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CRS Report for Congress

Executive Lobbying: Statutory Controls

Walter J. Oleszek
Senior Specialist in Legislative Process
Government and Finance Division

Summary

Federal agency employees use appropriated funds to foster public support and opposition to legislation pending before Congress. Congress has enacted limitations and prohibitions on executive lobbying, but these statutory restrictions have been difficult to enforce. To the extent that prosecution is required, Congress must rely on the Justice Department. Non-criminal prohibitions have been enacted to limit the expenditure of appropriated funds for certain types of lobbying activities. Congressional oversight can help curb executive lobbying efforts that are found objectionable. For further analysis, see CRS Report RL32750, *Public Relations and Propaganda: Restrictions on Executive Agency Activities*, by Kevin Kosar; CRS Report 97-57, *Restrictions on Lobbying Congress With Federal Funds*, by Jack Maskell; and CRS Report RL33065, *Lobbying Reform: Background and Legislative Proposals, 109th Congress*, by R. Eric Petersen. This report will be updated as necessary.

Enforcement of Statutory Restrictions.[1] Studies occasionally use the term "legal fiction" to describe statutory restrictions on executive lobbying.[2] This reputation comes from some ambiguity and ambivalence in congressional policy as well as enforcement decisions by the Department of Justice. Even those who advocate selective restrictions on departmental lobbying understand that the legislative process depends on a free flow of information from the executive branch to Congress. Nevertheless, certain types of executive branch lobbying have been found offensive to lawmakers and have prompted statutory limitations.

A principal statutory restriction, 18 U.S.C. § 1913, recognizes both the need for executive lobbying and the need for limitations. After prohibiting certain executive practices, the statute provides that it "shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member [of

[1] This report was originally authored by Louis Fisher, formerly Senior Specialist in Separation of Powers. The listed author updated the report and is available to answer questions concerning its contents.

[2] Richard L. Engstrom and Thomas G. Walker, "Statutory Restraints on Administrative Lobbying — 'Legal Fiction,'" 19 J. Public L. 89 (1970).

Congress] or official, at his request, or to Congress or such official, through the proper official channels, requests for legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business, ..." Critics of executive lobbying realize that agencies need some latitude in promoting their own programs. As one legislator remarked: "Certainly, any Administration should be expected to use all legal means at its disposal to encourage acceptance of its programs."[3]

Statutory sanctions against executive lobbying have had limited effect because of uncertainty about the law and Justice Department interpretations. Because of conflicting statutes and interpretations, it is sometimes difficult to find a violation of agency activity. On February 17, 2005, Comptroller General David M. Walker objected to agencies using appropriated funds "to produce or distribute prepackaged news stories intended to be viewed by television audiences that conceal or do not clearly identify for the television viewing audience that the agency was the source of those materials." A month later Joshua B. Bolten, Director of the Office of Management and Budget, issued a memorandum stating that the Government Accountability Office (GAO) opinion conflicted with the view of the Justice Department, and it is the Justice Department, "and not the GAO, that provides the controlling interpretations of law for the Executive Branch."[4]

Under Article II, Section 3, of the Constitution, Presidents have a right to give Congress information on the State of the Union and to "recommend to their Consideration such Measures as he shall judge necessary and expedient." Vice Presidents and members of the President's Cabinet enjoy a broad discretion to speak out on public issues. The Justice Department has taken the position that agency heads may use the facilities of their institutions to address unsolicited letters to Members of Congress with respect to pending legislation.[5] Executive department officials "are free to publicly advance Administration and Department positions, even to the extent of calling on the public to encourage Members of Congress to support Administration positions."[6] The Comptroller General stated in 1977: "we have consistently recognized that any agency has a legitimate interest in communicating with the public and with legislators regarding its policies and activities."[7] Even with regard to the President, however, the Justice Department has cautioned "against grass-roots appeals, even by the President, that involve substantial expenditures of appropriated funds for such things as television or radio time, newspaper or magazine advertisements, or mass, unsolicited distribution of printed materials."[8]

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[3] Ancher Nelsen, "Lobbying by the Administration," in *We Propose: A Modern Congress* 145 (New York: McGraw-Hill, 1966).

[4] GAO memorandum, B-304272, Feb. 17, 2005, "Prepackaged News Stories"; OMB memorandum, M-05-10, March 11, 2005, "Use of Government Funds for Video News Releases."

[5] Letter from Assistant Attorney General Herbert J. Miller, Jr. to Rep. Glenard P. Lipscomb, May 10, 1962, reprinted at 108 Cong. Rec. 8451 (1962).

[6] 13 Op. O.L.C. 300, 301 (1989).

[7] 56 Comp. Gen. 890 (1977).

[8] 12 Op. O.L.C. 30, 33 n.5 (1988).

Lobbying With Appropriated Funds. Congress has opposed agency use of appropriated funds to drum up public support or opposition to pending legislation. Members of Congress do not want to be on the receiving end of constituent pressures artificially manufactured by agency telephone calls, telegrams, departmental threats and coercion, and other stimuli originating from within an administration. The GAO and the former Bureau of the Budget have objected to agency publications that are proselytizing in tone and propagandistic in substance.[9] The Justice Department has pointed out that the right of citizens to lobby Congress does not mean a right to use federal funds for that purpose: "Although private persons and organizations have a right to petition Congress and to disseminate their views freely, they can be expected, within the framework established by the Constitution, to do their lobbying at their own expense. They have no inherent or implicit right to use federal funds for that purpose unless Congress has given them that right."[10]

Statutory Limit on Publicity Experts. With bipartisan backing, Congress in 1913 stipulated in an appropriations bill: "No money appropriated by this or any other Act shall be used for the compensation of any publicity expert unless specifically appropriated for that purpose."[11] This statutory restriction responded to what legislators from both parties considered a pattern of agency abuse. Representative Frederick Gillett sponsored this provision after learning that the Civil Service Commission had advertised for a "publicity expert" in the Department of Agriculture. The CSC circular explained that the publicity expert would prepare news matter and secure the publication of such items in various periodicals and newspapers. To Representative Gillette it did not seem "proper for any department of the Government to employ a person simply as a press agent to advertise the work and doings of that department, and it is to prevent that in any department that this amendment is offered." To clarify his amendment, he agreed that nothing in it would prevent an employee of the Department of Agriculture from "giving to the country information as to the work of the department."[12] In that sense, the amendment was aimed not at informative bulletins but rather at press releases intended to promote the agency and its mission.

Agencies were able to circumvent this statutory restriction in part by avoiding the position of "publicity expert" while permitting positions for director of information, chief educational officer, supervisor of information research, director of publications, and other imaginative titles.[13] Although the 1913 legislation remains part of permanent law (5 U.S.C. § 3107), it has been substantially diluted by other statutes that specifically authorize and fund experts who publicize agency programs. Today it is commonplace for Congress to supply funds to agencies and departments for public information officers. The issue becomes whether those officers supply basic information to the public or step over the line and function as a "publicity expert." GAO does not view Section 3107 as prohibiting an agency's legitimate promotional functions where authorized by law. For

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[9] "Legislative Activities of Executive Agencies" (Part 10), hearings before the House Select Committee on Lobbying Activities, 81st Cong., 2nd sess. 24-25, 31-32 (1950).

[10] 5 Op. O.L.C. 180, 185 (1981).

[11] 38 Stat. 212 (1913).

[12] 50 Cong. Rec. 4409 — 4411 (1913).

[13] James L. McCamy, *Government Publicity: Its Practices in Federal Administration* 7(1939).

example, GAO did not regard an agency mass media campaign to educate the public on energy conservation as a violation of Section 3107.[14]

Lobbying With Appropriated Moneys Act. More troublesome to Congress was the practice of agencies using appropriated funds to stimulate public support or opposition to pending legislation. In 1919, Congress passed language to prohibit that practice, and this statutory restriction (known as the Lobbying With Appropriated Moneys Act) remains part of permanent law (18 U.S.C. § 1913). Debate in the House of Representatives in 1919 reveals that Members were offended by bureau chiefs and departmental heads "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."[15]

The statute currently provides: No part of the money appropriated for 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, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation. The restriction was not intended to prevent agency employees from communicating to Members of Congress, at their request, through proper official channels, requests for legislation or appropriations "which they deem necessary for the efficient conduct of the public business.[16]

Violations of Section 1913 originally carried a criminal penalty of a fine, imprisonment for not more than one year, or both. The employee, after being given notice and hearing "by the superior officer vested with the power of removing him, shall be removed from office or employment." The Justice Department never prosecuted anyone for violating this provision. Amendments in 2002 removed the criminal penalties and substituted civil penalties included in the title of the *U.S. Code* that covers contractors and grantees (31 U.S.C. § 1352).

Authorization Bills. Congress has found it necessary at times to enact specific constraints to prohibit executive agencies from lobbying on particular public issues. For example, after the Civil Rights Commission decided to press its views on the abortion controversy, Congress enacted this language: "Nothing in this chapter or any other Act

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[14] General Accounting Office, "Principles of Federal Appropriations Law," 3d ed., vol. I, January 2004, at 4-232 to 4-233.

[15] 58 Cong. Rec. 403 (1919) (statement by Rep. James Good).

[16] Executive branch lobbying restrictions are typically reiterated in some of the annual appropriations measures Congress considers. Section 8012 of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 requires that none of the funds appropriated under the measure be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress (P.L. 109-148, 119 Stat. 2700). Similar provisions regarding funds appropriated for nuclear waste disposal were enacted in the Energy and Water Development Appropriations Act, 2006, P.L. 109-103, 119Stat. 2272-2273.

shall be construed as authorizing the Commission, its advisory committees, or any other person under its supervision or control to study and collect, make appraisals of, or serve as a clearinghouse for any information about laws and policies of the Federal Government or any other governmental authority in the United States, with respect to abortion."[17]

From the very start, the Legal Services Corporation has been prohibited from undertaking to influence the passage or defeat of any legislation by Congress or by a state or local legislative body, but agency personnel "may testify or make other appropriate communication (A) when formally requested to do so by a legislative body, a committee, or a member thereof, or (B) in connection with legislation or appropriations directly affecting the activities of the Corporation."[18]

In 1987, Congress responded to executive branch lobbying in support of the Contra military forces in Nicaragua by adding several sections to the Foreign Relations Authorization Act. One section prohibited the "use of funds for political purposes." No funds authorized to be appropriated by the statute, or by any other statute authorizing funds "for any entity engaged in any activity concerning the foreign affairs of the United States," shall be used for these purposes: "(1) for publicity or propaganda purposes designed to support or defeat legislation pending before Congress; (2) to influence in any way the outcome of a political election in the United States; or (3) for any publicity or propaganda purposes not authorized by Congress."[19]

The Justice Department interpreted paragraph (3) to prohibit "covert attempts to mold opinion through the use of third parties." It also ruled that the administration was entitled to respond to media requests for "op-ed pieces" or interviews by referring the media to supporters of the Contras in the private sector, but it "would be unwise . . . for the Administration to solicit the media to print articles by or interviews with anyone not serving in the government. And, of course, the Administration cannot assist in the preparation of any articles or statements by private sector supporters, other than through the provision of informational materials...."[20]

Private Contractors. Another section of the 1987 Foreign Relations Authorization Act restricted the use of contract funds for "public diplomacy efforts" by the State Department (§ 141). The objective was to restrict States's ability to contract with outside groups for the purpose of boosting the Contras. Over a two-year period, the International Business Communications (IBC) had received $420,000 from the State Department to draft op-ed pieces for placement in U.S. newspapers, arrange meetings between members of the Contra movement and legislators, and promote other public relations activities.[21]

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[17] 42 U.S.C. § 1975a(f) (2000). This limitation first appeared in an authorization for the Commission in 1978 (92 Stat. 1067) and later in 1983 (97 Stat. 1305, § 5(e)).

[18] 88 Stat. 382, § 1066(c) (1974); 42 U.S.C. § 2996e(c) (2000).

[19] 101 Stat. 1339, § 109 (1987).

[20] 12 Op. O.L.C. 30, 40 (1988).

[21] S.Rept. 100-75, 100th Cong., 1st sess. 26 (1987).

Restrictions on lobbying activities by private contractors appear in other statutes. Language in the Labor-HHS appropriations bill has provided: "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."[22]

Provisions relating to grant and contract recipients are treated more comprehensively in what is called the "Byrd Amendment," added in 1989 to the Interior appropriations bill and codified at 31 U.S.C. § 1352. Senator Robert C. Byrd was concerned about recipients of federal contracts, grants, or loans who used federal money to lobby the federal government for additional financial assistance. His amendment states that no funds appropriated by any act may be expended by the recipient of a federal contract, loan, or cooperative agreement "to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress" in connection with these actions: the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

On June 30, 2005, an amendment was added to the Department of Transportation appropriations bill for fiscal 2006. To the existing Section 921, which prohibited the use of appropriated funds for publicity or propaganda purposes, or for the preparation, distribution 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, language was added to extend the prohibition to the use for funds "directly or indirectly, including by private contractor."

The sponsor of the amendment pointed to recent reported examples of administrative propaganda: the National Resource Conservation Service paid a freelance writer at least $7,500 to write articles "touting so-called Federal conservation programs and placed them in outdoors magazines"; the commentator Armstrong Williams was paid $241,000 by the Education Department to promote the administration's education policy; and columnist Maggie Gallagher received $21,500 from the Department of Health and Human Services to work on the administration's marriage initiative.[23] The amendment was agreed to by the House without opposition.

Conclusion. To be effective, statutory restrictions on executive lobbying must be accompanied by persistent and determined congressional oversight, fortified, if necessary, by sanctions in the form of reducing agency funds or withdrawing discretionary authority that agencies value and do not want to lose. Congressional hearings, GAO investigations, and media coverage are effective in limiting agency abuse.

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[22] 108 Stat. 2572, § 504 (1994).

[23] 151 Cong. Rec. H5485 (daily ed. June 30, 2005).