The original documents are located in Box 7, folder "Congressional - Lobbying (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE
WASHINGTON

Eva
Pass copy to Ken
Lazarus for his
response to me
T.

10/31/74

To: Ken Lazarus

From: Phil Buchen

Could you please prepare
a response for me to
send to Bill Timmons.

Thanks.

Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

NOV 11 1974

MEMORANDUM TO KENNETH A. LAZARUS
Associate Counsel to the President

I enclose three OLC memoranda relevant to the effect of the "antilobbying" provisions of Federal law upon activities of the Executive branch.

The basic memorandum is the first, written by Mr. Katzenbach and dated October 10, 1961. The last two, dated May 14, 1969 and January 12, 1970, respectively, reflect the adherence of Mr. Rehnquist to the position taken earlier. For the record, I will note my own concurrence: Considerations of legislative history, consistent practice and constitutionality favor a restrictive reading of 18 U.S.C. 1913, so as to apply its prohibitions only to attempts by the Executive branch to influence the Congress through the public. We do not interpret it to prohibit direct contact between authorized members of the Executive branch and the Congress itself.

As these memoranda reflect, however, there are occasions on which individual congressmen have asserted a contrary principle. Needless to say, we have no interest in provoking a conflict on the point. To avoid it, legislative contacts should be handled at relatively high levels. I think it is the prospect of hundreds of faceless bureaucrats running about the halls of Congress which causes concern.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE
WASHINGTON

11-13-74

Phil:

Attached is a memorandum from you to Bill Timmons in response to his inquiry of October 30.

Ken K

THE WHITE HOUSE

WASHINGTON

October 30, 1974

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: WILLIAM E. TIMMONS BT

SUBJECT: Lobbying

I have received through Don Rumsfeld your memorandum on Standards of Conduct for WH employees.

The paragraph on Lobbying reminded me to raise an issue with you which is peculiar to the operations of the Office of Legislative Affairs. While we like to think we are providing information to Members of Congress, a reasonable case could be made that we are in fact lobbying under a strict interpretation of the law. However, the Constitution gives the President certain legislative responsibilities and powers: Messages to Congress, calling Special Sessions, signing or vetoing legislation, etc. As agents of the President we do work to obtain measures that are acceptable to the President -- and try to defeat bills that are unacceptable.

The question is what constitutes improper lobbying activities. Are there guidelines that should be followed in dealing with Members of Congress?

cc: Donald Rumsfeld

Justice

THE WHITE HOUSE

WASHINGTON

November 13, 1974

MEMORANDUM FOR: WILLIAM E. TIMMONS

FROM: PHILIP W. BUCHEN P.W.B.

SUBJECT: Lobbying

In response to your inquiry of October 30, attached are three OLC memoranda relevant to the effect of the "antilobbying" provisions of Federal law (18 U.S.C. 1913) upon the activities of your office.

The basic memorandum is the first, written by Mr. Katzenbach and dated October 10, 1961 (Tab A). The last two, dated May 14, 1969 (Tab B) and January 12, 1970 (Tab C), respectively, reflect the adherence of Mr. Rehnquist to the position taken earlier. For the record, current Assistant Attorney General Scalia has noted to me his concurrence with the views expressed in these papers.

Read together, these memoranda conclude that considerations of legislative history, consistent practice and constitutionality favor a restrictive reading of 18 U.S.C. 1913, so as to apply its prohibitions only to attempts by the Executive branch to influence the Congress through the public. OLC does not interpret it to prohibit direct contact between authorized members of the Executive branch and the Congress itself.

As these memoranda reflect, however, there are occasions on which individual congressmen have asserted a contrary principle. Needless to say, we have no interest in provoking a conflict on the point. To avoid it, legislative contacts should be handled through authorized channels and at relatively high levels.

cc: Don Rumsfeld

Herbert J. Miller, Jr.
Assistant Attorney General
Criminal Division
Nicholas deB. Katzenbach
Assistant Attorney General
Office of Legal Counsel

OCT 10 1961

Letter from Congressman Gross in respect of "lobbying" activities of Executive Branch personnel.

This is in response to your request for my comment regarding Congressman H. R. Gross's letter of August 24, 1961 to the Attorney General. Mr. Gross called the Attorney General's attention to testimony given on August 4, 1961 by Sargent Shriver, Director of the Peace Corps, before the Subcommittee on Manpower Utilization of the House Postoffice and Civil Service Committee to the effect that Bill Moyers, a paid employee of the Peace Corps, had joined him in conferring with various Congressman to enlist their support of a bill to establish that organization on a statutory basis. Mr. Gross is of the view that this action by Messrs. Shriver and Moyers conflicted with section 209 of the General Government Appropriations Act, 1961 1/ and requests a "review and disposition" of the matter.

The statute referred to by Mr. Gross reads as follows:

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

A similar or identical provision has been enacted in one or more appropriation acts each year since 1951 2/ when it appeared in section 408 of the Department of Agriculture Appropriation Act, 1952 3/ and shortly thereafter in section 603 of the Independent Offices Appropriation Act, 1952. 4/

1/ 74 Stat. 478.
2/ The provision was most recently enacted as section 509 of the General Government Matters, Department of Commerce and Related Agencies Appropriation Act, 1962, P.L. 87-125, approved August 3, 1961.
3/ 65 Stat. 247.
4/ 65 Stat. 291.

The provision made its way into the Department of Agriculture Appropriation Act, 1952, by means of a floor amendment in the House. 5/ The sponsor of the amendment, Congressman Smith of Wisconsin, was critical of the number of public relations personnel employed in the Government agencies and of the great volume of Government publications. He recommended his amendment and it was adopted in the content of stemming the flow of such publications. 6/ Although there was no discussion of this amendment in the Senate committee report and no mention of it in debate on the Senate floor, Senate discussion of the same amendment in the Independent Offices Appropriation Act disclosed a concern only with the expenditure of Government funds for personal services and publications intended to affect the course of legislation by molding public opinion. 7/ The enactment of this provision in the years since 1951 has been routine and without significant Congressional comment.

It will be seen that the legislative history of the language in section 209 of the General Government Matters Appropriation Act of 1961 does not support the application of that section or of the identical legislation currently in effect, 8/ to purely private meetings by Executive Branch officials with Members of Congress. Furthermore, the "publicity or propaganda purposes" which are the sine quo non of the expenditures made unlawful by section 209 cannot reasonably be found to inhere in such private meetings. I am of the opinion, therefore, that Mr. Shriver and Mr. Moyers did not violate the statutory provision referred to by Mr. Gross when they visited Members of Congress in support of the Peace Corps legislation.

Although Mr. Gross did not mention 18 U.S.C. § 1913, that statute has some relevance in connection with his complaint. In the absence of an express Congressional authorization to the contrary, it prohibits the use of appropriated funds

". . . to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter,

5/ 97 Cong. Rec. 5474, May 17, 1951.
6/ 97 Cong. Rec. 5474-75, May 17, 1951.
7/ 97 Cong. Rec. 6733-39, June 19, 1951; 97 Cong. Rec. 10065, August 15, 1951; 97 Cong. Rec. 10111, August 16, 1951.
8/ See fn. 2, supra.

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, . . . 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." 9/

18 U.S.C. § 1913 is derived from section 6 of the Third Deficiency Appropriation Act, fiscal year 1919. 10/ While the committee reports make no mention of this section, the floor manager of the bill in the House explained that: 11/

"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 wire 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 [6] of the bill will absolutely put a stop to that sort of thing."

9/ A search has revealed no judicial or formal administrative precedents concerned with 18 U.S.C. § 1913.
10/ 41 Stat. 68.
11/ 58 Cong. Rec. 403, May 29, 1919.

It is apparent that 18 U.S.C. § 1913 was enacted for essentially the same purpose as the recent appropriation act provisions considered above. However, applied literally, 18 U.S.C. § 1913 would seem to preclude Executive Branch officials from speaking or otherwise communicating in support of proposed legislation to Members of Congress, as distinguished from Congress as a body, except upon the request of a Member. Moreover, applied literally, the section would seem to preclude any communications whatsoever, whether invited or not, from representatives of the Executive Branch to Congress or Members of Congress for the purpose of expressing opposition to proposed legislation. These extreme prohibitions have not been observed by either the Legislative or the Executive Branch and, as a practical matter, could not be observed without great harm to the lawmaking process. Accordingly, I agree with the conclusion reached by now Senator Thomas J. Dodd in his memorandum of June 7, 1940 to Mr. Rogge (a copy of which you forwarded) that this statute is to be construed in the light of its purpose in order to avoid any absurd results flowing from its literal application. Viewing the statute in this light in relation to the instant matter, I am of the opinion that it did not bar the conversations which Mr. Moyers had with certain Members of Congress at the direction of Mr. Shriver even though the conversations took place at the instance of Mr. Shriver and not at the request of the Congressmen.

Passing to the inquiry of the Deputy Attorney General as to "how Justice personnel can be used on the hill," I might observe at the outset that the so-called "Federal lobby" has more than once been the subject of criticism by Members of Congress and others. 12/ However, the criticism has almost always arisen from activities by Government officials which are considered to be aimed at rallying public opinion for or against pending legislation and not from the occurrence of personal conferences between such officials and Members of Congress or their aides. 13/

12/ See Tompkins, Congressional Investigation of Lobbying: A Selected Bibliography (1956), pp. 16-23, for a list of writings on the legislative activities of the federal agencies.

13/ For example, the Subcommittee on Publicity and Propaganda of the House Committee on Expenditures conducted an investigation in 1947-48 to inquire into "reports of the persistent efforts within the administrative agencies of Government to discredit Congress and to influence legislation." H. Rept. 2474, 80th Congress, 2d Sess., p. 1 (1948).

In 1949 the House constituted a Select Committee on Lobbying Activities to investigate, among other things, "all activities of agencies of the federal government intended to influence, encourage, promote or retard legislation." 14/ In the course of remarks made at the beginning of hearings on this phase of the Committee's assignment, the Chairman stated 15/

> "As I said in opening our previous sessions in this series of hearings, it is necessary in a democracy, for our citizens, individually or collectively, to seek to influence legislation. It is equally necessary for the executive branch of Government to be able to make its views known to Congress on all matters in which it has responsibilities, duties, and opinions. The executive agencies have a definite requirement to express views to Congress, to make suggestions, to request needed legislation, to draft proposed bills or amendments, and so on. . . .
>
> "What I am trying to make abundantly clear here at the start is that the executive agencies have the right and responsibility to seek to 'influence, encourage, promote or retard legislation' in many clear and proper--and often extremely effective--respects, and that definite machinery is provided by law and by established custom for the exercise of these rights, but that, under certain conditions, Federal funds cannot be spent to influence Congress."

The concern of the Committee members during this portion of the hearings was almost exclusively with conduct of agency heads and lesser officials which generated public pressure on Members of Congress. Only two or three brief exchanges in the hearings dealt with personal efforts on the part of Government officials to persuade Congressmen to vote for or against legislation. 16/

14/ H. Res. 298, 81st Cong., 1st Sess.

15/ Hearings, Select Committee on Lobbying Activities, 81st Cong., 2d Sess., Part 10, p. 2.

16/ For example, Congressman Halleck at one point asked the Administrator of the Housing and Home Finance Agency whether he or any subordinate "unsolicited, undertook to persuade members of Congress in respect of legislation." After receiving a negative response, Mr. Halleck observed that it seemed to him many times that "the Executive Departments have pressed with undue vigor on matters of legislation almost to the point of usurpation of the legislative authority." Id., p. 51. At another point the Federal Security Administrator averred that "there is no law that says I cannot try to influence Congress on my own" as an officer, if not using federal funds for that purpose. Id., p. 341.

In an interim report 17/ the Select Committee pointed out that Article II of the Constitution, relating to the duties and powers of the President, provides that "he shall from time to time give to the Congress information on the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient." (Underlining added.) The Committee went on to comment that 18/

> ". . . in furtherance of basic responsibilities the executive branch, and particularly the Chief Executive and his official family of departmental and agency heads, inform and consult with the Congress on legislative considerations, draft bills and urge in messages, speeches, reports, committee testimony and by direct contact the passage or defeat of various measures."

In its final report the Select Committee made no criticism of any particular lobbying practices by Government officials and concluded that 18 U.S.C. § 1913 is adequate to prevent improper lobbying activities by these officials. 19/

The Select Committee was sound in emphasizing that the participation of the President in the legislative function is based on the Constitution.

> ". . . it was the intention of the Fathers of the Republic that the President should be an active power [in legislation] . . . he is made by the Constitution an important part of the legislative mechanism of our government." 20/

17/ H. Rept. 3138, 81st Cong., 2d Sess., p. 51 (1950).
18/ Id., p. 52; see also id., p. 54.
19/ H. Rept. 3239, 81st Cong., 2d Sess., pp. 35-36 (1951). The minority party members of the Committee, although not advocating any legislation in addition to 18 U.S.C. § 1913, criticized the Committee as having "seen fit to defend lobbying by Government." Id., Part 2, pp. 3-4.
20/ Norton, The Constitution of the United States, Its Sources and Its Application (1940), p. 123.

"The President's right, even duty, to propose detailed legislation to Congress touching every problem of American society and then to speed its passage down the legislative transmission belt, is now an accepted usage of our constitutional system." 21/

This constitutionally established role in the legislative process has become so vital through the years that the President has been aptly termed the Chief Legislator. 22/

The Select Committee was also sound in recognizing that the President cannot carry out his Constitutional duties in the legislative arena by himself and that necessarily he must entrust authority to his chief subordinates to act, and in turn to direct their own subordinates to act, in this arena in his stead. 23/ The Hoover Commission's Task Force on Departmental Management made a simdlar point in stating that a department head is at all times an assistant to the Chief Executive but that

"as a part of the executive branch, he has also the constitutional obligation both to consult with and inform the Legislature, as well as to see that legislative intentions expressed through statutes are realized." 24/

Congress itself has given specific recognition to the propriety of "lobbying" activities on the part of Government officials in section 308 of the Federal Regulation of Lobbying Act of 1946. 25/ That section in general imposes registration requirements on persons who are paid for attempting to influence passage or defeat of any legislation by Congress. However, certain categories of

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21/ Rossiter, The American Presidency (2d ed. 1960), p. 113.
22/ Chamberlain, The President, Congress and Legislation (1946), p. 14; Rossiter, op. cit., p. 28; see also Corwin, The President -- Office and Powers, (4th ed. 1957), pp. 265-277.
23/ Examples of significant legislative activities by Executive agency personnel of varying ranks during the period beginning about 1890 appear in Chamberlain, op. cit.
24/ Report of Task Force on Departmental Management of the Hoover Commission, appendix 1, p. 57.
25/ 60 Stat. 841, 2 U.S.C. § 267.

persons are excepted from these requirements, including in particular "public officials acting in an official capacity."

It must be conceded that the Constitutional activities of the President, and of subordinate officers of the Executive Branch acting on his behalf to influence legislation, can, like other areas of his Constitutional authority, be subjected to a measure of control by limitations imposed by Congress upon the use of appropriated funds. Congress "may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution." 41 Op. A. G. No. 32 (July 13, 1955, p. 4, emphasis supplied); see also United States v. Butler, 297 U.S. 1, 73-74. I would therefore consider it most doubtful whether Congress could impose limitations upon the use of appropriated funds which go so far as to render it altogether impractical or impossible for the President, and those acting pursuant to his direction, to carry out a basic Constitutional function.

I would not be prepared to take the position that the limitation contained in the General Government Matters Appropriation Acts on the use of appropriated funds for publicity or propaganda campaigns does go so far. I believe, however, that a literal interpretation of 18 U.S.C. § 1913 which would prevent the President or his subordinates from formally or informally presenting his or his administration's views to the Congress, its members or its committees as to the need for new legislation or the wisdom of existing legislation, or which would prevent the administration from assisting in the drafting of legislation, would raise serious doubts as to the constitutionality of that statute. As so interpreted, it would seriously inhibit the exercise of what is now regarded as a basic Constitutional function of the President concerning the legislative process. It seems clear that this consideration significantly affected the view of 18 U.S.C. § 1913 taken by the House Select Committee on Lobbying. As understood by that Committee, 18 U.S.C. § 1913 prohibits only substantially the same activities as are covered by the limitation in the appropriation acts. In addition, it should be noted that the consistent practice in the over forty years during which 18 U.S.C. § 1913 has been in effect is based upon the assumption that it goes no further.

Having in mind the Constitutional provision and other material referred to above, I make the following observations in response to the Deputy Attorney General's inquiry as to the use of Department personnel at the Capitol:

1. There is no legal objection to the use of any officer or employee of the Department to call upon Members or aides of the Congress to express the position of the Department with regard to proposed legislation in which it has a proper interest.

2. There is no legal objection to the Department's rendering drafting assistance to a Member of Congress or a Congressional committee which requests it -- or volunteering such assistance when the Department deems it appropriate.

3. There is no legal objection to the Department's placing members of its staff at the disposal of a Congressional committee which is meeting in executive session either to study or to mark up a bill. 25/

4. There is no legal objection to the Department's requesting permission for a representative to testify at public hearings of a Congressional committee. Whether a request will be granted is, of course, within the discretion of the committee and it is therefore desirable, if possible, to ascertain in advance of the request what the reaction is likely to be.

5. Representatives whom the Department sends to the Capitol should leave no doubt that they are acting solely in an official capacity and they should make certain that any Department views and positions they may present are identified as such rather than as their own personal views.

Attachments

25/ It is interesting to note that an Executive Branch employee, Benjamin V. Cohen, was present on the floor of the House of Representatives during a session in 1934 at the request of Speaker Rayburn, then Chairman of the Committee on Interstate and Foreign Commerce, to aid him in explaining the bill that became the Securities Exchange Act of 1934. 78 Cong. Rec. 7943-44, May 2, 1934.

cc

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Use of Presidential yachts by cabinet officers to advocate legislative programs to Members of Congress.

You have asked whether there is any statutory bar to the use of Presidential yachts by cabinet officers to hold receptions for Members of the Congress in the course of which their support is solicited for pending Administration legislation. In my view, there is no such bar.

Two statutory provisions bear on the subject. The first is 18 U.S.C. 1913 (enacted in 1919, 41 Stat. 68), which forbids any officer or employee of the United States or of any department or agency thereof, upon pain of criminal prosecution and removal from office or employment by the superior officer vested with the power of removal, to use, in the absence of express authorization by Congress, appropriated funds--

> "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."

An exception is provided for communications "to Members of Congress on the request of any Member or to Congress, through the proper official channels" regarding "requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."

The second statutory provision appears in a variety of appropriation acts, reading substantially to the effect that --

> "No part of any appropriation contained in this Act, or of the funds available for expenditure by any corporation or agency included in this Act, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before the Congress." 1/

1. At the outset it should be noted that there are no judicial or formal administrative precedents construing either of these provisions. There are, however, a number of departmental studies that have been made at various times. A fairly recent study was prepared by this Office in 1961 in connection with a complaint by Congressman Gross to the Attorney General involving Sargent Shriver, then Director of the Peace Corps, and Bill Moyers, then one of its employees, who had conferred with various Congressmen to enlist their support of a bill to establish the Peace Corps on a statutory basis. 2/ This study concluded that the activities of Mr. Shriver and Mr. Moyer did not violate either of the provisions. It was said that the appropriation act provision had no application because, as disclosed by its legislative history, it was concerned with the expenditure of appropriated funds "for personal services and publications intended to affect the course of legislation by molding public opinion," and not with "purely private meetings by Executive Branch officials with Members of Congress." It was also concluded that 18 U.S.C. 1913 had the same objective, and that its words could not be construed literally since to do so would lead to absurd results in that it would preclude uninvited legislative communications from Executive Branch officials to Members of Congress -- a prohibition which could not be

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1/ See, e.g., § 301, Independent Offices and Department of Housing and Urban Development Appropriation Act, 1969. P.L. 90-550; 82 Stat. 937.

2/ For your convenience a copy of the study is attached.

observed "without great harm to the lawmaking process." Finally, it was noted that a 1949 report of a House Select Committee on Lobbying had recognized that by virtue of the provision in Article II, § 3 of the Constitution requiring the President to recommend to the Congress "such measures as he shall judge necessary and expedient" --

> "the executive branch, and particularly the Chief Executive and his official family of departmental and agency heads, inform and consult with the Congress on legislative considerations, draft bills and urge in messages, speeches, reports, committee testimony and by direct contact the passage or defeat of various measures."

2. My own analysis of the problem leads me to concur in the conclusions heretofore reached by this Office, although it must be admitted that the literal language of 18 U.S.C. 1913 lends itself to the view that "uninvited" legislative communications to Members of Congress are impermissible. In order to reach a construction of the statute which is both constitutional and sensible, it is necessary to read into its language a limitation that what it prohibits is the use of appropriated funds to pay for any of the proscribed items that are directed to the public. For example, it would be improper to use the Presidential yachts to hold receptions for private citizens as a device designed to induce them to speak or write to Members of Congress to favor or oppose legislation.

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

Attachment

JAN 12 1970

MEMORANDUM FOR THE HONORABLE BRYCE N. HARLOW
Counsellor to the President

In accordance with your request, I enclose a brief memorandum for executive congressional liaison officials concerning the scope of restrictions on executive lobbying before the Congress.

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

JAN 12 1972

MEMORANDUM

Re: Restrictions on executive lobbying before the Congress.

Your attention is called to the federal anti-lobbying statute (18 U.S.C. 1913) which prohibits, upon pain of criminal prosecution and removal from office or employment, the use, in the absence of express congressional authorization, of appropriated funds to pay for any personal service, communication, or other device intended to influence a Member of Congress to favor or oppose any legislation.*/ An exception is provided with respect to official communications to Members of Congress on the request of any Member, or to Congress, regarding requests for legislation or appropriations.

The precise kinds of activities proscribed by 18 U.S.C. 1913 are not clear, judicial precedents being lacking as a guide. (See attached appendix for activities reviewed by the Department of Justice.) An obvious lobbying attempt would consist of a public distribution of a statement by a department or agency official advising the recipients to urge their representatives in Congress to vote in a particular way on a specific item of legislation. Apart from such clear evasions, the House Select Committee on Lobbying Activities has recognized the traditional role of officials in the executive branch "to inform and consult with the Congress on legislative considerations, draft bills and urge in messages, speeches, reports, committee testimony and by direct contact the passage or defeat of various measures." H. Rept. No. 3138, 81st Cong. 2d Sess., p. 52 (1950). Similarly, the Department of Justice

*/ A federal statute also prohibits the use of appropriated funds for the compensation of publicity experts, unless specifically appropriated for that purpose. 5 U.S.C. 3107. In addition, Congress has, in various appropriation acts, imposed specific restrictions against lobbying with federal funds.

has expressed the view that the statute does not override the responsibility of the executive branch to make known the views of the Administration on measures pending in Congress.

It should be noted, however, that in recent years some executive branch unsolicited communications to Members of Congress regarding pending legislation have been the subject of criticism, and on occasion a Member of Congress has brought the matter to the attention of the Department of Justice for investigation and possible prosecution. Although no prosecutions have been brought, the Department carefully investigated the facts of each case.

It is suggested that if an official has doubt as to whether his proposed activity relating to legislation is forbidden he should consult his department's or agency's chief legal officer.

APPENDIX

A. Examples of activities viewed by the Department of Justice as not being contrary to 18 U.S.C. 1913:

1. Letter of August 19, 1966, from Secretary of Agriculture to all Members of Congress as distinguished from Committee members in which the Secretary briefly analyzed two pieces of legislation (the Child Nutrition Act and the Community Development District Act), and concluded with the statement: "I urge your support of these important measures."

2. Prior to enactment of the State Technical Services Act of 1965, Department of Commerce officials discussed the advantages of the bill with interested individuals and organizations, urged support for the bill in correspondence, and while not directly, "at least inferentially", encouraged various persons to present the favorable aspects of the bill to Members of Congress. The Attorney General felt that these activities did not demonstrate "the ultimate in discreet judgment", but that there was no criminal violation.

3. Memorandum and material sent in 1967 to Members of the Congress by the Vice President as Chairman of the President's Council on Youth Opportunity urging their support in the Stay-in-School campaign. Since this material did not relate to pending legislation, but was merely a part of the effort to have Members of Congress participate in the program, it was not contrary to 18 U.S.C. 1913.

B. Example of proposed activity which the Department of Justice felt might be contrary to 18 U.S.C. 1913, if carried out:

1. Unsolicited widespread distribution (100,000 copies) of the President's 1968 Farm Message.

Thursday 1/16/75

3:05 I called Lazarus' office to check and see if he had information for you on the anti-lobbying statute ----- but he has gone to a meeting.

Since you have a call in to Ken Cole, thought you might want to bring this up -- when he calls back.

(Attached is all I have in my file on the subject.)

THE WHITE HOUSE

WASHINGTON

January 16, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: DICK CHENEY

Phil, you ought to ask somebody in your shop to take a look at the history of the anti-lobbying statute. Supposedly in 1973 the Nixon Administration got in trouble with a proposed Clawson effort to sell the battle of the budget that year. Talk to Ken Cole. He can give you some guidance on the background of it. We ought to make certain we are in compliance with the statutes and whatever court orders have been issued since then.

Cong. - lobbying

THE WHITE HOUSE

WASHINGTON

November 13, 1974

MEMORANDUM FOR: WILLIAM E. TIMMONS

FROM: PHILIP W. BUCHEN P.W.B.

SUBJECT: Lobbying

In response to your inquiry of October 30, attached are three OLC memoranda relevant to the effect of the "antilobbying" provisions of Federal law (18 U.S.C. 1913) upon the activities of your office.

The basic memorandum is the first, written by Mr. Katzenbach and dated October 10, 1961 (Tab A). The last two, dated May 14, 1969 (Tab B) and January 12, 1970 (Tab C), respectively, reflect the adherence of Mr. Rehnquist to the position taken earlier. For the record, current Assistant Attorney General Scalia has noted to me his concurrence with the views expressed in these papers.

Read together, these memoranda conclude that considerations of legislative history, consistent practice and constitutionality favor a restrictive reading of 18 U.S.C. 1913, so as to apply its prohibitions only to attempts by the Executive branch to influence the Congress through the public. OLC does not interpret it to prohibit direct contact between authorized members of the Executive branch and the Congress itself.

As these memoranda reflect, however, there are occasions on which individual congressmen have asserted a contrary principle. Needless to say, we have no interest in provoking a conflict on the point. To avoid it, legislative contacts should be handled through authorized channels and at relatively high levels.

cc: Don Rumsfeld

Herbert J. Miller, Jr.
Assistant Attorney General
Criminal Division
Nicholas deB. Katzenbach
Assistant Attorney General
Office of Legal Counsel

OCT 10 1961

Letter from Congressman Gross in respect of "lobbying" activities of Executive Branch personnel.

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The statute referred to by Mr. Gross reads as follows:

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A similar or identical provision has been enacted in one or more appropriation acts each year since 1951 2/ when it appeared in section 408 of the Department of Agriculture Appropriation Act, 1952 3/ and shortly thereafter in section 603 of the Independent Offices Appropriation Act, 1952. 4/

1/ 74 Stat. 478.
2/ The provision was most recently enacted as section 509 of the General Government Matters, Department of Commerce and Related Agencies Appropriation Act, 1962, P.L. 87-125, approved August 3, 1961.
3/ 65 Stat. 247.
4/ 65 Stat. 291.

The provision made its way into the Department of Agriculture Appropriation Act, 1952, by means of a floor amendment in the House. 5/ The sponsor of the amendment, Congressman Smith of Wisconsin, was critical of the number of public relations personnel employed in the Government agencies and of the great volume of Government publications. He recommended his amendment and it was adopted in the context of stemming the flow of such publications. 6/ Although there was no discussion of this amendment in the Senate committee report and no mention of it in debate on the Senate floor, Senate discussion of the same amendment in the Independent Offices Appropriation Act disclosed a concern only with the expenditure of Government funds for personal services and publications intended to affect the course of legislation by molding public opinion. 7/ The enactment of this provision in the years since 1951 has been routine and without significant Congressional comment.

It will be seen that the legislative history of the language in section 209 of the General Government Matters Appropriation Act of 1961 does not support the application of that section or of the identical legislation currently in effect, 8/ to purely private meetings by Executive Branch officials with Members of Congress. Furthermore, the "publicity or propaganda purposes" which are the sine quo non of the expenditures made unlawful by section 209 cannot reasonably be found to inhere in such private meetings. I am of the opinion, therefore, that Mr. Shriver and Mr. Moyers did not violate the statutory provision referred to by Mr. Gross when they visited Members of Congress in support of the Peace Corps legislation.

Although Mr. Gross did not mention 18 U.S.C. § 1913, that statute has some relevance in connection with his complaint. In the absence of an express Congressional authorization to the contrary, it prohibits the use of appropriated funds

> ". . . to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter,

5/ 97 Cong. Rec. 5474, May 17, 1951.
6/ 97 Cong. Rec. 5474-75, May 17, 1951.
7/ 97 Cong. Rec. 6733-39, June 19, 1951; 97 Cong. Rec. 10065, August 15, 1951; 97 Cong. Rec. 10111, August 16, 1951.
8/ See fn. 2, supra.

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, . . . 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." 9/

18 U.S.C. § 1913 is derived from section 6 of the Third Deficiency Appropriation Act, fiscal year 1919. 10/ While the committee reports make no mention of this section, the floor manager of the bill in the House explained that: 11/

"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 wire 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 [6] of the bill will absolutely put a stop to that sort of thing."

9/ A search has revealed no judicial or formal administrative precedents concerned with 18 U.S.C. § 1913.
10/ 41 Stat. 68.
11/ 58 Cong. Rec. 403, May 29, 1919.

It is apparent that 18 U.S.C. § 1913 was enacted for essentially the same purpose as the recent appropriation act provisions considered above. However, applied literally, 18 U.S.C. § 1913 would seem to preclude Executive Branch officials from speaking or otherwise communicating in support of proposed legislation to Members of Congress, as distinguished from Congress as a body, except upon the request of a Member. Moreover, applied literally, the section would seem to preclude any communications whatsoever, whether invited or not, from representatives of the Executive Branch to Congress or Members of Congress for the purpose of expressing opposition to proposed legislation. These extreme prohibitions have not been observed by either the Legislative or the Executive Branch and, as a practical matter, could not be observed without great harm to the lawmaking process. Accordingly, I agree with the conclusion reached by now Senator Thomas J. Dodd in his memorandum of June 7, 1940 to Mr. Rogge (a copy of which you forwarded) that this statute is to be construed in the light of its purpose in order to avoid any absurd results flowing from its literal application. Viewing the statute in this light in relation to the instant matter, I am of the opinion that it did not bar the conversations which Mr. Moyers had with certain Members of Congress at the direction of Mr. Shriver even though the conversations took place at the instance of Mr. Shriver and not at the request of the Congressmen.

Passing to the inquiry of the Deputy Attorney General as to "how Justice personnel can be used on the hill," I might observe at the outset that the so-called "Federal lobby" has more than once been the subject of criticism by Members of Congress and others. 12/ However, the criticism has almost always arisen from activities by Government officials which are considered to be aimed at rallying public opinion for or against pending legislation and not from the occurrence of personal conferences between such officials and Members of Congress or their aides. 13/

12/ See Tompkins, Congressional Investigation of Lobbying: A Selected Bibliography (1956), pp. 16-23, for a list of writings on the legislative activities of the federal agencies.

13/ For example, the Subcommittee on Publicity and Propaganda of the House Committee on Expenditures conducted an investigation in 1947-48 to inquire into "reports of the persistent efforts within the administrative agencies of Government to discredit Congress and to influence legislation." H. Rept. 2474, 80th Congress, 2d Sess., p. 1 (1948).

In 1949 the House constituted a Select Committee on Lobbying Activities to investigate, among other things, "all activities of agencies of the federal government intended to influence, encourage, promote or retard legislation." 14/ In the course of remarks made at the beginning of hearings on this phase of the Committee's assignment, the Chairman stated 15/

> "As I said in opening our previous sessions in this series of hearings, it is necessary in a democracy, for our citizens, individually or collectively, to seek to influence legislation. It is equally necessary for the executive branch of Government to be able to make its views known to Congress on all matters in which it has responsibilities, duties, and opinions. The executive agencies have a definite requirement to express views to Congress, to make suggestions, to request needed legislation, to draft proposed bills or amendments, and so on. . . .
>
> "What I am trying to make abundantly clear here at the start is that the executive agencies have the right and responsibility to seek to 'influence, encourage, promote or retard legislation' in many clear and proper--and often extremely effective--respects, and that definite machinery is provided by law and by established custom for the exercise of these rights, but that, under certain conditions, Federal funds cannot be spent to influence Congress."

The concern of the Committee members during this portion of the hearings was almost exclusively with conduct of agency heads and lesser officials which generated public pressure on Members of Congress. Only two or three brief exchanges in the hearings dealt with personal efforts on the part of Government officials to persuade Congressmen to vote for or against legislation. 16/

14/ H. Res. 298, 81st Cong., 1st Sess.

15/ Hearings, Select Committee on Lobbying Activities, 81st Cong., 2d Sess., Part 10, p. 2.

16/ For example, Congressman Halleck at one point asked the Administrator of the Housing and Home Finance Agency whether he or any subordinate "unsolicited, undertook to persuade members of Congress in respect of legislation." After receiving a negative response, Mr. Halleck observed that it seemed to him many times that "the Executive Departments have pressed with undue vigor on matters of legislation almost to the point of usurpation of the legislative authority." Id., p. 51. At another point the Federal Security Administrator averred that "there is no law that says I cannot try to influence Congress on my own" as an officer, if not using federal funds for that purpose. Id., p. 341.

In an interim report 17/ the Select Committee pointed out that Article II of the Constitution, relating to the duties and powers of the President, provides that "he shall from time to time give to the Congress information on the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient." (Underlining added.) The Committee went on to comment that 18/

> ". . . in furtherance of basic responsibilities the executive branch, and particularly the Chief Executive and his official family of departmental and agency heads, inform and consult with the Congress on legislative considerations, draft bills and urge in messages, speeches, reports, committee testimony and by direct contact the passage or defeat of various measures."

In its final report the Select Committee made no criticism of any particular lobbying practices by Government officials and concluded that 18 U.S.C. § 1913 is adequate to prevent improper lobbying activities by these officials. 19/

The Select Committee was sound in emphasizing that the participation of the President in the legislative function is based on the Constitution.

> ". . . it was the intention of the Fathers of the Republic that the President should be an active power [in legislation] . . . he is made by the Constitution an important part of the legislative mechanism of our government." 20/

17/ H. Rept. 3138, 81st Cong., 2d Sess., p. 51 (1950).
18/ Id., p. 52; see also id., p. 54.
19/ H. Rept. 3239, 81st Cong., 2d Sess., pp. 35-36 (1951). The minority party members of the Committee, although not advocating any legislation in addition to 18 U.S.C. § 1913, criticized the Committee as having "seen fit to defend lobbying by Government." Id., Part 2, pp. 3-4.
20/ Norton, The Constitution of the United States, Its Sources and Its Application (1940), p. 123.

> "The President's right, even duty, to propose detailed legislation to Congress touching every problem of American society and then to speed its passage down the legislative transmission belt, is now an accepted usage of our constitutional system." 21/

This constitutionally established role in the legislative process has become so vital through the years that the President has been aptly termed the Chief Legislator. 22/

The Select Committee was also sound in recognizing that the President cannot carry out his Constitutional duties in the legislative arena by himself and that necessarily he must entrust authority to his chief subordinates to act, and in turn to direct their own subordinates to act, in this arena in his stead. 23/ The Hoover Commission's Task Force on Departmental Management made a similar point in stating that a department head is at all times an assistant to the Chief Executive but that

> "as a part of the executive branch, he has also the constitutional obligation both to consult with and inform the Legislature, as well as to see that legislative intentions expressed through statutes are realized." 24/

Congress itself has given specific recognition to the propriety of "lobbying" activities on the part of Government officials in section 308 of the Federal Regulation of Lobbying Act of 1946. 25/ That section in general imposes registration requirements on persons who are paid for attempting to influence passage or defeat of any legislation by Congress. However, certain categories of

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21/ Rossiter, The American Presidency (2d ed. 1960), p. 113.
22/ Chamberlain, The President, Congress and Legislation (1946), p. 14; Rossiter, op. cit., p. 28; see also Corwin, The President -- Office and Powers, (4th ed. 1957), pp. 265-277.
23/ Examples of significant legislative activities by Executive agency personnel of varying ranks during the period beginning about 1890 appear in Chamberlain, op. cit.
24/ Report of Task Force on Departmental Management of the Hoover Commission, appendix 1, p. 57.
25/ 60 Stat. 341, 2 U.S.C. § 267.

persons are excepted from those requirements, including in particular "public officials acting in an official capacity."

It must be conceded that the Constitutional activities of the President, and of subordinate officers of the Executive Branch acting on his behalf to influence legislation, can, like other areas of his Constitutional authority, be subjected to a measure of control by limitations imposed by Congress upon the use of appropriated funds. Congress "may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution." 41 Op. A. G. No. 32 (July 13, 1955, p. 4, emphasis supplied); see also United States v. Butler, 297 U.S. 1, 73-74. I would therefore consider it most doubtful whether Congress could impose limitations upon the use of appropriated funds which go so far as to render it altogether impractical or impossible for the President, and those acting pursuant to his direction, to carry out a basic Constitutional function.

I would not be prepared to take the position that the limitation contained in the General Government Matters Appropriation Acts on the use of appropriated funds for publicity or propaganda campaigns does go so far. I believe, however, that a literal interpretation of 18 U.S.C. § 1913 which would prevent the President or his subordinates from formally or informally presenting his or his administration's views to the Congress, its members or its committees as to the need for new legislation or the wisdom of existing legislation, or which would prevent the administration from assisting in the drafting of legislation, would raise serious doubts as to the constitutionality of that statute. As so interpreted, it would seriously inhibit the exercise of what is now regarded as a basic Constitutional function of the President concerning the legislative process. It seems clear that this consideration significantly affected the view of 18 U.S.C. § 1913 taken by the House Select Committee on Lobbying. As understood by that Committee, 18 U.S.C. § 1913 prohibits only substantially the same activities as are covered by the limitation in the appropriation acts. In addition, it should be noted that the consistent practice in the over forty years during which 18 U.S.C. § 1913 has been in effect is based upon the assumption that it goes no further.

Having in mind the Constitutional provision and other material referred to above, I make the following observations in response to the Deputy Attorney General's inquiry as to the use of Department personnel at the Capitol:

1. There is no legal objection to the use of any officer or employee of the Department to call upon Members or aides of the Congress to express the position of the Department with regard to proposed legislation in which it has a proper interest.

2. There is no legal objection to the Department's rendering drafting assistance to a Member of Congress or a Congressional committee which requests it -- or volunteering such assistance when the Department deems it appropriate.

3. There is no legal objection to the Department's placing members of its staff at the disposal of a Congressional committee which is meeting in executive session either to study or to mark up a bill. 26/

4. There is no legal objection to the Department's requesting permission for a representative to testify at public hearings of a Congressional committee. Whether a request will be granted is, of course, within the discretion of the committee and it is therefore desirable, if possible, to ascertain in advance of the request what the reaction is likely to be.

5. Representatives whom the Department sends to the Capitol should leave no doubt that they are acting solely in an official capacity and they should make certain that any Department views and positions they may present are identified as such rather than as their own personal views.

Attachments

26/ It is interesting to note that an Executive Branch employee, Benjamin V. Cohen, was present on the floor of the House of Representatives during a session in 1934 at the request of Speaker Rayburn, then Chairman of the Committee on Interstate and Foreign Commerce, to aid him in explaining the bill that became the Securities Exchange Act of 1934. 78 Cong. Rec. 7943-44, May 2, 1934.

cc

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Use of Presidential yachts by cabinet officers to advocate legislative programs to Members of Congress.

You have asked whether there is any statutory bar to the use of Presidential yachts by cabinet officers to hold receptions for Members of the Congress in the course of which their support is solicited for pending Administration legislation. In my view, there is no such bar.

Two statutory provisions bear on the subject. The first is 18 U.S.C. 1913 (enacted in 1919, 41 Stat. 68), which forbids any officer or employee of the United States or of any department or agency thereof, upon pain of criminal prosecution and removal from office or employment by the superior officer vested with the power of removal, to use, in the absence of express authorization by Congress, appropriated funds--

> "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."

An exception is provided for communications "to Members of Congress on the request of any Member or to Congress, through the proper official channels" regarding "requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."

The second statutory provision appears in a variety of appropriation acts, reading substantially to the effect that --

> "No part of any appropriation contained in this Act, or of the funds available for expenditure by any corporation or agency included in this Act, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before the Congress." 1/

1. At the outset it should be noted that there are no judicial or formal administrative precedents construing either of these provisions. There are, however, a number of departmental studies that have been made at various times. A fairly recent study was prepared by this Office in 1961 in connection with a complaint by Congressman Gross to the Attorney General involving Sargent Shriver, then Director of the Peace Corps, and Bill Moyers, then one of its employees, who had conferred with various Congressmen to enlist their support of a bill to establish the Peace Corps on a statutory basis. 2/ This study concluded that the activities of Mr. Shriver and Mr. Moyer did not violate either of the provisions. It was said that the appropriation act provision had no application because, as disclosed by its legislative history, it was concerned with the expenditure of appropriated funds "for personal services and publications intended to affect the course of legislation by molding public opinion," and not with "purely private meetings by Executive Branch officials with Members of Congress." It was also concluded that 18 U.S.C. 1913 had the same objective, and that its words could not be construed literally since to do so would lead to absurd results in that it would preclude uninvited legislative communications from Executive Branch officials to Members of Congress -- a prohibition which could not be

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1/ See, e.g., § 301, Independent Offices and Department of Housing and Urban Development Appropriation Act, 1969. P.L. 90-550; 82 Stat. 937.

2/ For your convenience a copy of the study is attached.

observed "without great harm to the lawmaking process." Finally, it was noted that a 1949 report of a House Select Committee on Lobbying had recognized that by virtue of the provision in Article II, § 3 of the Constitution requiring the President to recommend to the Congress "such measures as he shall judge necessary and expedient" --

> "the executive branch, and particularly the Chief Executive and his official family of departmental and agency heads, inform and consult with the Congress on legislative considerations, draft bills and urge in messages, speeches, reports, committee testimony and by direct contact the passage or defeat of various measures."

2. My own analysis of the problem leads me to concur in the conclusions heretofore reached by this Office, although it must be admitted that the literal language of 18 U.S.C. 1913 lends itself to the view that "uninvited" legislative communications to Members of Congress are impermissible. In order to reach a construction of the statute which is both constitutional and sensible, it is necessary to read into its language a limitation that what it prohibits is the use of appropriated funds to pay for any of the proscribed items that are directed to the public. For example, it would be improper to use the Presidential yachts to hold receptions for private citizens as a device designed to induce them to speak or write to Members of Congress to favor or oppose legislation.

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

Attachment

JAN 12 1970

MEMORANDUM FOR THE HONORABLE BRYCE N. HARLOW
Counsellor to the President

In accordance with your request, I enclose a brief memorandum for executive congressional liaison officials concerning the scope of restrictions on executive lobbying before the Congress.

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

MEMORANDUM

Re: Restrictions on executive lobbying before the Congress.

Your attention is called to the federal anti-lobbying statute (18 U.S.C. 1913) which prohibits, upon pain of criminal prosecution and removal from office or employment, the use, in the absence of express congressional authorization, of appropriated funds to pay for any personal service, communication, or other device intended to influence a Member of Congress to favor or oppose any legislation.*/ An exception is provided with respect to official communications to Members of Congress on the request of any Member, or to Congress, regarding requests for legislation or appropriations.

The precise kinds of activities proscribed by 18 U.S.C. 1913 are not clear, judicial precedents being lacking as a guide. (See attached appendix for activities reviewed by the Department of Justice.) An obvious lobbying attempt would consist of a public distribution of a statement by a department or agency official advising the recipients to urge their representatives in Congress to vote in a particular way on a specific item of legislation. Apart from such clear evasions, the House Select Committee on Lobbying Activities has recognized the traditional role of officials in the executive branch "to inform and consult with the Congress on legislative considerations, draft bills and urge in messages, speeches, reports, committee testimony and by direct contact the passage or defeat of various measures." H. Rept. No. 3138, 81st Cong. 2d Sess., p. 52 (1950). Similarly, the Department of Justice

*/ A federal statute also prohibits the use of appropriated funds for the compensation of publicity experts, unless specifically appropriated for that purpose. 5 U.S.C. 3107. In addition, Congress has, in various appropriation acts, imposed specific restrictions against lobbying with federal funds.

has expressed the view that the statute does not override the responsibility of the executive branch to make known the views of the Administration on measures pending in Congress.

It should be noted, however, that in recent years some executive branch unsolicited communications to Members of Congress regarding pending legislation have been the subject of criticism, and on occasion a Member of Congress has brought the matter to the attention of the Department of Justice for investigation and possible prosecution. Although no prosecutions have been brought, the Department carefully investigated the facts of each case.

It is suggested that if an official has doubt as to whether his proposed activity relating to legislation is forbidden he should consult his department's or agency's chief legal officer.

APPENDIX

A. Examples of activities viewed by the Department of Justice as not being contrary to 18 U.S.C. 1913:

1. Letter of August 19, 1966, from Secretary of Agriculture to all Members of Congress as distinguished from Committee members in which the Secretary briefly analyzed two pieces of legislation (the Child Nutrition Act and the Community Development District Act), and concluded with the statement: "I urge your support of these important measures."

2. Prior to enactment of the State Technical Services Act of 1965, Department of Commerce officials discussed the advantages of the bill with interested individuals and organizations, urged support for the bill in correspondence, and while not directly, "at least inferentially", encouraged various persons to present the favorable aspects of the bill to Members of Congress. The Attorney General felt that these activities did not demonstrate "the ultimate in discreet judgment", but that there was no criminal violation.

3. Memorandum and material sent in 1967 to Members of the Congress by the Vice President as Chairman of the President's Council on Youth Opportunity urging their support in the Stay-in-School campaign. Since this material did not relate to pending legislation, but was merely a part of the effort to have Members of Congress participate in the program, it was not contrary to 18 U.S.C. 1913.

B. Example of proposed activity which the Department of Justice felt might be contrary to 18 U.S.C. 1913, if carried out:

1. Unsolicited widespread distribution (100,000 copies) of the President's 1968 Farm Message.

Assistant Attorney General
Office of Legal Counsel

fyi

Department of Justice
Washington, D.C. 20530

NOV 11 1974

MEMORANDUM TO KENNETH A. LAZARUS
Associate Counsel to the President

I enclose three OLC memoranda relevant to the effect of the "antilobbying" provisions of Federal law upon activities of the Executive branch.

The basic memorandum is the first, written by Mr. Katzenbach and dated October 10, 1961. The last two, dated May 14, 1969 and January 12, 1970, respectively, reflect the adherence of Mr. Rehnquist to the position taken earlier. For the record, I will note my own concurrence: Considerations of legislative history, consistent practice and constitutionality favor a restrictive reading of 18 U.S.C. 1913, so as to apply its prohibitions only to attempts by the Executive branch to influence the Congress through the public. We do not interpret it to prohibit direct contact between authorized members of the Executive branch and the Congress itself.

As these memoranda reflect, however, there are occasions on which individual congressmen have asserted a contrary principle. Needless to say, we have no interest in provoking a conflict on the point. To avoid it, legislative contacts should be handled at relatively high levels. I think it is the prospect of hundreds of faceless bureaucrats running about the halls of Congress which causes concern.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

10/31/74

To: Ken Lazarus

From: Phil Buchen

Could you please prepare a response for me to send to Bill Timmons.

Thanks.

THE WHITE HOUSE

WASHINGTON

October 30, 1974

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: WILLIAM E. TIMMONS

SUBJECT: Lobbying

I have received through Don Rumsfeld your memorandum on Standards of Conduct for WH employees.

The paragraph on Lobbying reminded me to raise an issue with you which is peculiar to the operations of the Office of Legislative Affairs. While we like to think we are providing information to Members of Congress, a reasonable case could be made that we are in fact lobbying under a strict interpretation of the law. However, the Constitution gives the President certain legislative responsibilities and powers: Messages to Congress, calling Special Sessions, signing or vetoing legislation, etc. As agents of the President we do work to obtain measures that are acceptable to the President -- and try to defeat bills that are unacceptable.

The question is what constitutes improper lobbying activities. Are there guidelines that should be followed in dealing with Members of Congress?

cc: Donald Rumsfeld