the normal and healthy functioning of the body politic.

Although the limited scope of the rider's prohibition is therefore clear, further consideration of its precise application is still necessary. In the first instance, it may be said that the rider is directed toward non-news sorts of disseminations. No problem of compliance therefore is presented where the press itself seeks information or views from federal officials on pending legislation, or when federal officials provide statements to the press. In either case, the press itself operationally defines what is news and will not normally publish government (or non-government) submissions that do not meet that standard. Nor do all communications directed specifically to the public come within the rider. No interference with the initial expression of an official's opinion is intended, rather a limitation is imposed upon the subsequent dissemination by the Government of those views when they no longer qualify as a news event, e.g., the mass mailing of unsolicited copies of an official's speech urging support of particular legislation.[14]

13/ Id. at 181. Although the practice of appealing to the people through the press seems to have reached new prominance during the tenure of Theordore Roosevelt and Woodrow Wilson, its origins are much older; Andrew Jackson and Abraham Lincoln are reported to have engaged in such activity.

14/ In our view, a Presidential speech to the nation that is voluntarily carried over radio and television by the major networks will under most circumstances qualify as a news event. Speeches by lower level officials appearing in public forums will also often constitute protected news-type communication. Extensive campaigns in support of Administration proposals may, however, become so excessive as to amount to forbidden overreaching by the Executive branch. Under some circumstances, therefore, expression that is ordinarily outside the scope of the rider may well rise to the level of propaganda.

Not all dissemination of non-news material relating to pending legislation is forbidden, of course. The role of the federal government in providing "information" has traditionally been recognized as proper,[15] although even neutral, well-intentioned communications of this sort have at one time been criticized as excessive and therefore inappropriate.[16] The line between forbidden "propaganda" and permitted "information" is therefore not a precise one.

Guidance can be derived, however, by reference to the rider's more explicit prohibition of propaganda "designed to support or defeat legislation." Purportedly informational communications may be seen to fall within this language due to any one of several failings. An explicit or implicit call for citizens to contact their Congressional representatives with their views involves a clearly forbidden effort in the nature of propaganda to influence legislation.[17] Partisan expressions are also suspect, although a resolution in favor of one side of a question is not forbidden so long as a sufficiently full and fair exposition of the facts is made so as to permit an individual or the public to form an independent opinion or conclusion.[18] Excessive distribution of even

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15/ H.R. Rep. No. 3138, 81st Cong., 2d Sess. 59 (1950).

16/ See, e.g., 97 Cong. Rec. 6735 (1951) for Congressional criticism of such publications as "ECA's Dilemma--Can Elephants and Water Buffalos Outwork Machinery?" But see 97 Cong. Rec. 6797 (1951) for a defense of Department of Agriculture publications concerning fleas.

17/ See Comp. Gen. Dec. B-164105 (August 10, 1977) which interprets the publicity or propaganda rider as precluding "appeals addressed to the public suggesting that they contact their elected representatives and indicate their support or opposition to pending or proposed legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner." In our view, use of words short of an express request to "write Congress" can constitute an appeal.

18/ Treas. Reg. 1.501(c)(3)-1(d)(3) (1976) adopts an analogous approach in defining the proper scope of exemption for charitable organizations under the tax law.

neutral material may also constitute the sort of over-reaching forbidden by the statute, as can distribution on a non-neutral basis to certain segments of the population.

Although we cannot anticipate and discuss all potential problems, we suggest that compliance with a rather simple guideline should assure conformance with this facet of the law: federal officials are free to speak their minds to the press and to the public in all respects; what they must avoid is any effort to serve as their own press by cranking out their own propaganda for distribution via any of a variety of media or by shifting personnel resources into the field of public relations without Congressional authorization.

III. 18 U.S.C. § 1913

The language of section 1913 is rather sweeping and unclear:[19]

19/ No criminal prosecutions have been undertaken pursuant to this provision; nor are formal administrative interpretations or useful judicial constructions available to assist in defining its scope. Only two cases involving section 1913 are reported. In National Association for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973), private plaintiffs sought to prevent the Department of Labor from providing any federal funds to an organization of state unemployment offices which plaintiffs claimed engaged in lobbying activities. The court failed to uncover section 1913's somewhat obscure legislative history. Rather, it attempted to derive some understanding of the legislative intent by analogy to the Federal Regulation of Lobbying Act, a statute enacted more than 25 years later for quite different purposes. Little useful insight may therefore be gained from this decision. The court in American Public Gas Association v. Federal Energy Administration, 408 F. Supp. 640 (D.D.C. 1976), the only other reported case dealing with section 1913, spoke but briefly of the statute, since it found that the requirements for injunctive relief, the remedy sought by private plaintiffs, had not been met. The only relevant scholarly commentary, Engstrom & Walker, "Statutory Restraints on Administrative Lobbying--Legal Fiction," 19 J. Pub. Law 89 (1970), preceded these decisions and adds no helpful insight.

> 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 deem necessary for the efficient conduct of the public business.

Although titled "Lobbying with appropriated funds" in the most recent version of Title 18 of the United States Code (which has been enacted into positive law), the provision first appeared in codified form in 1926 as "Use of appropriations to pay for personal services to influence Member of Congress to favor or oppose legislation." Like the other legislation previously discussed, this stop-gap rider sought to stem the growing federal bureaucracy's tendency to abandon ordinary straightforward contact with the Congress in preference for more indirect and perhaps more persuasive channels of communication. The statute does enumerate the possible vehicles of abuse--"personal services" (the "publicity expert" found offensive six years earlier), "advertisement, telegram, telephone, letter, printed or written matter," or "other device" (any unspecified machination, plot or procedure). It fails, however, to identify either the context in which its prohibition is to apply or the contents of such communications deemed to be offensive. Both omissions can be easily explained. The intent of Congress was to bar improper use of any of the listed devices--excessive, overreaching, abusive utilization of any such channel--but not their routine use as a matter of course. To frame a statute in terms of "improper use," or yet to attempt to put into words a clear definition of such organic abuse while at the same time exempting "proper" use, is, of course, a practically

hopeless exercise. No mention of forbidden content appears for yet a more obvious reason; no regulation of content was intended, only the eradication of improper and abusive use of the channels of communication.

We therefore conclude that section 1913 should be given no broader scope than the appropriation rider. It does not refer to speeches or newspapers; it intends no incursion into the realm of First Amendment interests earlier discussed. As long, therefore, as a federal official limits himself to public forums and relies upon normal workings of the press, he may say anything he wishes without fear of violating section 1913.[20] Nor is it necessary to censor the content of Executive branch correspondence; only the abusive use of letters in a way that exceeds the bounds of proper official conduct falls within the statutory prohibition.[21]

More subtle implications arise, however, in connection with traditional lobbying conduct, by virtue of the statute's peculiar language: "No money . . . shall . . . be used directly or indirectly to pay for . . . [any] 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 . . . ." Unlike the appropriations rider discussed earlier, section 1913 is not cast in words that clearly encompass only broad appeals to the public. The statute would therefore appear to apply in certain situations involving more individualized contact. There is really no reason to so extend the force of the provision, however. The well-established tradition of Executive-

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20/ As noted earlier at note 14, however, he cannot engage in an excessive speech-making campaign that amounts to an attempt to propagandize the public from the podium.

21/ For example, a campaign to contact a large group of citizens by means of a form letter prepared and signed by a federal official would be improper. Mentioning the need for support of a particular legislative proposal would, on the other hand, be permissible, where the request appeared in a limited number of individual letters sent to persons with whom the official had had previous contact concerning related matters of policy. Factual situations that fall between these two extremes may or may not constitute the kind of abusive overreaching that section 1913 sought to prevent; each such situation must therefore be examined on its own merits.

Legislative branch contacts concerning legislation is recognized in the statute's savings clause: "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." Moreover, the statute, as seen in historical context, was not intended to apply to such conduct in the first place. Thus, the savings proviso, although specifically speaking only of responses to requests by Members of Congress and communications to Congress as a whole, can be read merely as reassurance to federal employees that they might continue to send practical suggestions to Congress,[22] not an attempt to brush away, by implication, years of practice based on well-recognized practical and constitutional necessity.

Similarly, Executive branch contact with individual citizens and citizen groups could not be significantly curtailed without grave injury to First Amendment interests. The people have a right to petition the Government, including the Executive branch, for redress of grievances, California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 510 (1972); that right would seem to extend to petitions for Executive support of legislative programs as well. Such contacts are also of great practical importance in providing the Executive branch with information necessary to its proper functioning.[23] This information may be factual, highlighting the existence of social problems and serving as a basis for proposed remedial legislation; it may also pertain to the political climate, an important factor in gauging whether various proposals command sufficient public support to warrant their submission to Congress. Express recognition of the need for comparable freedom of action in the public

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22/ This inference arises from the Congressional debate over a proposed amendment to section 1913 that was ultimately rejected. See 58 Cong. Rec. 425-426 (1919).

23/ See Hearings before House Select Committee on Lobbying Activities, 81st Cong., 2d Sess., pt. 10, at 44-45 (1950).

sphere is reflected in the approach taken by the Hatch Political Activity Act,24/ and in the conclusions of the House Select Committee on Lobbying which investigated the lobbying activities of federal agencies and

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24/ Such sentiments were voiced repeatedly during the course of the Congressional debate on the Hatch Political Activity Act, Act of August 2, 1939, ch. 410, 53 Stat. 1149:

> MR. CELLER: " . . . Just imagine, the President endeavoring to test out some theory, measure, plan or policy, and being unable to permit one of his trusted lieutenants to sound out public opinion by making a political speech."
> 84 Cong. Rec. 9624 (1939).
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> MR. WHITE: " . . . A President of the United States should have the right to defend his record in the arena of politics, and the same thing is true of a Cabinet member or policy-making officials who naturally must defend the policies for which they are responsible in the field of political activity."
> 84 Cong. Rec. 9630 (1939).
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> MR. HATCH: " . . . As I have often said, when policymaking officials of the Government, such as the President and Members of the Cabinet inaugurate and carry on great policies of government, they must necessarily frequently go before the country and the people and explain their policies, and often it is true that they must defend them when they are assailed. It is but right and proper that they should have the full privilege of doing so, and the bill now so provides."
> 84 Cong. Rec. 9672 (1939).

These views are reflected in section 9(d) of the Act, 5 U.S.C. § 7324(d), which details those exempted from coverage, including employees paid from the appropriation for the office of the President, heads or assistant heads of Executive or military deparments, and certain policy-making officials appointed by the President with the advice and consent of the Senate.

others in 1950.[25] It cannot lightly be assumed that Congress intended to limit the subject matter to be discussed in the course of such meetings between citizens and federal officials so as effectively to chill this protected discourse.

Interaction with citizen groups can, however, in other circumstances, come within the statute's ban, for citizen groups may be used in a variety of ways as another "device" intended to influence legislation. It is clearly improper under the statute to create or to come to dominate a citizen group in order to use that group as an alter ego or agent capable of carrying out propaganda activities forbidden to the federal official in the first instance.[26] Even more subtle

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25/ Quoting from the Report of the Task Force on Departmental Management of the Hoover Commission, the Committee's interim report stated:

> Apart from his responsibility as spokesman, the department head has another obligation in a democracy: to keep the public informed about the activities of his agency. How far to go and what media to use in this effort present touchy issues of personal and administrative integrity. But of the basic obligation there can be little doubt.
> H. R. Rep. No. 3138, 81st Cong., 2d Sess. 53 (1950).

With particular reference to high-level officials, the Committee continued:

> Their relation to the Chief Executive and their public responsibilities on matters within their jurisdiction impose duties of leadership in matters of public policy upon officers of Cabinet and near-Cabinet rank. The traditional and statutory requirements on the dissemination of information by departments and agencies are a further expression of the duties of the executive branch which sometimes bear on legislative issues.
> Id. at 59.

26/ Such conduct by Federal Security Administrator Oscar Ewing in creating an organization to press for adoption of a national health plan was expressly criticized during the course of the 1950 hearings. See Hearings before House Select Committee on Lobbying Activities, 81st Cong., 2d Sess., pt. 10, at 354-430 (1950).

relationships with citizen lobby groups may be subject to question. Federal officers and employees cannot play any integral part in even an independent lobbying organization where private funds would otherwise have to be used to ensure that the functions they assume were performed. Similarly, requesting even an independent group to distribute a letter prepared by federal officials would be forbidden. Congress intended that Executive branch resources not be used for purposes of maintaining a private communications network of this sort.[27]

Whatever strictures exist on interlocking relationships between federal officials and citizen lobby groups, it remains clear that officials can talk freely with such citizen representatives on any sort of informal basis. They can make suggestions, respond to or raise particular inquiries, or discuss the merits of various lobbying strategies.[28] They cannot, however, use this forum to pass on to lobby groups information which the officers themselves could not properly collect or use in the first instance.[29]

27/ Furnishing such a letter to an independent group upon their request or signing a letter prepared by them may, on the other hand, be permissible, for no federal overreaching is involved and no obvious need to silence the unique voice of the federal official from being heard through this type of forum is apparent. However, in order to avoid even the appearance of impropriety and the possible issue of whether the official himself pressed the organization to issue the letter, it may be best to avoid such alternatives and to rely upon the free and independent forum available in the press.

28/ It would be permissible, for example, to share with citizen groups data concerning Congressional voting records or positions on pending legislation collected by members of the White House staff in connection with their own lobbying efforts.

29/ Thus, officials cannot use federal funds to underwrite unauthorized private polls of public opinion, then provide citizen groups with the resulting statistics to be used for lobbying purposes. Neither can they cull incoming mail in order to compile and then disseminate lists of citizens who favor or oppose particular legislation. Since officials could acknowledge the receipt of such mail, but not undertake repeated mailings absent a request to that effect, see 39 U.S.C. § 3204, they would lack a legitimate use for such a list on their own account and could not use federal funds to maintain this unique resource for the sole purpose of assisting private groups.

The many other ways in which public opinion can be molded in order to influence legislation need not be recounted here; in each case, the facts will control.30/ Compliance with both the appropriations rider and with section 1913 will be ensured through the Executive's untrammeled use of normal press channels, public forums, and routine personal contacts to gain legislative acceptance of administration programs.31/

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

30/ For example, paying representative citizens to attend an ad hoc confederence designed to stimulate their support of legislative programs would be prohibited under section 1913. See discussion of allegations against Secretary of Agriculture Brannan in Hearings before House Select Committee on Lobbying Activities, 81st Cong., 2d Sess., pt. 10, at 59-306 (1950).

31/ For purposes of this memorandum, we have not discussed the provisions of federal law which constrain the use of federal printing facilities and penalty mail privileges. The Federal Advisory Committee Act, 5 U.S.C. App. I, 86 Stat. 770, may also be applicable if the President or an Executive agency "establishes" or "utlizes" a private "committee, board, commission, council, conference, panel, task force, or other similar group . . . in the interest of obtaining advice or recommendations."

Department of Justice
Washington, D.C. 20530

NOV 29 1977

MEMORANDUM TO THE HONORABLE ROBERT J. LIPSHUTZ
Counsel to the President

Re: Anti-lobbying laws

Attached is the detailed review of the statutory restraints on lobbying activity by federal officials that you have requested. Our re-examination of this area of the law has led us to conclude that both 18 U.S.C. § 1913 and the series of "publicity or propaganda" appropriation riders that have been enacted since 1951 were intended to direct Executive branch efforts to affect public opinion with respect to pending legislation away from the creation of a government public relations arm and into the use of more appropriate channels--public forums, the press, and traditional lobbying activities involving citizen groups and members of Congress.

In our view, neither provision will be violated so long as no publicity campaign or other activity that amounts to overreaching by the Executive branch is undertaken; conduct which qualifies as overreaching presents a problem whenever it explicitly or implicitly calls for citizen action in contacting Congressional representatives. Although we have discussed this fairly straightforward rule at some length, we must continue to advise you that particular fact situations may involve close questions of interpretation that necessitate individualized consideration. Each case stands on its facts. While we hope this memorandum will provide general guidance, we will continue to do our best to advise you of the applicability of the anti-lobbying laws to specific proposed activities.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 8, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft Presidential Taping:
National Confectioners Association

Richard Darman has requested that comments on the above-referenced proposed remarks be submitted directly to Aram Bakshian by noon today. The remarks, to be taped, note the contributions of confectioners to the economy, such as the provision of over 70,000 jobs (presumably not including dentists). The remarks then review the progress of the recovery.

At one point the President would state: "You know from running your businesses that what you spend must not exceed what you take in. I need your help in explaining that to the Congress. And while you're at it, I wish you'd also make clear that you think the Government is already taking in plenty." I do not think this raises a problem under the anti-lobbying provisions, since the President does not refer to any specific legislation. Simply advising people to urge Congress to spend and tax less should not be viewed as prohibited lobbying. I read the language in question to Larry Simms of OLC, who agreed that it was not covered by the anti-lobbying provisions.

Agree - Is RR covered by anti-lobbying Act at all? >

There is one editing error in the draft, which I have noted in the proposed memorandum to Bakshian.

Attachment

anti-lobby

Calendar No. 306

98TH CONGRESS
1ST SESSION

S. 1646

[Report No. 98–186]

Making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1984, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 20 (legislative day, JULY 18), 1983

Mr. ABDNOR, from the Committee on Appropriations, reported the following original bill; which was read twice and placed on the calendar

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A BILL

Making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1984, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Treasury Department, the United States Postal Service, the Executive

the Secretary of the Department in which the Coast Guard is operating may have to conduct investigations under any law.

The authority of the Secretary of the Treasury under this section shall terminate two years from the date of enactment of this Act unless specifically renewed by the Congress.

SEC. 511. Of the total amount of budget authority provided for fiscal year 1984 by this or any other Act that would otherwise be available for consulting services, management and professional services, and special studies and analyses, 10 per centum of the amount intended for such purposes in the President's budget for 1984, as amended, for any agency, department, or entity subject to apportionment by the Executive shall be placed in reserve and not made available for obligation or expenditure: *Provided,* That this section shall not apply to any agency, department, or entity whose budget request for 1984 for the purposes stated above did not amount to $5,000,000.

TITLE VI—GENERAL PROVISIONS

DEPARTMENTS, AGENCIES, AND CORPORATIONS

SEC. 601. 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.

SEC. 602. Unless otherwise specifically provided the maximum amount allowable during the current fiscal year in accordance with section 16 of the Act of August 2, 1946 (60

of such funds unless otherwise specified in the Act by which they are made available: *Provided,* That in the event any functions budgeted as administrative expenses are subsequently transferred to or paid from other funds, the limitations on administrative expenses shall be correspondingly reduced.

SEC. 608. Pursuant to section 1415 of the Act of July 15, 1952 (66 Stat. 662), foreign credits (including currencies) owed to or owned by the United States may be used by Federal agencies for any purpose for which appropriations are made for the current fiscal year (including the carrying out of Acts requiring or authorizing the use of such credits), only when reimbursement therefor is made to the Treasury from applicable appropriations of the agency concerned: *Provided,* That such credits received as exchange allowances or proceeds of sales of personal property may be used in whole or part payment for acquisition of similar items, to the extent and in the manner authorized by law, without reimbursement to the Treasury.

SEC. 609. (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.

(b) No part of any appropriation contained in this Act shall be available for the payment of the salary of any officer or employee of the United States Postal Service, who—

(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any officer or employee of the United States Postal Service from having any direct oral or written communication or contact with any Member or committee of Congress in connection with any matter pertaining to the employment of such officer or employee or pertaining to the United States Postal Service in any way, irrespective of whether such communication or contact is at the initiative of such officer or employee or in response to the request or inquiry of such Member or committee; or

(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance or efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any officer or employee of the United States Postal Service, or attempts or threatens to commit any of the foregoing actions with respect to such officer or employee, by reason of any communication or contact of such officer or employee with any Member or commit-

tee of Congress as described in paragraph (1) of this subsection.

SEC. 610. No part of any appropriation contained in this or any other Act, shall be available for interagency financing of boards, commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality.

SEC. 611. Funds made available by this or any other Act to (1) the General Services Administration, including the fund created by the Public Buildings Amendments of 1972 (86 Stat. 216), and (2) the "Postal Service Fund" (39 U.S.C. 2003), shall be available for employment of guards for all buildings and areas owned or occupied by the United States or the Postal Service and under the charge and control of the General Services Administration or the Postal Service, and such guards shall have, with respect to such property, the powers of special policemen provided by the first section of the Act of June 1, 1948 (62 Stat. 281; 40 U.S.C. 318), but shall not be restricted to certain Federal property as otherwise requried by the proviso contained in said section, and, as to property owned or occupied by the Postal Service, the Postmaster General may take the same actions as the Administrator of General Services may take under the provi-

Calendar No. 505

98TH CONGRESS
1ST SESSION

H. R. 4139

IN THE SENATE OF THE UNITED STATES

OCTOBER 31, 1983

Received; read twice and placed on the calendar

AN ACT

Making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1984, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1984, and for other purposes, namely:

SEC. 512. No funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.)

SEC. 513. No funds appropriated under this Act for the Department of Treasury may be used for the purpose of eliminating any existing requirement for sureties on customs bonds.

TITLE VI—GENERAL PROVISIONS

DEPARTMENTS, AGENCIES, AND CORPORATIONS

SEC. 601. 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.

SEC. 602. Unless otherwise specifically provided the maximum amount allowable during the current fiscal year in accordance with section 16 of the Act of August 2, 1946 (60 Stat. 810), for the purchase of any passenger motor vehicle (exclusive of buses and ambulances), is hereby fixed at $6,000 except station wagons for which the maximum shall be $6,400: *Provided,* That these limits may be exceeded by not to exceed $1,700 for police-type vehicles, and by not to exceed $3,600 for special heavy-duty vehicles: *Provided further,* That the limits set forth in this section shall not apply to

owed to or owned by the United States may be used by Federal agencies for any purpose for which appropriations are made for the current fiscal year (including the carrying out of Acts requiring or authorizing the use of such credits), only when reimbursement therefor is made to the Treasury from applicable appropriations of the agency concerned: *Provided*, That such credits received as exchange allowances or proceeds of sales of personal property may be used in whole or part payment for acquisition of similar items, to the extent and in the manner authorized by law, without reimbursement to the Treasury.

SEC. 609. No part of any appropriation contained in this Act shall be available for the payment of the salary of any officer or employee of the United States Postal Service, who—

(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any officer or employee of the United States Postal Service from having any direct oral or written communication or contact with any Member or committee of Congress in connection with any matter pertaining to the employment of such officer or employee or pertaining to the United States Postal Service in any way, irrespective of whether such communication or contact is at the initiative of

such officer or employee or in response to the request or inquiry of such Member or committee; or

(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance or efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any officer or employee of the United States Postal Service, or attempts or threatens to commit any of the foregoing actions with respect to such officer or employee, by reason of any communication or contact of such officer or employee with any Member or committee of Congress as described in paragraph (1) of this subsection.

SEC. 610. No part of any appropriation contained in this or any other Act, shall be available for interagency financing of boards, commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality.

SEC. 611. Funds made available by this or any other Act to (1) the General Services Administration, including the fund created by the Public Buildings Amendments of 1972

bdc

THE WHITE HOUSE

WASHINGTON

September 19, 1985

MEMORANDUM FOR WHITE HOUSE STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Anti-Lobbying Restrictions

In view of the number of new members on the Staff, and as a reminder to all members of the Staff, I am recirculating the attached memorandum of February 23, 1981 which sets forth guidelines with respect to applicable anti-lobbying restrictions.

If you should have any questions, please do not hesitate to contact this office.

Thank you.

Attachment

THE WHITE HOUSE

WASHINGTON

March 14, 1986

MEMORANDUM FOR WHITE HOUSE STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Anti-Lobbying Restrictions

In view of the number of new members on the staff, and as a reminder to all members of the staff, I am recirculating the attached memorandum of February 23, 1981, which sets forth guidelines with respect to applicable anti-lobbying restrictions. If you should have any questions, please do not hesitate to contact this office.

Thank you.

Attachment

THE WHITE HOUSE

WASHINGTON

February 23, 1981

MEMORANDUM FOR MEMBERS OF THE WHITE HOUSE OFFICE STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Support of Administration Legislative Programs

This memorandum is intended to alert members of the White House staff to proscriptions on lobbying activities imposed by federal law and to provide general guidelines to staff members working in this area so as to insure compliance with those laws.

Simply stated, the so-called "Anti-Lobbying Act" (18 U.S.C. §1913) prohibits the use of appropriated funds, directly or indirectly, to pay for "any personal service, advertisement, telegram, telephone, letter, printed or written matter or other device" intended to influence a Member of Congress in acting upon legislation, before or after its introduction. There is also an appropriation rider, which has appeared in appropriation bills since 1951, barring the use of appropriated funds for "publicity or propaganda purposes" designed to support or defeat legislation pending before Congress.

Interpretations of 18 U.S.C. §1913 by the Department of Justice make it clear that an employee of the Executive Branch, while acting in his or her official capacity, may communicate with a member of Congress for the purpose of providing information or soliciting that member's support for the Administration's position on matters before Congress, whether or not such contact is invited and whether or not specific legislation is pending. Thus, the ordinary and traditional inter-action between the Executive and Legislative Branches is permitted. Likewise, it is not improper for an Executive Branch employee to provide legitimate informational background and material to the public in support of an Administration policy effort.

Problems arise where employees of the Executive Branch become involved, directly or indirectly, in efforts to induce or encourage members of the public to lobby members of Congress on Administration programs or legislation. Unfortunately, the line separating proper and improper conduct is imprecise

and the propriety of an activity may well depend on each individual situation. The following comments and examples are intended to provide general guidance for the more frequently encountered contacts and activities:

1) Executive Branch officials may speak freely in meetings with individuals or groups, at public forums, at news conferences, and during news interviews, but where these appearances of personnel become so excessive as to be deemed to be a publicity campaign, the activity might be challenged. Any undue degree of direct contact with the private sector by persons who do not ordinarily engage in such activities is evidence of prohibited conduct.

2) Appropriated funds should not be used to produce written, printed or electronic communications for distribution with the intent to induce members of the public to lobby members of Congress. For example, an organized mailing to members of the public initiated by Executive Branch personnel, stating the Administration's position and asking the recipients to contact their Senators and Representatives in support of that position should be avoided. Moreover, asking recipients to contact their elected representatives should also be avoided in communications sent in response to inquiries received by the Executive Branch. However, responses to incoming communications may include information which responds to the specific inquiries as well as explanations of the Administration's position on matters of public policy, including proposed legislation.

Massive distribution by the Executive Branch of unsolicited copies of a public document, such as the reprint of a public official's speech or other informational materials, may raise a question even though the contents are only informational and do not suggest that the recipients contact members of Congress. Normal unsolicited distribution of press releases, public officials' speeches, fact sheets and other informational materials to persons, because of governmental or organizational position or expression of interest in the subject matter, would not ordinarily create a problem. Each such proposed distribution must be separately judged based on the purpose and content of the communication and the number and kind of people who will receive the information.

3) Officials and employees of the Executive Branch may properly have regular contact with non-governmental organizations which have among their purposes lobbying members of Congress or attempting to influence the general public to lobby the Congress. However, in these dealings, the officials should not or even appear to dominate the group or use the group as an arm of the Executive Branch.

(a) Examples of the kinds of activities in which Executive Branch officials might participate in dealing with independent outside organizations include:

(i) exchange information, as long as it is not privileged.

(ii) make suggestions, respond to or raise particular inquiries, or discuss the merits of various legislative strategies and related matters, so long as the Executive Branch officials do not suggest organization of grass roots pressure;

(iii) address meetings (non-fundraisers) sponsored by such organizations:

(iv) Upon the request of an independent organization provide to it for reproduction and distribution by the organization:

-- sample copies of documents prepared by Executive Branch officials (such as press releases, public officials' speeches, fact sheets) that are otherwise available for public distribution.

-- letters on specific subjects written by Executive Branch officials.

(Note that the materials must not suggest that the recipients contact Members of Congress urging support of particular positions; also the decision to publish or distribute any such material must be left to the independent organization.)

(b) Examples of the kinds of things which Executive Branch officials should <u>avoid</u> include:

(i) responsibility for the on-going operation of an outside organization;

(ii) requesting that an organization activate its membership at large to contact members of Congress on behalf of a legislative proposal;

(iii) gathering information or producing materials specifically for such an organization which cannot properly or would not ordinarily be gathered or produced as part of the official's regular work;

(iv) producing or providing multiple copies of materials to be distributed by such organizations;

(v) requesting an organization to prepare or distribute any materials that suggest directly or indirectly that the recipients contact members of Congress, or playing any substantial role in advising an organization regarding the content of material it may wish to distribute;

(vi) providing to such organizations lists of or correspondence from persons who favor or oppose particular policy positions;

(vii) involvement in fundraising activities by such organizations (because of the varying forms that such involvement might take, any involvement should be discussed in advance with the Counsel's office).

These legal provisions are not intended to prohibit an on-going dialogue or interaction between the Executive Branch and the public in an educational effort to explain Administration positions, but where that conduct develops into a publicity and propaganda campaign designed or intended to pressure citizen groups into contacting Congressional representatives, the boundary of propriety has been crossed.

18 U.S.C. §1913 is a criminal statute and should be taken seriously. In addition, any specific allegation against White House staff members (Level IV and above) for violation of 18 U.S.C. §1913 potentially could trigger the "Special Prosecutors Act", 28 U.S.C. §591, et seq. The General Accounting Office is also authorized to undertake audits in this area, and any disallowed expenditures would have to be borne by the individual supervising the activity that resulted in the unauthorized use of government funds.

Because §1913 and the Appropriation rider have not often been interpreted it is difficult to be more specific in setting forth guidelines. Any difficult factual situation should be brought to the attention of this office before any action is taken.