Congressional Research Service

MEMORANDUM

November 2, 2009

To: Senate Committee on Finance
Attention: Michael Park

From: [redacted]
Legislative Attorney
American Law Division

Subject: **Use of Appropriated Funds by an Executive Department to Generate Letters from the Public to the President in Support of Health Care Reform Legislation**

This memorandum is submitted in response to the Committee's request to discuss the legal propriety of an executive department using federally appropriated funds to publish on the department's web-site a request for members of the public to fill out and submit a form letter to the President in support of health care reform legislation. The official website of the Department of Health and Human Services [HHS] on its home page (http:// www.hhs.gov) provides a link entitled "State Your Support for health reform this year," which then links to another HHS web site "HealthReform.gov."[1] The HHS-managed web site HealthReform.gov provides a form letter to the President of the United States "to support your commitment to comprehensive health reform." The letter provides also that: "By signing this statement we affirm our commitment to work with you and our Congressional leaders to enact legislation this year ...." The form requires one's name, zip code, and e-mail address, and also requests the mailing address and telephone number of the supporter, and provides a button to "submit" the letter and statement of support.

Executive departments and federal agencies are not authorized to spend federally appropriated funds merely for any purposes they desire, but may only expend federal funds for the purposes for which Congress has appropriated those monies. Under the United States Constitution, no funds may be expended by federal agencies, or their officers or employees in the executive branch, except by way of an appropriation made by an act of Congress.[2] The "Appropriations Clause" of the Constitution is not only an express assignment of appropriations authority to the Congress, but has also, as explained by a unanimous Supreme Court, been long understood "as a restriction upon the disbursing authority of the Executive department ...."[3]

Clearly recognized as within this congressional power over federal appropriations has been the authority of Congress to prescribe the details of the expenditures for which it appropriates funds. As stated by the

[1] The web sites were last visited on the date of this memorandum, Monday, November 2, 2009.

[2] The so-called federal "power of the purse" is expressly assigned to the Congress in Article I, § 9, cl. 7 of the Constitution: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ...."

[3] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).

Supreme Court: "That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain."[4] More recently, the Supreme Court has affirmed that the "Appropriations Clause" is intended to assign to Congress the authority to detail the purposes for which appropriated monies may or may not be spent by those in the executive branch: "It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not to the individual favor of Government agents ...."[5]

Permanent federal statutes now create a legal structure whereby it is explicitly provided in law that federal officials in the executive agencies and departments may spend monies only for the purposes for which Congress has appropriated those monies,[6] and may not, under penalty of fine and imprisonment, obligate or expend funds that have not been so appropriated and designated by Congress.[7] In describing the general appropriations principles which bar the misapplication or misuse of federal funds by federal executive agency personnel, the Government Accountability Office [GAO, formerly the General Accounting Office] explained:

> [T]his statute [31 U.S.C. § 1301(a)] was originally enacted in 1809 (ch. 28, § 1, 2 Stat. 535 (March 3, 1809)) and is one of the cornerstones of congressional control over the federal purse. Because money cannot be paid from the Treasury except under an appropriation (U.S. Const. art. I, § 9, cl. 7), and because an appropriation must be derived from an act of Congress, it is for Congress to determine the purpose for which an appropriation may be used. Simply stated, 31 U.S.C. § 1301(a) says that public funds may be used only for the purpose or purposes for which they were appropriated.[8]

Within general categories of permissible, that is, "authorized," expenditures, departments and agencies may expend funds for those items, services or objects which the department or agency deems necessary for the accomplishment of the authorized purposes. The "necessary expense doctrine" provides some latitude, discretion, and flexibility in spending by departments and agencies, but is not a *carte blanche* for any expense by a department, as such expenditure must be made "incident to accomplishing" the authorized object, and bear a "logical relationship to the appropriation sought to be charged."[9]

In addition to the general restrictions and limitations on departments and agencies using federal appropriations only for the purposes for which appropriated, Congress has enacted several specific and express limitations on the use of federal funds to further limit the purposes to which an expenditure of federal funds may be made. Several of these restrictions and prohibitions apply specifically to what is generally called "lobbying" the Congress or other government officials, particularly through what is known as "grass roots" lobbying techniques (that is, urging the public to write or communicate with government officials to express a particular point of view on issues and legislation), and to restrict generally "publicity and propaganda campaigns" not authorized by Congress.

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[4] *Id.* at 321-322.

[5] Office of Personnel Management v. Richmond, 496 U.S. 414, 428 (1990); note also Hart's Case, 16 Ct.Cl. 459, 484 (1880), *aff'd* 118 U.S. 62 (1886), and Harrington v. Bush, 553 F.2d 190, 194, n.7 (D.C.Cir. 1977): "The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people." Congress has extensive and "plenary" power under Article I, Section 9, cl. 7, to set conditions on the use of federal funds as long as such conditions would not abrogate another provision of the Constitution. South Dakota v. Dole, 483 U.S. 203 (1987); National Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998).

[6] 31 U.S.C. § 1301(a): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

[7] 31 U.S.C. §§ 1341, 1350, known as the "anti-deficiency act."

[8] U.S. Government Accountability Office [GAO], Office of the General Counsel. *Principles of Federal Appropriations Law,* Third Edition, page 4-6 (January 2004).

[9] GAO, *Principles of Federal Appropriations Law, supra* at 4-20 to 4-22.

A permanent statutory provision of federal criminal law, at 18 U.S.C. § 1913, now prohibits agencies, federal officials, or any recipients of federal funds from using such funds:

> ... 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 ...[10]

In addition to 18 U.S.C. § 1913, Congress has enacted yearly appropriations riders that apply either to specific appropriations made in an act, or more generally to *any* appropriations made in appropriations acts that year. Three such restrictions on HHS funding for 2009 may work to limit HHS in expending federally appropriated funds for certain "lobbying" activities or for "publicity or propaganda campaigns" not authorized by Congress. The first restrictive rider applies specifically to HHS funding in the Omnibus Appropriations Act, 2009, and the other two restrictions apply to all funding in that Act. The restrictions in Sections 503(a) of Division F and Section 717 of Division D of the 2009 Omnibus Appropriations Act appear to be duplicative and overlapping provisions with respect to federal legislation:

> SEC. 503. (a) No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or video presentation designed to support or defeat legislation pending before the Congress or any State legislature, except in presentation to the Congress or any State legislature itself.[11]

> SEC. 717. No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and 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. [12]

> SEC. 720. No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofor authorized by the Congress.[13]

"Information" versus Unauthorized "Publicity or Propaganda"

As explained by GAO, not all agency advocacy or arguments for particular government policies or programs would necessarily amount to a misuse of appropriated funds, or a direct violation of one of the types of appropriations riders against lobbying or "publicity or propaganda." GAO has noted that agencies and departments of the executive branch are often expressly authorized to use money for "informational" purposes. Thus, HHS has, for example, included within its express statutory authority, the authority to publish and disseminate "information related to public health," "health conditions," and "pertinent health information,"[14] and to formulate and carry out goals with respect to "health information

[10] 18 U.S.C. § 1913. This provision was expanded in 2002 to restrict the use of federal appropriations not only to lobby the Congress, but to attempt to influence any official of a government.

[11] P.L. 111-8, Omnibus Appropriations Act, 2009, Division F, Section 503, 123 Stat. 802 (March 11, 2009).

[12] P.L. 111-8, Omnibus Appropriations Act, 2009, Division D, Section 717, 123 Stat. 685 (March 11, 2009).

[13] P.L. 111-8, Omnibus Appropriations Act, 2009, Division D, Section 720, 123 Stat. 686 (March 11, 2009).

[14] 42 U.S.C. § 242*o*.

and health promotion."[15] GAO has explained with reference to an agency's general or specific authority to disseminate "information":

> In assessing an agency's justification, one important factor is the agency's statutory authority to disseminate information. The more explicit an agency's authority to carry out promotional or informational activities, the stronger is its ability to justify its activities.[16]

In assessing the appropriateness of an expenditure GAO will thus look to determine if, in the publication and dissemination of such material, there may be a case made for "legitimate informational activities" as opposed to merely improper "publicity or propaganda" campaigns. Additionally, in looking at the history of the express "publicity and propaganda" riders added to appropriations bills, GAO noted that the sponsor of the original provision distinguished between "what is propaganda and what is educational matter."[17] GAO explained in a 2004 opinion on the appropriateness of the Medicare prescription drug flyers sent out by HHS:

> Given the absence of definitional guidance in the statute and its legislative history, we have struggled over the years to balance the need to give meaning to this prohibition with an agency's right or duty to inform the public regarding its activities and programs. [footnote omitted] B-178528, July 27, 1973 (noting the difficulty of distinguishing between permissible informational activity and other activity constituting publicity or propaganda); B-212069, Oct. 6, 1983 (stating that the statute lacks guidelines to help distinguish between legitimate informational activity and proscribed publicity or propaganda). Our decisions reflect societal values in favor of a robust exchange of information between the government and the public it serves. B-184648, Dec. 3, 1975 (discussing an agency's "legitimate interest in communicating with the public"). This includes the right to disseminate information in defense of an administration's point of view on policy matters. B-223098, Oct. 10, 1986 (stating that public officials "may report on the activities and programs of their agencies, may justify those policies to the public, and may rebut attacks on those policies"); B-130961, Oct. 26, 1972 (noting that agencies "have a duty to inform the public on Government policies and, traditionally, policy-making officials have utilized Government resources to disseminate information in explanation and defense of those policies").[18]

In another decision in 2004, GAO examined and explained its past interpretations, and summarized what constituted "legitimate informational activities," by departments and agencies:

> We have held that the type of language contained in section 626 [see now section 720, above] does not bar an agency's legitimate informational activities. B-212069, October 6, 1983. Public officials may report on the activities and programs of their agencies, may justify those policies to the public, and may rebut attacks on those policies. B-114823, December 23, 1974.[19]

Concerning specifically the HHS web-site material under consideration, it is possible to argue that the department has not expended funds for any of the categories of "legitimate informational activities" expressly listed by GAO, that is, the agency is not merely "report[ing] on the activities and programs of their" department; not "justify[ing] those policies to the public"; nor is the department "rebut[ting] attacks

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[15] 42 U.S.C. § 300u

[16] GAO, B-302504, "Medicare Prescription Drug, Improvement, and Modernization Act of 2003 – Use of appropriated funds for flyer and print and television advertisements," at 7 (March 10, 2004).

[17] GAO, B-302504, supra at 6, quoting Representative Lawrence H. Smith, at 97 Cong. Rec. 4098 (1951).

[18] GAO, B-302504, supra at 6-7.

[19] GAO, B-301022, "Application of Anti-Lobbying Laws to the Office of National Drug Control Policy's Open Letter to State Level Prosecutors," at 3, March 10, 2004.

on those policies." In light of past decisions and interpretations, it would appear to be a legitimate inquiry as to whether the department is expending federal funds for such "informational" or "educational" purposes, or rather expending funds to expressly urge the public to engage in a letter writing campaign involving an electronic submission of a form letter to a government official (sometimes referred to as "astroturf" lobbying, that is, an artificially stimulated letter writing campaigns) urging the adoption of a particular public policy in legislation this year.

Section 720 – General Prohibition on Unauthorized Publicity or Propaganda

The *general* appropriations rider in the nature of the prohibition in Section 720, Division D of the Omnibus Appropriations Act of 2009, has been interpreted to be broader than, and therefore to cover conduct not necessarily prohibited by, the more specific restrictions on using appropriations for propaganda or publicity directed at "legislation pending before Congress."[20] Traditionally, the "publicity and propaganda" activities paid for by federal appropriations which are barred by the narrower restrictions regarding "legislation pending before Congress" involve grass roots "lobbying" activities by agencies and departments directed at Congress, that is, lobbying the public to communicate to and lobby the Congress.[21] The general appropriations rider prohibiting the use of federal funds for "publicity or propaganda purposes within the United States not heretofor authorized by the Congress" does not, however, mention "legislation pending before Congress," and thus as noted by GAO reaches "all unauthorized publicity and propaganda" and not merely grass roots types of lobbying and letter writing campaigns directed specifically at Congress.[22] Furthermore, it should be noted that GAO has explained in more recent publications that the general term "lobbying," including specifically "grass roots" lobbying, may "refer to attempts to influence decision makers other than legislators."[23] If the expenditure for the letter writing campaign to the President, supporting the President's position with regard to health care reform proposals, is not deemed sufficiently "informational" or educational, that is, that it is not a communication with the public "regarding its functions, policies, and activities,"[24] then it may be argued that it may be in violation of the general appropriations rider in Section 720, Division D, of the Omnibus Appropriations Act of 2009 as a "publicity or propaganda" campaign involving a grass roots lobbying effort directed at the President. It should be noted that a review of GAO decisions regarding "publicity and propaganda" campaigns has not revealed decisions addressing the specific conduct of federal agencies using federal appropriations to urge and assist the public to engage in a grass roots lobbying, letter writing campaign to the President.

Lobbying With Appropriated Funds – 18 U.S.C. § 1913

Expenditures of federal funds for letter writing campaigns to government officials to urge the adoption of a particular policy or legislation (before or after the introduction of any specific bill) should also be

[20] GAO, *Principles of Federal Appropriations Law, supra* at 4-197.

[21] 56 Comp. Gen. 889, 890 (1977); Decisions of the Comptroller General, B-128938, July 12, 1976, at 5; B-164497(5), August 10, 1977, at 3; B-173648, September 21, 1973, at 3; GAO, *Principles of Federal Appropriations Law, supra* at 4-205 to 4-206; see also Comptroller General Decisions B-270875, July 5, 1996; B-21639, January 22, 1985; B-212252, July 15, 1983; B-178648, December 27, 1973; B-139458, January 26, 1972.

[22] GAO, *Principles of Federal Appropriations Law, supra* at 4-197. GAO has so far noted that the "general" publicity and propaganda rider restriction, being broader than the one limiting grass roots communications to Congress, would also reach "covert" publicity activities, agency "puffery" and self-aggrandizement, and activities which are merely partisan political activities unrelated to official functions of the agency.

[23] GAO, *Principles of Federal Appropriations Law, supra* at 4-188.

[24] Id.

examined under the principles and language of 18 U.S.C. § 1913. As noted, § 1913 prohibits the use of federal appropriations for "printed or written matter, or other device, intended or designed to influence in any manner ... an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, [or] policy ...." Although the provision at 18 U.S.C. § 1913 expressly exempts communications from departments or agencies to government officials "through the proper official channels," urging the *public* to write letters to express support or opposition to legislation or policy, as opposed to *direct* communications to Congress or other government officials, were precisely the types of activities which had been considered to be within the prohibition in the past.[25]

In examining an expenditure of federal funds by a particular department official to determine if it violated 18 U.S.C. § 1913, GAO had noted that the expenditure to promote a letter writing campaign by an official to himself, that is, urging the public to write support or opposition letters to the then-Deputy Secretary of Energy, did not violate the pre-2002 provision of 18 U.S.C. § 1913, because: "Nowhere in the letter does the author encourage recipients to contact their elected representatives; he only invites them to write to him personally."[26] At the time of that decision, in 1996, the statute at 18 U.S.C. § 1913 applied only to lobbying of the *Congress* with appropriated funds.[27] However, in 2002, the statutory restriction on using appropriated funds for "lobbying" was broadened to include the use of federal funds to urge the public to write to an "official of a government."[28]

Even if an "official of a government" in § 1913 could be interpreted to include the President of the United States, it should be noted that the Department of Justice has generally interpreted the restrictions of 18 U.S.C. §1913 very narrowly and, as noted, has apparently never sought criminal enforcement of the law. The Department of Justice has explained, for example, that it would not enforce the prohibition against the "lobbying activities of Executive Branch officials whose positions typically and historically entail an active effort to secure public support for the Administration's legislative program ... [including] presidential aides, appointees, and their delegees...."; would not consider the statutory prohibition applicable to "public speeches" or public writings of federal executive branch officials, but rather only to private writings or communications to members of the public; and would not consider enforcement except for what the Department of Justice considered as "gross" solicitations of public support, or "significant" or "large scale" expenditures of public funds in these types of prohibited "grass roots" lobbying efforts.[29] There is thus a question whether the Department of Justice would enforce the provision concerning an expenditure of federal funds which does not involve *private* writings or communications to members of the public, as opposed to the promotion of a grass roots letter writing campaigns on a public web site of a department or agency. Furthermore, the Department of Justice has noted that they will not enforce the provisions of § 1913 even in the face of a wrongful expenditure of funds for a prohibited letter writing campaign if the expenditure of funds does not amount to $50,000 or more.[30]

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[25] Note legislative history of § 1913, at 58 Congressional Record 404, May 29, 1919; 2 Op. O.L.C. 30 (1978); 5 Op. O.L.C. 180 (1981); 13 Op. OLC 300 (1989); Office of Legal Counsel, Department of Justice, "Guidelines on 18 U.S.C. § 1913" (April 14, 1995). It should be noted that it appears that no one has ever been indicted or prosecuted for violations of this law. See, GAO, *Principles of Federal Appropriations Law, supra* at 4-195.

[26] GAO, B-270875, Letter to the Chairman of the House Committee on Government Reform and Oversight, at 4 (July 5, 1996).

[27] See 18 U.S.C. § 1913, 2000 Code ed.

[28] 18 U.S.C. § 1913, as amended by P.L. 107-273, § 205(a); 116 Stat. 1778, November 2, 2002,; see H.R. Rpt. No. 107-685, 107th Cong., 2d Sess. 177 (2002); S. Rpt. No. 107-96, 107th Cong., 1st Sess. 11 (2001).

[29] 13 Op. OLC 300, 302-304 (1989).

[30] The de minimis threshold amount of $50,000 for a prohibited grass roots lobbying campaign suggested in the 1989 Barr memorandum to Attorney General Thornburgh (13 Op. OLC, *supra* at 304), has been cited and reiterated by the Department of Justice in guidelines issued to General Counsels (Office of Legal Counsel, Department of Justice, "Guidelines on 18 U.S.C. § 1913," p. 2, April 14, 1995). Although the DOJ has interpreted a "de minimis" amount into the enforcement of the statute, it does (continued...)

Sections 503(a) and 717 - Publicity or Propaganda Directed at Congress

It may also be appropriate to examine the departmental campaign under the narrower and more specific "publicity and propaganda" riders in Section 503(a) (of Division F) and Section 717 (of Division D) of the 2009 Omnibus Appropriations Act, regarding publicity and propaganda "designed to support or defeat legislation pending before the Congress." In the past GAO has not regarded agency publications or speeches in favor or opposed to specific legislative proposals as violations of this type of appropriations rider where the material or information did not expressly state a message such as "write your congressman" or "let Washington know how you feel." In 2005, GAO was urged to interpret the provisions in a broader fashion to reach an obvious "intent" to encourage such communications to Congress, but which did not go so far as to use the so-called "magic words."[31] GAO declined to base an opinion of a violation of the provision on mere "intent" or "likelihood" to result in public communications to Congress, and upheld a departmental or agency campaign to support or oppose legislation "so long as the public is not urged to contact Members of Congress."[32] In explaining its holding, GAO stated: "Under our established case law, we have required evidence of a clear appeal by the agency to the public to contact congressional members and to urge them to support the agency's position."[33] Under this standard, it should be noted that the form letter in question, posted on the HHS web site which is to be submitted by the public electronically to the President in support of health care reform legislation pending before Congress, *expressly* commits the signor of the letter to "work with our Congressional leaders." This express language in the letter might arguably be seen as a direct and express "appeal" or "urging," that is, a call to action, within the government produced material to contact and communicate with Congress, and thus more than a mere "exposition" or argument in favor of the Administration's position. If so, such a campaign using federal funds and resources could be seen to violate the restrictions in Sections 503(a) (of Division F) and Section 717 (of Division D) of the 2009 Omnibus Appropriations Act.

Enforcement of Appropriations Restrictions

Concerning enforcement of appropriations riders, the question of enforcement is not addressed in the appropriations provisions. As an express congressional limitation on the use of appropriations, and thus also on the disbursement authority of the executive branch departments, these provisions of appropriations law may be interpreted and applied by GAO.[34] However, GAO does not have "enforcement" authority, as law enforcement is an executive, not a legislative function.[35] Furthermore, it should be noted that the Office of Management and Budget and the Office of Legal Counsel, Department of Justice, in memoranda in March of 2005 during President George W. Bush's Administration, informed agencies of the executive branch that they need not conform to the legal opinions of the Government Accountability Office concerning the expenditure of federal funds by agencies for covert or secret

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(...continued)

not appear that the Comptroller General, ruling on proper or improper expenditures of federal funds under the appropriations riders, has done so. Furthermore, if an expenditure could arguably be in violation of § 1913 on its face, then it may be appropriate to request GAO to audit the particular use of funds to determine the amount expended in preparation and execution of the web-sites in question.

[31] GAO, B-304715, "Social Security Administration – Grassroots Lobbying Allegation" (April 27, 2005).

[32] Id. at 4.

[33] Id.

[34] Note general investigative, reporting and audit authority regarding agency expenditures and disbursements, and Government accounts, 31 U.S.C. §§ 712, 719, 3523, 3526, 3529.

[35] Bowsher v. Synar, 478 U.S. 714 (1986).

propaganda activities, activities which may have implicated the general appropriations rider, in that the agencies "are not bound by GAO's legal advice."[36] As noted by GAO in the context of the appropriations law limiting the use of federal funds: "GAO's real 'enforcement' tool is to report any unlawful activities to Congress in furtherance of Congress's oversight of executive branch activities."[37]

[36] O.L.C., Department of Justice, "Memorandum for the General Counsels of the Executive Branch," March 1, 2005.

[37] GAO, *Principles of Federal Appropriations Law*, supra at 4-191 (January 2004), citing to U.S. General Accounting Office, *H.R. 3078, The Federal Agency Anti-Lobbying Act*, GAO/T-OGC-96-18 (Washington, D.C., May 15, 1996).