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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-140339

MAR 16 1979

The Honorable Eldon Rudd
U.S. House of Representatives

Dear Mr. Rudd:

As promised, here is the legal position of the General Accounting Office, including our response to the pertinent Justice Department memorandum, regarding our right of access to White House files relevant to the appointment of members to the U.S. Metric Board.

GAO's right of access to the information in question is based upon section 313 of the Budget and Accounting Act, 1921, 31 U.S.C. §54, which provides in relevant part:

> "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* * *."

Further, section 204(a) of the Legislative Reorganization Act of 1970, as amended, 31 U.S.C. §1154(a), provides sufficient statutory basis for GAO to investigate the appointment of members to the Metric Board. Section 204(a) provides:

> "The Comptroller General shall review and evaluate the results of Government programs and activities carried on under

> existing law when ordered by either House of Congress, or upon his own initiative, or when requested by any committee of the House of Representatives or the Senate, or any joint committee of the two Houses, having jurisdiction over such programs or activities."

The Justice Department argues that since the information sought does not involve fiscal matters, it is beyond the scope of 31 U.S.C. §54. According to the Justice Department, the term "activities" in section 54, as well as the other terms therein, is limited to "fiscal or organizational matters."

The language of 31 U.S.C. §54 clearly provides GAO the right of access to information regarding appointments to the U.S. Metric Board. There is nothing in the language of that section to suggest that GAO's right of access thereunder is limited to fiscal and organizational matters. Rather, the scope of section 54 is every bit as broad as the language states. This is confirmed by the fact that Congress, while continually expanding the scope of GAO's audit functions with respect to Federal agencies, has seen no need to change our basic access to records authority in 31 U.S.C. §54 as originally enacted. See, e.g., H.R. Rep. No. 95-1586, at 8 (1978). The Justice Department's interpretation of section 54 would not only completely undermine those statutes assigning GAO audit functions well beyond "fiscal and organizational matters," but runs counter to the longstanding practice of Executive branch agencies in consistently furnishing us information on all aspects of their activities.

The Justice Department memorandum also questions our audit authority under 31 U.S.C. §1154 since the audit concerning the Metric Board appointments was requested by an individual Member of Congress. Recognizing that section 1154 authorizes GAO to conduct audits at its own initiative, the memorandum observes:

> "However, it cannot be anticipated that the Comptroller General will take that step [proceed with an audit] after having received the request of a single

> Congressman, since such a step could have the effect of jeopardizing his role as an independent nonpolitical agency of the legislative branch."

The point the Justice Department is making in this statement is unclear, unless Justice is suggesting that we automatically reject audit proposals by individual Congressmen as a means of demonstrating our independence. In any event, there was no need to rely on "anticipation" in this case since it was obvious to all concerned that we had in fact decided to conduct the audit you, as an individual Congressman, requested.

The memorandum goes on to question our jurisdiction under 31 U.S.C. §1154 on the basis that "it is the responsibility of the President and the Senate to determine whether there has been compliance with the qualification requirements of [section 5 of the Metric Conversion Act of 1975] 15 U.S.C. §205d" and the Metric Board appointments do not constitute "a Government program or activity carried out under existing law." The memorandum proceeds to suggest that 15 U.S.C. §205d may be unconstitutional.

The statute (15 U.S.C. §205d) provides that the President shall appoint Metric Board members from lists of qualified individuals recommended by certain organizations. The Board members have been nominated, confirmed, and appointed. The purpose of the audit was to ascertain whether these appointees did in fact come from the lists provided for in the statute.

Whatever actions were taken in response to this statutory provision obviously constitute "activities" under existing law. We see no merit to the suggestion that there is no general congressional right to investigate compliance with 15 U.S.C. §205d because the President is responsible for compliance with this section. Ascertaining how the Executive carries out its responsibilities under the law is both the touchstone of 31 U.S.C. §1154 and the essence of Congress' constitutional oversight role. See, e.g., _____ v. _____, 273 U.S. 135, 161 and 174 (1927); _____ v. United States, 354 U.S. 178, 187 (1957):

> "* * * The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."

The constitutionality of 15 U.S.C. §205d was clearly not relevant to our access request. Whatever doubts may have been entertained as to the constitutionality of section 205d, the Executive branch either did or did not take steps to implement it. We requested access in order to ascertain those steps, if any, that were actually taken.

Finally, the Justice memorandum suggests a possible claim of privilege based on a presidential determination of the need for "candid and straightforward advice from those who submit the names." Executive privilege is a complex and controversial subject. While the courts have recognized the existence of the privilege (see U.S. v. Nixon, 418 U.S. 683 (1974) and Nixon v. GSA, 433 U.S. 425 (1977)), they have yet to fully delimit its scope and effect in such areas as the nature and extent of communications covered, and the precise factors to be applied, and their relative weight, in balancing the interest in confidentiality against the need for disclosure. Further, it is not at all apparent that the information in question would involve the free-flowing consideration of policy options executive privilege is designed to protect. See, e.g., U.S. v. Nixon, supra, at 708. There is no need to expound at length on the doctrine of executive privilege. The short answer in this case is that the privilege was never invoked in response to GAO's access request.

For the reasons stated above, we are convinced that our statutory right of access to records concerning the Metric Board appointments was clear. Unfortunately, as indicated in Mr. Keller's earlier letter to you, we have no remedy at present to enforce our access rights. Section 102 of H.R. 24, introduced on January 15, 1979, by Representative Brooks (copy enclosed), would provide such a remedy. We strongly support this provision.

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Finally, I would like to offer several observations on the way our access request was handled in this case. As we read the Justice Department memorandum, it did not purport to provide a final response to our access request. Rather, the ultimate advice was that a basis existed for the President to invoke executive privilege if he made certain determinations. The memorandum also stressed the importance of efforts to seek an accommodation.

As noted above, executive privilege was not invoked; nor was any attempt whatever made to seek an accommodation. The absence of any effort at compromise is particularly disturbing in this case since it appears to us that a basis for compromise was available here. We recognize that there are legitimate concerns over confidentiality in the appointment process. At the same time, the limited scope of the audit you proposed would not have significantly intruded upon the need for confidentiality. Essentially, we could have accomplished the audit purpose by merely confirming that the persons actually appointed came from the lists required by the statute. There would have been no need to dwell upon those persons who were not appointed or the reasons for their rejection.

Sincerely yours,

MILTON SOCOLAR

Milton J. Socolar
General Counsel

Enclosure