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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-114839

March 2, 1978

Mr. Robert Lipshutz
Counsel to the President
The White House

Dear Mr. Lipshutz:

Your February 6, 1978, letter to Victor Lowe, Director of our General Government Division, has been brought to my attention. We had originally written to request information concerning activities of White House staff members designed to promote public support for Senate confirmation of the Panama Canal Treaty. You state that the Justice Department has advised you that "speechmaking is in fact constitutionally protected" and not subject to statutory prohibitions on attempts to influence legislation, and suggest that our request was, therefore, not a proper inquiry. Your reply raises several matters which I believe warrant clarification.

Most importantly, our access authority exists independent of the subject matter of a given inquiry, and is not limited by considerations of whether a particular item or activity may be legally questionable. The responsibility of the executive branch to furnish GAO with the information it requests is established in the Budget and Accounting Act of 1921. The appropriate sections provide as follows:

> Sec. 312(a) (31 U.S.C. 53). "The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt disbursement, and application of public funds * * *."
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> Sec. 313 (31 U.S.C. 54). "All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them, and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment * * *."

In addition, the law clearly establishes the authority of the General Accounting Office to determine the legality of Federal expenditures. In this connection, 31 U.S.C. 74 states, in part:

> "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, * * *."

GAO is thus the final administrative authority to rule on questions of the propriety of expenditures of appropriated funds. (This authority does not, however, apply to funds which are specifically authorized to be accounted for solely on the certification of the President or a department head.)

We would submit, therefore, that there is no basis in law for the denial of access in this situation.

Next, some comment on the statutes concerning attempts to influence legislation would appear to be in order. We have consistently recognized that 18 U.S.C. 1913, since it provides penal sanctions, is properly within the responsibility of the Justice Department. We have frequently expressed the position in our decisions that, since we have no authority over the enforcement of section 1913, it would be inappropriate for us to venture an opinion as to its scope or applicability. The extent of our involvement with this statute is to refer to the Justice Department matters which our investigations reveal to be questionable.

However, the Congress has also chosen to deal with this area by means of provisions which have been included in appropriation acts for many years. One such provision is section 607(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1978, Pub. L. No. 95-81 (July 31, 1977), 91 Stat. 355, set forth below.

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

The power of the Congress to place conditions on the availability of appropriations, within constitutional limits, cannot be questioned. As noted, GAO is charged by law with the responsibility of determining the propriety of expenditures of appropriated funds. In this context, while we would as a practical matter always consider any views the Justice Department may wish to present, they are not controlling.

We are, of course, aware that section 607(a) is somewhat vague, that it deals with matters of expression generally viewed as falling within the scope of the First Amendment, and that an overly expansive interpretation might well pose constitutional problems. It must be noted, however, that section 607(a) does not purport to prohibit any type of expression. It merely reflects the congressional judgment that public funds should not be used in a certain manner. In applying section 607(a) and similar provisions, therefore, we have attempted to develop an approach that is realistic, that recognizes the special legal status of expression, but that at the same time preserves what we believe to be the essence of the congressional intent.

In interpreting "publicity and propaganda" provisions such as section 607(a), we have recognized that the executive branch has a legitimate interest in communicating with the public and with legislators regarding Government policies and activities. We have not viewed the statutory prohibitions as precluding all expressions by executive branch officials of support for an Administration policy or position, including comment on the perceived virtues or pitfalls of any action pending before the Congress. Rather, the prohibition of section 607(a), in our view, applies primarily to expenditures involving direct appeals addressed to the public suggesting that they contact their elected representatives and indicate their support of, or opposition to, pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. The enclosed material is provided to illustrate determinations we have made in this area.

With respect to the constitutional allegations, we believe it has been clearly established that the First Amendment does not prohibit the Congress from placing reasonable restrictions on the conduct of public officials.

The Supreme Court has, for example, upheld the Hatch Act against constitutional challenges. See, e.g., United Public Workers of America v. Mitchell, 330 U.S. 75, 94-104 (1947). (The Hatch Act, of course, exempts White House and certain other high-level officials, but this was written into the legislation.) The "publicity and propaganda" provision, as we have interpreted and applied it, is a restriction on the use of public funds by the executive branch to influence the legislative process in a narrowly precise fashion. As such, we do not believe it is constitutionally defective. Nor do we see any basis for drawing a distinction, under the legislation itself or under the Constitution, between oral and written forms of expression.

In view of the foregoing, I believe our original request was a "proper inquiry" and trust this response answers your question on our right of access.

Sincerely yours,

Comptroller General
of the United States

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