THE COMPTROLLER GENERAL

Report To The Chairman, Committee On Government Operations, House of Representatives

OF THE UNITED STATES

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GAO/GGD-84-46
MARCH 20, 1984

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D C 20548

B-129874

The Honorable Jack Brooks
Chairman, Committee on
Government Operations
House of Representatives

Dear Mr. Chairman:

This report responds to your June 30, 1983, request that we review executive branch lobbying practices, and, if warranted, recommend better controls over contacts between agency officials and congressional representatives. The report deals with both direct and indirect executive branch efforts to influence the legislative process, and draws upon interviews we conducted with 44 congressional staff directors and agency legislative liaison officials.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution until 30 days from the date of this report. At that time, we will send copies to interested parties and make copies available to others on request.

Sincerely yours,

Charles A. Bowsher

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE CHAIRMAN, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES

NO STRONG INDICATION THAT RESTRICTIONS ON EXECUTIVE BRANCH LOBBYING SHOULD BE EXPANDED

D I G E S T

Although laws that restrict the use of appropriated funds for lobbying by executive branch employees are ambiguous, GAO found little support for amending or strengthening them in 44 interviews with senior congressional committee staff members and federal agency legislative liaison officials. GAO believes that while the existing framework of both formal and informal sanctions does not guarantee prevention of improper lobbying incidents, available alternatives to deter such incidents with more certainty could have the undesirable effect of inhibiting constructive and legitimate relationships between the executive and legislative branches of government.

Neither historical tradition, contemporary practice, nor the Constitution deny an active role in the legislative process to the President and other officials of the executive branch of government. The principal antilobbying statute, a section of the criminal code enacted in 1919 to prohibit the use of appropriated funds to influence congressional action, has not been interpreted to prevent federal officials from directly urging the Congress to adopt legislation they believe is necessary.

At the request of the Chairman of the House Committee on Government Operations, GAO explored the contemporary interpretation of this law, comparable restrictions

in annual appropriations acts, and internal agency guidelines on permissible and impermissible "lobbying" practices by federal employees. GAO interviewed 21 congressional staff directors and 23 senior agency legislative relations officials on the subject of executive branch influence on the legislative process. The interviews covered not only direct lobbying practices, but also indirect or "grass roots" lobbying and other ways executive branch officials can affect legislation. GAO did not obtain comments on this report from the agencies where interviews were conducted.

GAO's interviews, supplemented by written material from the Congress, the White House, the Congressional Research Service, and academia, support the view that applicable statutes and written guidelines on agency lobbying are unclear, imprecise, and judicially unenforceable except in rare cases of extreme violation. (See pp. 6 to 9.) With a few limited exceptions, GAO found that most departments and agencies do not provide their employees with formal guidelines to supplement the ambiguous and limited provisions of the applicable laws. (See pp. 9 to 12.)

ETHICAL JUDGMENTS ON AGENCY LOBBYING ARE DIVERGENT

GAO asked congressional staff members and agency officials for their ethical evaluations of some 20 hypothetical agency practices related to lobbying. Most practices generated divided opinions and qualified responses from both congressional and agency representatives, though the agency officials were stricter than congressional staff in their interpretations of what constituted improper behavior. There were both opponents and defenders of such practices as requesting

voluntary lobbying help of prominent private citizens, using agency publications to support legislative objectives, characterizing or classifying voting records, and temporarily assigning executive branch staff members to congressional staffs. Commonly, the point was made that ethical judgments must be rendered in terms of degree and scale rather than as sharp distinctions between right and wrong. Also, higher level officials are often accorded more leeway to attempt to sway public and congressional opinion than are lower level staff. (See Chapter 3.)

Only three specific practices were regarded by substantial majorities of both groups as ethically impermissible. These were the temporary hiring of outside lobbying specialists, participation by agency officials in the fundraising activities of outside organizations that engage in congressional lobbying, and offering political inducements to legislators for votes in support of the administration's program. In contrast, fewer than a tenth of the respondents objected to direct lobbying, to urging the public to support elements of the President's program, or to informational relationships with constituency groups on legislative matters. (See pp. 15 to 21.)

The congressional staff members GAO interviewed generally expressed the view that more, rather than less, direct dialogue with the executive branch should be encouraged. Some of them asserted that advice and information from federal agencies is often an important counterweight to growing pressure from private sector lobbies. (See pp. 24 and 25).

Both agency officials and congressional staff observed that there is a high degree of variation in the patterns of relations between executive branch agencies and the committees of the Congress. Some relationships were characterized as adversarial, some purely professional, some deferential, others highly political, and still others closely cooperative. The widespread awareness of this complexity made congressional staff members, in particular, reluctant to say that the norms applying to their own relationships with the executive branch ought necessarily to be applied to other committee relationships. (See pp. 23 and 24.)

LITTLE SUPPORT VOICED FOR STRICTER CONTROLS

Despite the common perception that the laws governing executive branch influence on the legislative process are ambiguous, no widespread support was voiced in the interviews for any of the options GAO presented to exert stricter controls. Substantial majorities recommended against the alternatives of a stricter criminal statute, expanded limitations in appropriations language, and required disclosure of executive-legislative contacts. Half of those GAO interviewed also opposed the idea of a written code of conduct to guide executive branch officials in their relationships with the Congress. (See pp. 26 to 29.)

The most frequent suggestion voiced in the interviews was to continue with the existing framework of controls. Significantly, most practitioners regard the laws and formal regulations as only part, and not necessarily the most important part, of the existing control system. The threat of media exposure, political backfire, and

potential embarrassment arising from public questioning of an individual's or an agency's actions were also mentioned as effective deterrents to abuse of prevailing norms of behavior. Underlying confidence in the effectiveness of this overall framework is demonstrated by the finding that fewer than 1 in 10 of the individuals GAO interviewed said that executive branch lobbying presents a serious current threat to the integrity of the legislative process. (See pp. 29 and 30.)

RECOMMENDATION TO THE CONGRESS

While recognizing that the data collected for this review are not determinative, GAO nevertheless shares the predominant opinion expressed in the interviews that the risks and conceptual problems involved in setting precise legal limits on executive-legislative relations exceed the benefits. It would be difficult at best to draw these parameters in a way that would better deter improper incidents, but not unduly constrain legitimate and necessary communication. GAO does not recommend new statutory restraints. GAO recommends, however, that the Congress enact into permanent law the restrictions on indirect or "grass roots" lobbying which have had to be incorporated into appropriation acts each year. Permanent legislation would enacourage agencies to issue interpretive guidance to their employees, and ensure that the restrictions remain in effect even when parts of the government are operating under a continuing resolution. (See p. 32 for suggested legislative language.)

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ABBREVIATIONS

DOD	Department of Defense
EPA	Environmental Protection Agency
GAO	General Accounting Office
HHS	Department of Health and Human Services
OMB	Office of Management and Budget

CHAPTER 1

INTRODUCTION

We were requested by the Chairman of the House Committee on Government Operations, on June 30, 1983, to assess the adequacy of current laws and regulations that govern executive branch efforts to influence the legislative process. The Committee's concern stemmed in part from General Accounting Office (GAO) investigations of recent questionable incidents involving legislative liaison activities of the Department of Defense.[1] One purpose of the Committee's request to GAO was to determine whether this concern is broadly shared and whether further preventive measures are warranted.

"LOBBYING" IS AN INEXACT TERM

This report deals with executive branch activities related to lobbying the Congress. The Supreme Court has defined "lobbying in its commonly accepted sense" as "direct communication with members of Congress on pending or proposed legislation."[2] The term originated as a reference to persons congregated in the lobbies of the Capitol building to buttonhole legislators on their way to vote. The Federal Regulation of Lobbying Act of 1946 (2 U.S.C. §§261-270), which does not apply to the legislative activities of government agencies, uses the term exclusively in this sense of direct contact with legislators. The Justice Department and GAO have generally interpreted the statutes restricting lobbying by executive branch officials as applying almost exclusively to "indirect" or "grass roots" lobbying. In this form, lobbying involves urging third parties, either members of special interest groups or the general public, to contact their legislators in support of or opposition to a legislative issue. In this report, however, lobbying is discussed in a broader context as a reference to many different ways the executive branch may attempt to influence the outcome of the legislative process. It does not deal with lobbying by private sector persons, except as their activities are instigated or supported by federal officials.

ANTILOBBYING STATUTES

There are two types of statutes which restrict executive branch lobbying--criminal statutes and appropriations act

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[1] Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft (AFMD-82-123, September 29, 1982); and Compiling Numerical Ratings for Members of the Congress by the Department of Defense (MASAD-83-14, June 20, 1983).

[2] United States v. Harriss, 347 U.S.612,620 (1954).

limitations. The criminal sanctions are provided by 18 U.S.C. section 1913, entitled "Lobbying with Appropriated Moneys", which was originally enacted in 1919. Section 1913 reads that

> "No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, 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;"

The law then adds an important qualification:

> ". . . 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."

The statute goes on to provide penalties for violation: a maximum $500 fine or up to 1 year in jail, or both, plus removal from federal employment. Since this is a criminal statute, its enforcement is the responsibility of the Justice Department and the courts.

Various appropriation acts also contain general provisions prohibiting the use of appropriated funds for publicity and propaganda. The most broadly applicable example of this type of restriction is the Treasury, Postal Service, and General Government Appropriation Act, which annually provides:

> "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."

By virtue of the words, "this or any other Act," it applies to all government agencies, not just those receiving funds under the act in which the provision appears. Also, it expressly applies to government corporations, even those which do not receive direct appropriations. The annual Labor, Health and

Human Services, and Education and Related Agencies Appropriation Act has a more detailed provision, applying only to agencies funded by that act. Its language specifies that it does not restrict "normal and recognized executive-legislative relationships," but it spells out the meaning of "publicity and propaganda" and specifically prohibits lobbying activities by grant and contract recipients. GAO has the authority to investigate the expenditure of these appropriated funds and identify any improper use of them. In the event of a violation, we can calculate and recover the amount of federal funds improperly expended.

A review of the legislative history in this area of law reveals that the Congress has been concerned about executive branch influence over legislative matters as far back as 1913. The two types of statutes were passed in an effort to guard against encroachments by the executive branch into the legislative arena. However, neither one clearly defines what constitutes inappropriate lobbying.

In general, the Justice Department has viewed the Lobbying with Appropriated Moneys statute as applying primarily to "indirect" or "grass roots" lobbying. No indictment has ever been issued under its provisions.

GAO has also construed the appropriation act restrictions as applying to "indirect" lobbying only and not to direct communication with Members of Congress, or to expression of executive branch opinion on legislative issues. For example, on November 17, 1983, GAO ruled that an article published in the May 30, 1983, issue of Business America, a magazine publication of the Department of Commerce, violated an appropriation restriction against lobbying activities (B-212235). The ruling applied only to the last paragraph of the article, which contained an appeal to members of the public to urge their congressional representatives to support extension of the Export Administration Act. It did not apply to the portions of the article in which officials of the Department of Commerce expressed their views on the merits of the legislation.

A summary of relevant Justice Department cases, Comptroller General decisions, and other GAO investigations of alleged illegal "lobbying" can be found in Principles of Federal Appropriations Law.[3] It discusses at length the laws and legal precedents with respect to executive branch "lobbying."

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[3]United States General Accounting Office, Office of the General Counsel, First Edition, June 1982; pp. 3-128 to 3-153.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives, scope, and methodology for conducting this review were specified by the House Committee on Government Operations. Specifically, the objectives were (1) to determine what types of agency activities related to the legislative process are considered to be permissible and impermissible by both congressional committee staff directors and senior agency legislative liaison officials and (2) to recommend, based in part on the opinions of these knowledgeable political practitioners, better controls over executive branch efforts to influence legislators, if they are warranted.

To accomplish the objectives, we were requested to interview the staff directors of House and a few selected Senate committees to obtain their perceptions on the nature of contacts between agency officials and congressional representatives, and on what types of contacts they consider to be appropriate and inappropriate. We were also requested to conduct similiar interviews with the senior department and agency officials with full-time responsibility for legislative liaison activities. Working with the committee, we developed a list of individuals to be interviewed and a list of executive branch lobbying practices to be used for discussion purposes during the interviews. We conducted our field work from September to November, 1983.

All of the committees and executive branch organizations that we contacted agreed to participate in the interviews. We interviewed staff members of 16 House and 5 Senate committees. With one exception, each of these members was either the staff director or chief counsel of the full committee. The remaining individual was the committee parliamentarian. We also interviewed 23 senior officials responsible for legislative liaison activities in each of the federal departments (including the military departments) and 7 independent executive branch agencies. More than one individual was present in most of the department and agency interviews, but we sought in each case to specify that the responses were to be attributable to the organization's senior official with full-time responsibility for legislative liaison. The committees and the federal units where we conducted interviews are listed in appendix I and appendix II respectively.

The interviews were not structured in format, although we did cover the same subjects with each respondent. During the interviews, we emphasized the importance of each respondent discussing the reasons for his or her responses, and depended heavily on this qualitative information in our analysis. Also, the focus of the interviews differed between the two groups, with respect to evaluation of specific agency practices related to influencing the legislative process. The focus of the

department and agency interviews was on determining the policy of the organization with respect to each "lobbying" practice, while the focus of the congressional interviews was on the individual respondent's views as to whether a given practice was ethical or not. In neither case did we attempt to elicit personal experiences with any of the practices we discussed. Because the samples were not randomly selected, the interview results cannot be projected to the universes of all agencies or all committees.

In addition to the information obtained during the interviews, we requested 33 federal departments, agencies, and independent regulatory commissions (listed in app. III) to send us a copy of their written guidelines on permissible and impermissible lobbying activities. A detailed discussion of these guidelines is provided in chapter 2. We also reviewed literature on executive branch lobbying and examined the statutes governing this area.

We did not obtain comments on this report from the agencies where we conducted interviews. The review was conducted in accordance with generally accepted government auditing standards.

CHAPTER 2

EXISTING LAWS AND GUIDELINES DO NOT CLEARLY DEFINE THE LIMITATIONS ON EXECUTIVE BRANCH AGENCIES

The executive branch departments and agencies must comply with the provisions of the antilobbying statutes. However, because neither 18 U.S.C. 1913 nor the appropriation acts' restrictions have often been interpreted judicially, the line separating proper and improper conduct is imprecise. As a result, the departments and agencies have interpreted and implemented the provisions differently. Some, for example, provide specific written guidelines on what constitutes permissible and impermissible lobbying activities. Others provide little or no written guidance.

THE STATUTES RESTRICTING EXECUTIVE BRANCH LOBBYING ARE WIDELY REGARDED AS UNCLEAR, IMPRECISE, AND UNENFORCEABLE

The criminal statute and the appropriation act restrictions controlling executive branch lobbying are regarded as unclear, imprecise, and largely unenforceable by most of the agency legislative liaison officials and the congressional committee staff that we interviewed, largely because the statutes do not clearly define what constitutes inappropriate lobbying. Specifically, none of the congressional staff characterized the existing laws as precise or enforceable and only two considered them clear. The views of the agency officials interviewed were somewhat more divergent. While about half agreed that the laws are unclear, imprecise, and unenforceable, nearly as many held a contrary view. Chapters 3 and 4 discuss the results of these interviews in greater detail.

Other sources support the view that the laws are ambiguous. Concern about the vagueness of and the confusion resulting from the antilobbying statutes is widely documented. For example, following an investigation by GAO[1] into alleged improper lobbying activities by the Department of Defense (DOD) on the procurement of the C5-B aircraft, the House Armed Services Subcommittee on Investigations conducted a similar investigation

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[1] Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C5-B Aircraft (AFMD-82-123, September 29, 1982).

of the DOD activities. One of the findings of the Subcommittee's investigation was that "the existing laws prohibiting expenditure of appropriated funds for lobbying activities are imprecise, vague and largely unenforceable." The Subcommittee recommended that the appropriate committees of Congress "should review existing laws. . .and make recommendations by legislation to correct any such defects and clarify the responsibilities of executive branch agencies in lobbying the Congress."

In a widely circulated memorandum describing prohibitions on lobbying activities in 1981, Mr. Fred F. Fielding, Counsel to the President, noted that "unfortunately, the line separating proper and improper conduct is imprecise and the propriety of an activity may well depend on each individual situation." (See app. IV.)

GAO has also found the statutes, particularly the appropriation acts, to be confusing because none of the appropriation act restrictions have been enacted into permanent law, and there are no clear guidelines as to what constitutes inappropriate behavior. As pointed out in chapter 1, one of the most broadly applicable antilobbying measures is an appropriation restriction contained in the general provisions of the annual Treasury, Postal Service and General Government Appropriation Act. By its terms this restriction is applicable to appropriations contained in all appropriation acts in a given year and not just to appropriations contained in the Treasury, Postal Service and General Government Act.

Over the years, we have found a number of violations of this restriction and executive agencies and departments have taken corrective actions in response to our findings. However, as a general provision in an annual appropriation act, this measure is not permanent legislation and must be enacted each year. Also, because this restriction is contained in the annual Treasury, Postal Service and General Government Appropriation Act, officials of other agencies and departments are often unaware that their agencies are covered by the restriction, inasmuch as their agencies would otherwise not be affected by an appropriation act for another agency.

An additional problem has appeared in recent years with the increased use of continuing resolutions to fund agency operations when the annual appropriation act has not passed Congress by the beginning of a fiscal year. When the Treasury, Postal Service and General Government Appropriation bill is incorporated by reference in a law continuing appropriations, the antilobbying restriction, although still effective as to these appropriations, does not appear in the text of the continuing resolution. For these reasons, many agencies and departments do not promulgate regulations implementing nonpermanent appropriation restrictions.

Furthermore, GAO has been faced with a dilemma in trying to enforce the publicity and propaganda provisions contained in the appropriation acts because they do not contain clear guidelines as to what constitutes inappropriate behavior. Former Comptroller General Elmer B. Staats explained in a 1967 letter to Congressman Thomas B. Curtis:

> "The reason for this is that agencies are authorized and, in some cases, specifically directed to keep the public informed concerning their programs. Where such authorized activities involve, incidentally, reference to legislation pending before Congress, it is extremely difficult to draw a dividing line between the permissible and the prohibited."

Generally, though, GAO has construed the restrictions as applying to "indirect" lobbying only and not to direct contact or communication between executive branch employees and members of Congress. Indirect or "grass roots" lobbying involves urging third parties to contact legislators in support of agency legislative objectives.

Three studies published by the Congressional Research Service in 1978 and 1979 further document the problems encountered in interpreting the antilobbying statutes. They found no court cases which distinguished between prohibited and permissible lobbying by federal agencies under the statutes. One of the studies, "White House - Congress Relationships: Information Exchange and Lobbying", mentions that

> "from the few decisions rendered thus far by the Judiciary, it is apparent that the courts are inclined to defer to the judgment of Congress and the President as to what constitutes appropriate lobbying activity by executive officials."

Academic research also supports the assertion that antilobbying restrictions have long been regarded as difficult to interpret and apply. Professor Joseph P. Harris wrote in 1972 that U.S. Code Title 18, Section 1913 "is not enforced and lobbying by government employees is regularly and openly conducted."[2] Quoting a former Congressman as saying "every bureaucrat should be put in jail for lobbying to put his schemes through Congress", Edward de Grazia asserted that "in fact, the agency anti-lobbying law, if rigorously enforced, could do just

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[2]Congress and the Legislative Process, 2nd edition, 1972, p. 165.

that."[3] Calling legislative liaison "the polite term for administrative lobbying", Professor Daniel M. Berman observed that "every department and agency has its own liaison officers, though technically all the work that is done in the bureaucracy to influence congressional action is illegal."[4] Richard Engstrom and Thomas Walker concluded that "this entire legal area may be viewed as a classic case in 'legal fiction'."[5]

FEW FEDERAL DEPARTMENTS AND AGENCIES PROVIDE SPECIFIC GUIDELINES AS TO WHAT CONSTITUTES PERMISSIBLE AND IMPERMISSIBLE LOBBYING ACTIVITIES

Because the line separating proper and improper conduct is imprecise, and because there are no governmentwide regulations governing executive branch lobbying, the departments and agencies we surveyed have interpreted and implemented the provisions of the statutes differently. A few provide specific instructive guidelines as to what constitutes permissible and impermissible lobbying activities, but the majority provide little or no guidance.

We surveyed 33 federal departments, agencies, and independent regulatory commissions to determine the existence of written guidelines on permissible and impermissible lobbying activities. Of these 33 governmental units, 11 responded that they have no specific written guidance on lobbying. These are the Central Intelligence Agency, the Securities and Exchange Commission, the Civil Aeronautics Board, the National Endowment for the Arts, the Office of Management and Budget, and the Departments of Agriculture, Energy, Labor, Treasury, State, and Housing and Urban Development.

The remaining 22 departments and agencies responded that they have written guidelines governing lobbying activities. However, in analyzing the materials sent to us, we found that most of these organizations' "guidelines" are simply references to the statutory language of the antilobbying statutes and not explanatory or instructive guidelines distinguishing between proper and improper conduct. For example, the general guidelines for conduct by Environmental Protection Agency (EPA)

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[3]"Congressional Liaison: An Inquiry into its Meaning for Congress", Congress: the First Branch of Government, The American Enterprise Institute for Public Policy Research, 1966, p. 301.

[4]In Congress Assembled, 1964, p. 91.

[5]"Statutory Restraints on Administrative Lobbying--'Legal Fiction'", Journal of Public Law, 1970. p. 102.

officials are found at 40 C.F.R., Part 3. Specifically, Appendix B of 40 C.F.R., Part 3, cites 18 U.S.C. 1913, the section of the U.S. Code which prohibits lobbying with appropriated funds. This U.S. Code section is also referred to in the EPA Conduct and Discipline Manual. However, neither the code nor the manual delineates permissible and impermissible lobbying activities. Similarly, the Federal Maritime Commission's General Order 53, as amended, sets out the standards of conduct for Commission employees (46 C.F.R. 500.735). Included within the section listing statutory provisions to which employees are subject is the prohibition against lobbying with appropriated funds (18 U.S.C. 1913). It does not, however, include specific guidelines on proper and improper conduct.

The other federal departments and agencies which reference the provisions of the antilobbying statutes as their guidance on lobbying are the Departments of Justice, Interior, and Commerce, and the National Aeronautics and Space Administration, the Veterans Administration, the Office of Personnel Management, the Nuclear Regulatory Commission, the National Science Foundation, the Small Business Administration, the Federal Trade Commission, the Consumer Product Safety Commission, and the General Services Administration.

Of the 33 agencies and departments surveyed, only 8 provide some specific guidance on permissible and impermissible lobbying activities to their employees. A discussion of each follows.

National Endowment for the Humanities

The National Endowment for the Humanities does not have a set of written guidelines on lobbying aimed specifically at the Endowment. However, according to its Chairman, its activities are guided by, and consistent with, the practices and prohibitions laid out in "Lobbying and Related Matters" in GAO's Principles of Federal Appropriations Law. This document, as pointed out on page 3, provides a lengthy discussion of the legal restrictions on lobbying by government officials, and interpretations, although limited, of the statutes by the Justice Department, the Comptroller General, and the courts.

Department of Health and Human Services

Lobbying activities by employees of the Department of Health and Human Services (HHS) are governed by two documents. One is the Department's Standard of Conduct Regulations, which outlines generally the conduct expected of employees on and off the job and contains standards similar to the standards found in other federal agency codes of conduct. Specifically, the

Department's conduct regulations (45 CFR 73.735-302[b]) state that "an employee shall not, either directly or indirectly, use appropriated funds to influence, or attempt to influence, a member of Congress to favor or oppose legislation."

The second form of guidance is a memorandum from a former HHS General Counsel to the Secretary outlining the various statutory antilobbying provisions. According to the Assistant General Counsel for the Business and Administrative Law Division of HHS, this memorandum has been used frequently since its issuance on April 2, 1974, to provide guidance to officials of the Department who are engaged in congressional relations activities. The memorandum allows the Department to "continue to publish materials which are factual in nature explaining legislative proposals within the responsibility of the Department which can be used to inform the public", but it cautions ". . .against the preparation of materials relating to legislation intended for wide and unsolicited distribution in contrast to the dissemination of literature pre-prepared to be responsive to requests for information." It also emphasizes that the thrust of the legislation is in the direction of inhibiting grass roots lobbying.

Department of Education

The guidelines provided by the Department of Education on permissible and impermissible lobbying activities are the same as those provided by the Department of Health and Human Services. This is because they were developed while the departments were combined under the Department of Health, Education and Welfare. At the Department of Education, these guidelines can be found in a February 9, 1982, memorandum from the Assistant General Counsel, Division of Business and Administrative Law, to the General Counsel.

Department of Transportation

The Department of Transportation does not have its own guidelines regarding permissible or impermissible lobbying practices either, but Department employees are instructed to follow the guidelines set out in a memorandum circulated in 1982 to the Cabinet Departments by Mr. Fred Fielding, Counsel to the President. The memorandum provides a summary of the legal restrictions on members of the executive branch in connection with their interaction with members of Congress. It also provides examples of the kinds of things which executive branch officials should avoid and the kinds of activities in which they might participate. The full text of this memorandum is reprinted in appendix IV.

Military departments

Like the Department of Transportation, the military departments (Defense, Army, Navy, and Air Force) use the guidelines prepared by the Counsel to the President on the legal restrictions on legislative activities. In addition, these guidelines are supplemented by two guidelines which were promulgated by the Secretary of Defense on February 3, 1983, as a result of a December 30, 1982, report of the House Armed Services Subcommittee on Investigations concerning legislative efforts by the Department of Defense in regard to C-5B and B-1B aircraft and the sale to Saudi Arabia of an airborne warning and control system. These supplementary guidelines are:

> (1) "holding a series of joint legislative strategy meetings with defense contractors presents, at least, an appearance problem" [and], (2) "under no circumstances should communications with associations, industry, or other members of the public urge, directly or indirectly, that the groups or individuals pressure Members of Congress regarding a DOD program or issue."

OMB HAS RECENTLY PUBLISHED NEW GUIDELINES FOR NONPROFIT ORGANIZATIONS

The Office of Management and Budget, in consultation with this Office, had recently drafted detailed antilobbying regulations in connection with a proposed amendment to Circular A-122, "Cost Principles for Nonprofit Organizations." These cost principles will prohibit nonprofit organizations with federal grants or contracts from using federal funds for certain lobbying activities. Although the proposed revision is not applicable to the activities carried out directly by federal employees that are the subject of this report, we nevertheless believe that these proposed regulations will help clarify some prohibitions on the use of appropriated federal funds for indirect or grass roots lobbying activities. These prohibitions include such activities as the use of federal funds by grantees or contractors to influence the outcomes of elections through endorsements, publicity, or support of political organizations, and to influence legislation by urging the public to participate in demonstrations, lobbying, or letter-writing campaigns. If other agencies and departments promulgate general antilobbying regulations based on the OMB cost principles for nonprofit organizations, some of the vagueness and uncertainty that has characterized these aspects of antilobbying appropriation restrictions should begin to be corrected.

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In summary, of the 33 federal departments, agencies, and independent regulatory commissions we surveyed, only 8 provide some specific guidance on permissible and impermissible lobbying activities to their employees. And, even among this subgroup, the extensiveness of the guidelines varies. The most extensive guidelines we found are those used by the Department of Transportation and the military departments. Each of these departments uses the memorandum prepared in 1981 by the Counsel to the President on the legal restrictions on legislative activities. The memorandum (app. IV) provides specific examples of the kinds of activities that executive branch officials should avoid, and may well be the best substitute available for governmentwide regulations on the subject.

CHAPTER 3

VIEWS AND OPINIONS ARE WIDELY DIVERGENT WITH RESPECT TO EXECUTIVE BRANCH LOBBYING

We interviewed senior staff members of 21 House and selected Senate committees to obtain their perceptions on the nature of contacts between agency officials and congressional representatives and, more specifically, on what types of possible executive branch actions related to lobbying they consider to be appropriate and inappropriate. We conducted similar interviews with the senior department and agency officials responsible for legislative liaison activities in 23 federal departments and agencies. We found that the views and opinions varied widely on the legitimacy of certain lobbying practices. Overall, however, neither group believed that executive branch lobbying constitutes a severe and immediate threat to the integrity of the legislative process.

ETHICAL JUDGMENTS OF INVOLVED OFFICIALS VARIED WIDELY ON SPECIFIC LOBBYING PRACTICES

To guide our discussions, we used a list, reprinted in appendix V, of 20 possible federal agency activities related to lobbying the Congress. The results of these interviews[1] show very little opposition to practices involving direct communication with the public, constituency groups, or the Congress to advocate the administration's legislative agenda. Three other practices were broadly condemned by those interviewed, but for the majority of practices, opinions were widely divergent and qualified. Each of these practices is

[1]In interpreting the results of interviews conducted for this review, several methodological cautions must be borne in mind by the reader. Although the groups we were asked to interview are key coordinators of the daily interchange between the executive and legislative branches on legislative matters, they do not have final authority in these areas. Also, the samples were small and not randomly selected. There is no basis for asserting that the views they expressed reflect the views of the universe of persons involved in executive-legislative branch relations. For consistency and ease of interpretation, we have expressed many categories of responses on questions that were asked in all or nearly all of the interviews in fractional terms. With a total sample of 44 interviews, divided into subgroups of 21 legislative and 23 executive branch respondents, the use of fractions can inappropriately mislead the reader into inferring projectability, and a degree of exactitude, that is unwarranted. Therefore, we are including

discussed in greater detail in the following sections. Overall, the congressional staff members tended to be less restrictive in their views and opinions on practices related to executive branch lobbying than were the senior legislative liaison officials we interviewed.

Direct lobbying

We found virtually no objection to the practice of direct persuasion of Members and staff of the Congress by agency officials on the administration's legislative program. The respondents made no distinction between contacts initiated by the agency and those made in response to a congressional request for information. All but two of the respondents regarded both types of contacts as permissible. Most of the congressional staff interviewed observed that the administration has a legitimate and necessary role in the legislative process and that the Congress depends heavily on the executive branch for information and support relevant to legislative decisionmaking. The agency legislative liaison officials also defended this practice, many of them saying they would not be doing their jobs if they failed to advocate the legislative positions of their agencies. One official asserted that such contacts are explicitly authorized by Article II, section 3, of the Constitution, which provides that the President shall periodically recommend to Congress "such measures as he shall judge necessary and expedient. . . ."

Indirect individual lobbying

While there were virtually no objections to the practice of direct lobbying by agency officials, the interviews revealed substantial objection to what might be called "surrogate lobbying"--engaging outside individuals to lobby the Congress on agency behalf.

This opposition was most clearly expressed with regard to the practice of engaging outside consultants to advise on

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actual numbers of respondents in parentheses after such fractions. The number of cases in each comparison varies because we have eliminated those interviews in which the respondent was not asked to or did not make a clear choice between the alternatives presented. In discussion of specific lobbying practices, we have combined categories of responses (always and generally appropriate/permissible are combined, as are never appropriate/permissible and generally inappropriate/impermissible) both to simplify the presentation and in recognition of the fact that distinctions made within these categories were often somewhat arbitrary. Finally, we have placed heavy emphasis in our analysis on the open-ended discussion that we encouraged on each question.

legislative strategy or to lobby the Congress, a practice fairly common in the private sector. Almost 9 of 10 (32 of 37) opposed the practice for federal agencies.

Specifically, of the congressional staff who objected to an agency engaging an outside consultant, about half explain that agencies should have their own expertise and that there should be no need to use taxpayers' money for this purpose. The agency officials generally agreed that their full-time staffs should provide adequate assistance and expertise. Not only is temporary outside help unneeded, it could also raise conflict of interest and accountability problems. One department, however, reported using a consultant to give advice on dealing with a committee investigation of its activities.

Opinion was more divided with respect to the practice of requesting the voluntary lobbying help of individual private citizens, such as former officials of the agency. Nearly two-thirds (18 of 29) expressed no objection to the practice, but an unusually large number (14) took no position at all, many of them because they thought the answer depended entirely on the context. Some congressional staff asserted that knowledgeable advice is of value both to the Congress and to the agency. Some opponents, particularly within the agency group, observed that this practice might be construed as illegal indirect lobbying, and pointed out that conflict of interest questions could arise since many former officials have private interests that bear some relationship to their past official responsibilities.[2]

Potential inducements

It is so clearly established in ethics and law that bribery--offering or accepting direct financial rewards for official decisions--is repugnant that we did not discuss this practice in our interviews. However, we did seek to ascertain attitudes toward more subtle manifestations of the influence of other sorts of inducements in the context of executive branch involvement in the legislative process. In general, we found conflicting views, confirming that this is a troublesome ethical problem for most of the individuals we interviewed.

For example, about two-thirds (25 of 37) of the respondents disapproved of the practice of agency officials offering

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[2]GAO has held that agencies may not legally use appropriated funds to engage outside consultants to contact Congress. Also, the use of former agency officials for this purpose is precluded. See our decisions B-128938, July 12, 1978, and B-202975, November 3, 1981.

legislators, in exchange for support on elements of the administration's legislative program, politically valuable inducements such as promises of help in future elections or support on unrelated legislation. Ideally, this majority view ran, legislative issues should be resolved on their own individual merits. Seven congressional and five executive branch respondents, however, defended the practice as an inseparable part of the give-and-take of the legislative process. Both groups, as well as the seven who were undecided on the legitimacy of the practice, recognized that it was common and long-standing, and many said that they saw no practical way of controlling it. Three agency and two congressional respondents also observed that the question as presented ignored their perception that it was the Congress, at least as frequently as the executive branch, who initiated "log-rolling" suggestions. Also evident in several of the agency comments was the qualification that while this may not be appropriate or practical at the agency level, it was more acceptable, and more common, at the White House level.

An allied question relating to the executive branch's ability to gain support for its legislative program, is the practice of Presidentially appointed officials making campaign appearances in support of congressional candidates of the President's party. Only about one-fifth (7 of 34) found this objectionable.

Opinion was more sharply divided on the propriety of agencies offering, and congressional members/staff accepting, benefits such as free air travel and/or "wining and dining" in connection with imparting information on activities of the agencies. About three-fifths (20 of 34) at least generally opposed the practice, but there were a number of qualifications. Some interviewees of both groups said that it is appropriate for congressional members to travel to federal facilities if the purpose of the travel is educational. Travel of this type, they said, is not a benefit but rather a necessity; it helps the Congress make more informed decisions. They maintained also that using military aircraft when available is often cheaper than using commercial aircraft. These same respondents said offering dinner invitations is equally permissible as long as the purpose is to exchange information. One congressional staff director added that meeting over dinner is sometimes the only way the two parties can meet.

Other respondents expressed different views. For example, some said this practice is appropriate only if the congressional member or staff pays the expense. Others noted that it is not a question of being right or wrong but rather a matter of degree. To illustrate, two congressional staff directors said few members could be influenced by a theater ticket, a luncheon, or a trip to the White House but that a series of such actions might be more influential and, consequently, more questionable.

A number of agency officials regarded the question as purely hypothetical in their agencies, since they have nothing to offer. Their resources are so limited that they cannot afford to offer anything that a reasonable person would regard as a "benefit."

Presenting unauthorized views

Of all the practices discussed during the 44 interviews there was only one in which the views of the two groups were on opposite ends of the scale--the practice of agency officials departing from official administration policy in private communications with representatives of the Congress. There was almost unanimous agreement among the congressional staff that this practice is permissible and, in fact, needed. From their standpoint, such candor and differences of opinion are what drive good legislation. Most said they want to hear all sides of the story. Conversely, almost all the agency officials interviewed said this is highly unethical although they recognized that it happens.

Temporary staff assignments

One way the executive branch can influence the legislative process is by temporarily assigning staff to committees or Members of Congress. Aware of a potential for conflicts of interest in such temporary assignments, one-third (12 of 36) of the respondents said that the practice was an inappropriate one. Twice as many (24 of 36) had no serious objection to it, but many of them said that it should be confined to training and internship assignments. Few saw potential for abuse of the separation of powers principle if congressional supervisors exercised due caution to prevent conflict of interest situations. Several agency officials observed that their personnel ceiling limits require discouraging requests from the Congress for the help of subject matter experts, because such requests could easily get out of hand.

Characterization of voting records

By a two-thirds margin (15 of 22) agency officials disapproved of the practice of agencies preparing any classification or characterization of the voting records of individual members of Congress. Slightly more congressional staff directors (10 of 18) approved than disapproved of the practice, however. Several of them noted that congressmen have become accustomed to having their voting records rated and classified by outside groups, and said they had no doubt that such ratings received circulation within executive branch agencies.

Those who had no objection to the practice commonly noted that voting records are readily available on the public record.

While recognizing that every administration will inevitably develop mental classifications of likely supporters and opponents of the administration's viewpoint on particular issues, most of them agreed with critics of the practice that it would be politically inadvisable to commit such indices to written form. In its extreme form, no one we interviewed expressed the view that it would be appropriate for an agency to develop anything like an "enemies list" of unfriendly Members of Congress.

Use of mass media

By nearly a nine-to-one margin (33 of 37), those whom we interviewed thought it was appropriate and permissible for administration spokespersons to urge the public to support elements of the administration's legislative program through the use of speeches, news releases, and by-line articles in the mass media. Of those agency officials who commented on this practice, almost half said that it is appropriate to educate the public on the agency's position but also recognized that the message "write your congressman" ought not to be explicit in such appeals. Several others specified that this should be permissible but only for the President and his political appointees.

Overall, the congressional respondents found this practice to present even less of a problem than did the agency legislative liaison officials. None of them found this practice to be objectionable as a matter of principle. Some, however, like some of the agency officials, said that it is appropriate only at the Presidential and political appointee level.

A sharper division was found on the question of using agency periodical publications to support legislative objectives, without necessarily giving the opposition's side of the story. Overall, slightly more than one-half (21 of 38) of the respondents regarded this as an acceptable practice. One of them pointed out, however, that this tactic can backfire politically. Opponents of an agency's position are sure to get copies of agency publications and can use examples of bias and one-sidedness to advantage in political debate.

An alternative to direct publication of legislative advocacy material is for agencies to provide position papers on pending legislation to sympathetic outside groups, who would then reproduce and distribute the material broadly. Two-thirds of the respondents (24 of 36) found little or nothing wrong with this practice, but many of them, particularly in the agencies, explained that the alternative of attempting to hold back such public information raised even greater problems. Some of the minority who objected to this practice pointed out that the critical factor is one of intent or purpose. If the material is

prepared for mass distribution, this makes it wrong whether the actual distribution is done with agency funds or outside resources.[3]

Relationships with outside constituency groups

The question of what limits should apply to agencies in their relationships with such nongovernmental organizations as contractors, grantees, service clients, and special interest groups was recognized as especially sensitive. These are the "third-party" relationships to which most statutory restrictions on lobbying appear to apply most directly. The interviewees nearly all recognized, however, that agency lobbying is rarely carried out in isolation; most agencies have constituencies which share at least some (but rarely all) of the agencies' legislative goals. A substantial number of the individuals we interviewed, in the congressional even more typically than the agency group, were quite flexible and tolerant with regard to an agency's right to communicate rather freely with such groups, even though taxpayer funds inevitably support these communications.

For example, less than one-tenth of the respondents (3 of 42) voiced any objection to ongoing dialogue or interaction between agencies and outside groups in an educational effort to explain administration positions on pending legislation, without the agencies directly urging the groups to contact Congress. Over nine-tenths of the respondents (39 of 40) likewise accepted the exchange of information between agencies and their constituency groups on legislative prospects and problems, when not directly related to the tactical lobbying decisions of either side.

This support does not disappear even when more active cooperation between agencies and their constituency groups is considered. While only about one-quarter of the agency officials (4 of 17) said it is permissible for agencies to engage in cooperative or joint development of legislative strategies with outside interest groups, about two-thirds (14 of 20) of the congressional staff members disagreed and found the practice appropriate. Overall, the interviewees were almost evenly split on the question. At least four of those who questioned this practice said that the real danger arising from it was that the outside groups might gain undue influence over the agencies, rather than vice versa.

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[3]GAO has held that agencies may not prepare position papers or other similar material specifically for sympathetic outside groups, with the tacit understanding that such groups will use this material in a grass roots lobbying campaign. See B-129874, September 11, 1978, and Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft, (AFMD-82-123), September 29, 1982.

A slight majority (18 of 34) did oppose the practice of agencies offering advice or assistance to interest groups, grantees, or contractors who independently express a desire to contact members of Congress on behalf of agency-supported legislation or appropriations. Here, too, agency opposition was predominant. A number of respondents observed that constituency groups are usually better informed and have more resources than federal agencies, and rarely have need for agency "assistance."

The one constituency-related practice clearly objectionable to a large majority of the respondents (32 of 39) was that of agency officials supporting or participating in fundraising events for the benefit of organizations that engage in legislative lobbying. Even here, however, two congressional staff members said the practice could be justified for top political appointees.

We also asked about the practice of agencies scheduling a conference in Washington, D.C., at a time when the Congress is considering legislation that is of special importance to the people invited to the conference. The predominant agency reaction to this suggestion was that it was unrealistic rather than right or wrong. Many observed that it is practically impossible to predict the legislative schedule with such precision, and that in any case outside interest groups have no need for agency help in this kind of lobbying.

THE INTERVIEW RESULTS ALSO REVEAL SEVERAL COMMON THEMES AND OBSERVATIONS ON EXECUTIVE BRANCH LOBBYING

We encountered several common themes and observations in the respondents' open-ended discussion of the general subject of executive branch influence on the legislative process, and in their explanations and qualifications of responses to specific possible federal agency activities related to lobbying the Congress. While none of these cross-cutting observations were made by all of the respondents, in our opinion, they express the sense of the interviews and are important to an understanding of both the nature of the issues raised by executive branch lobbying and the acceptability of the various potential remedies discussed in the next chapter.

Distinctions of degree and scale are important

Many of the respondents observed that nearly all of the practices discussed earlier in this chapter offer the potential for abuse if an agency pursues them too aggressively or on an unusually large scale. These respondents, who render advice and policy judgments relating to agency lobbying practices, noted

that judgments must often be rendered on matters of degree and scale rather than as sharp distinctions between right and wrong.[4] For example, an agency can distribute advocative documents to dozens or even hundreds of interested persons, but an unsolicited mass mailing of the same material in thousands of copies would not be seen as permissible to most of the interviewees. Similarly, few would criticize an agency head for not charging congressional guests for "ham and eggs" at a legislative breakfast, but more would question the propriety of providing lavish entertainment at agency expense. At current levels we found little criticism of programs that permit executive branch employees to accept training assignments on congressional staffs, but we believe if the numbers of such assignments were greatly increased, there would be greater objection.

More, not less, agency dialogue is encouraged

With only two exceptions, congressional staff members expressed the general view that a full and free exchange of information, viewpoints, and arguments with the executive branch is desirable. Most of them asserted that more, not less, direct dialogue with the agencies should be encouraged. The principle was often expressed that the legislative process works best when all relevant viewpoints are put to the test of free and unfettered contention, supported by capable and informed advocates including the federal officials with responsibility for carrying out the eventual results of the congressional decision. We encountered more complaints about reticence, indecision, and passivity of agency advocates than we did about immoderation in asserting and defending agency positions on legislative matters.

Political accountability is an important distinction

A common qualification in respondents' comments on the acceptability of various practices was related to the level of political accountability of the executive branch official who is responsible for the action. The higher the rank of the responsible official, the more likely was a practice to be viewed as an acceptable tactic. For example, at one extreme the President is accorded special leeway in attempting to influence legislative outcomes. While lesser officials recognize both implicit and explicit restrictions on their ability to organize outside constituencies, to encourage the public to contact the Congress, to engage in political log-rolling, and to flatter Members of Congress with desirable invitations, we encountered no one who advocated denying these privileges to the President as an

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[4]GAO, however, does not agree with this view. Agency officials may violate antilobbying appropriation restrictions if any amount of appropriated funds, no matter how small, are expended for prohibited activities.

individual. Similarly, within the departments, the secretary was generally accorded the right to behave in a more aggressively political and advocative manner than subordinate officials.[5] At the other extreme, career civil servants and military officers run substantial risks of offending public and congressional sensibilities by engaging in those practices that are not unquestionably legitimate.

A wide diversity is perceived in committee-agency relationships

Another common theme running through interviews with both congressional staff and agency officials was the perception of a large degree of diversity in the complex web of interaction between entities of the Congress and of the executive branch. Our interviews were colored by frequent references to tradition, partisan politics, personalities, jurisdictions, legislative cycles, and many other "special" factors characterizing particular relationships.

While each of our interviews reflected one, two, or several agency-committee patterns of interaction, only in aggregate does their full diversity become apparent. In some policy areas (veterans and small business affairs, for instance), the respondents said there is a closely-knit cohesion among the agency, the committees, and the constituency groups. Some agencies, even those assigned advocative responsibilities by law, often act as moderating influences on the demands of various constituency groups. The military departments, according to two respondents, believe that Article I, Section 8, of the Constitution, which states that the Congress shall have the power to raise and support armies, gives them a unique responsibility and obligation to provide advice directly to the Congress. Only recently has the Congress systematically questioned presidential preeminence in military and diplomatic affairs; executive branch opinion is still accorded substantially more weight in these areas than in purely domestic legislation. Investigative committees and subcommittees, it was pointed out to us several times, often have adversarial relationships with agencies in sharp contrast with the more cooperative and mutually accommodating patterns of confidence that often develop between authorizing committees and their assigned agencies. Other agencies and committee staffs see their relationships as highly technical, specialized, and professional, though nonetheless very close and cooperative.

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[5]GAO's position, however, is that neither the President nor his political appointees are exempt from the antilobbying appropriation restrictions.

As a result of this diversity, many of the practitioners we interviewed were reluctant to issue flat ethical imperatives or judgments. Congressional staff members in particular did not advocate the application of customs of their own committees to other committees of the Congress.

MOST OF THE RESPONDENTS DID NOT VIEW EXECUTIVE BRANCH LOBBYING AS A SERIOUS THREAT

Following discussion of specific agency practices, GAO asked each respondent whether, in his or her view, executive branch lobbying constitutes a serious challenge to the integrity of the legislative process. Of the 43 interviewees who responded to this question, 35 said that they did not view the problem as a serious challenge, but rather saw only minor issues involved. Five others said that the problem is potentially serious though not serious now. Only three see it as a serious challenge to the integrity of the legislative process at the present time.

A number of reasons were advanced in support of these judgments. The two congressional staff directors who found the situation serious pointed to personal experience with lobbying practices that they felt exceeded the bounds of propriety.

Among the preponderant majority who expressed the view that only minor issues are involved, about half of both congressional and agency interviewees volunteered that unethical incidents and abuses are rare. More than half the congressional staff directors noted in this context that they would like to see more, not less, advocacy on the part of the executive branch. Seven of them observed that federal agencies are the most dependable source of information and advice from the perspective of the public interest, outside of the legislative branch itself. This consideration was also brought up by half of the agency spokespersons, some of whom noted that the President has a unique claim as well as responsibility to voice a national policy perspective as the only official in the country elected with a national policy mandate.

Seven of the agency officials also asserted that it is the legislative branch rather than the executive branch which most often solicits activities which challenge agency ethical standards. Rather than agencies offering tangible inducements to gain key votes, several noted, the suggested *quid pro quo* often originates with someone on Capitol Hill.

Two respondents observed that executive branch lobbying has diminished in importance as a problem with the recent growth in congressional staff and its ability to do independent fact-gathering and analysis of public policy issues. Congress is better

equipped today than in the past, it is argued, to assimilate multiple and divergent sources of information, and is less vulnerable to improper or unbalanced pressure from executive agencies.

Finally, a substantial majority of both congressional staff and agency officials asserted that the growth of outside lobbying pressures on the Congress has far outstripped any potential threat to the legislative process arising from excessive executive branch influence. Some of them maintain that advice from federal officials offers an important counterweight to burgeoning special interest pressures. Only two agency officials asserted that they still retain more influence with the Congress than do outside lobbying groups, who have relatively uncontrolled access to many lobbying tools (such as mass mail, campaign contributions, honoraria, and commercial entertainment) and the freedom to concentrate on specific, very narrow issues that are unavailable or forbidden to federal officials.

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Overall, our interviews did not reveal an ethical rejection of most hypothetical agency practices related to influencing legislative actions. Only three such practices--offering inducements for favorable votes, hiring outside lobbying experts, or participating in fundraising activities of outside lobbying groups--earned the disapproval of as many as two-thirds of the persons we interviewed. Nor, aside from the question of adhering to administration policy positions, did we find a striking difference between executive and legislative branch opinion. Indeed, the diversity of viewpoints, reflecting a highly intricate web of varying relationships between legislative committees and executive branch agencies, is perhaps one of the principal findings of our interviews. It is also significant, however, that whatever their individual views on the appropriateness of various lobbying tactics, preponderant majorities of both the congressional and executive branch respondents do not believe that executive branch lobbying constitutes a severe and immediate threat to the integrity of the legislative process. In fact, a majority of congressional staff directors volunteered that more, not less, contact and exchange between the branches of government would be beneficial to the legislative process.

CHAPTER 4

OVERALL, THERE IS INSUFFICIENT RATIONALE FOR NEW CONTROLS OVER EXECUTIVE BRANCH LOBBYING

In spite of the prevailing opinion that the existing laws and guidelines defining proper executive branch influence on the legislative process are unclear, imprecise, and unenforceable (see ch. 2), we found no agreement in our interviews on the effectiveness of any revised set of remedies to control potential abuses in the future. Opposition substantially outweighed support for the alternatives of a stricter criminal statute, expanded restrictions through financial control, or requiring greater disclosure of lobbying activities. More than half of the individuals we interviewed also saw no need for a more explicit code of conduct to guide executive-legislative branch relationships. The predominant suggestion, among both congressional staff directors and agency officials, was to continue with the present framework of control, recognizing that it is imperfect and will not infallibly prevent abuses in the future. We agree that the costs, risks, and conceptual problems associated with any concerted legislative initiative to set more precise boundaries on permissible activities outweigh the potential benefits.

A STRICTER CRIMINAL STATUTE IS OPPOSED

Forty of the 44 persons we interviewed opposed the idea of an expanded or stricter criminal law to control executive branch lobbying. Among the more prominent reasons for this opposition were the following:

--A stricter antilobbying law would send the wrong signal, and inhibit rather than increase the level of constructive dialogue between federal agencies and the Congress.

--The statute could not be written precisely enough to accommodate varying patterns of agency-committee interactions, to make distinctions that are properly matters of scale and degree, or to discriminate among actions that are appropriate if done by some officials but not by others.

--The seriousness of the penalty is out of proportion to the offense, and would inhibit prosecution. (One individual said that in practice only career professionals would be vulnerable to prosecution, and these are officials whose advice the Congress values highly).

--Without concurrent restrictions on outside interest group pressures on the Congress, further limits on the executive branch's ability to promote its policies would make the outside groups relatively even more influential than they are today.

Opposition to new statutory controls did not extend, however, to a broad recommendation that existing restrictions be repealed. Despite criticism that the Lobbying with Appropriated Moneys statute is unenforceable or that it misleads those who are unfamiliar with interpretation of the law into believing that direct agency persuasion of the Congress is illegal, only one agency official specifically suggested its repeal.

EXPANDED FINANCIAL CONTROLS ARE NOT REGARDED AS NECESSARY

By a five-to-one margin (25 of 30), those who commented specifically on the possible remedy of expanded financial controls over lobbying practices opposed the idea. Some said that it would be impractical, even if desirable, to define and restrict funds related to legislative advocacy without affecting agencies' ability to handle the volume of case work and purely factual information requests from the Congress. Others observed that expanded audits would involve definitional and accounting problems, and probably cost more than the minor amounts of money potentially recoverable.

As with the criminal sanctions, however, we found almost no support for removing financial restrictions that are already commonly imposed through the appropriations process. An agency that incurs the displeasure of the Congress or one of its key committees, regardless of the reason, is highly vulnerable to cuts in any of its appropriations accounts. Both opponents and supporters of expanded financial controls recognized that the appropriations power is among the most effective tools available to the Congress to control the executive branch and to assure that lobbying does not become excessive, heavy-handed, or otherwise improper. The majority simply discerned no need to codify or regulate violations more systematically than is the present practice.

REQUIRING MORE DISCLOSURE OF LOBBYING ACTIVITIES IS VIGOROUSLY OPPOSED

Because attempts have been made in the past to regulate private sector lobbying by requiring disclosure of some of the funds spent for lobbying, we asked the persons we interviewed whether greater disclosure offered promise as a means of

controlling executive branch lobbying.[1] For instance, the names of agency officials who contact Congress, and the amounts of time and funds they spend on lobbying the Congress, could be systematically recorded and periodically made available to the press, the public, or to official investigators.

This idea met with unanimous (and occasionally vehement) disapproval of the agency officials who responded (22 of 22), and about four-fifths (14 of 17) of the congressional staff directors also rejected it. They noted that the volume of such contacts is enormous, and the paperwork burden and expense of recording contacts would be very high. Several agency officials asserted that they are already required to document some aspects of congressional liaison (for example, congressional use of military transportation). Others noted that after-the-fact investigations could successfully recapture relevant events and contacts in the few cases that become controversial, at much less cost than the expense of logging hundreds of daily contacts.

MINOR SUPPORT EXISTS FOR A CODE OF CONDUCT

Forty-two interviewees responded to our question whether a code of conduct should be developed to guide relationships between the executive branch and the legislative branch. A dozen of them answered that this was a good idea, and nine more said that it could do no harm though they saw no real need for it. Although one-half flatly opposed the idea, this was the most positive response we found for any specific reform measure.

Several of those who supported the idea of a formal code of conduct noted that this is a reasonable and fairly common approach to dealing with ethical questions. They thought that a simple statement of the rules would be a response to the common assertion (see ch. 2) that present antilobbying laws are unclear, and help remove misimpressions about what the current law requires by giving wide circulation to a definitive description of right and wrong behavior.

Those who flatly opposed the idea--nearly equally divided between congressional staff and agency officials--did so for a variety of reasons. Several asserted that a code, like the present law, would have to be so general that it would be meaningless; no specific "do's and don'ts" would be adaptable enough to cover the multitude of ways executive and legislative

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[1]The House has considered this question. On April 20, 1978, by a vote of 350-44, the House voted against an amendment to the proposed Public Disclosure of Lobbying Act that would have made the bill's disclosure provisions applicable to the executive branch.

branch members interact. Others, particularly in the agencies, said that their existing guidelines were already sufficient. Still others said that a formal code of conduct would have no effect on the very small number of people who are inclined to act unethically, and that it would be redundant for the vast majority of participants in the legislative process who already act ethically. One agency official termed the idea "insulting", another "juvenile."

Finally, several individuals on both sides of this question asserted that if a code of conduct were written, it should be made broad enough to apply both to congressional members and staff as well as to executive branch employees.

THE EXISTING FRAMEWORK IS BELIEVED TO CONTROL ABUSES EFFECTIVELY

Before testing the proposals of expanded statutory, financial, disclosure, and code of conduct remedies in our interviews, we asked each respondent for his or her own suggestions as to the most effective way to prevent impermissible lobbying practices by executive branch officials. Most suggestions were negative or cautionary advice against particular approaches or proposals, including those mentioned earlier in this chapter. By far the most frequent positive suggestion was to continue with the existing system of controls.

In view of the findings that most of the interviewees characterized present laws as unclear, imprecise, and unenforceable (see ch. 2) and that all of the interviewees found at least a few possible lobbying practices ethically wrong (see ch. 3), this endorsement of the status quo may seem surprising. It can be explained, however, by the concurrent perception by most of the respondents that statutory prohibitions and formal guidelines comprise only part of a larger set of forces that effectively prevent most, but not all, objectionable conduct.

Nearly all of the individuals we interviewed at least implicitly described the legislative process as an open system, providing access to multiple viewpoints and to both advocates and opponents of proposed congressional actions. As noted earlier (see page 15), it is broadly accepted that the executive branch has an important and legitimate role in the process. The fact that opponents of agency positions are also involved, however, makes it fairly certain that the activities of agency advocates of congressional action are likely to be exposed to critical scrutiny. Activities that can be convincingly described as beyond the bounds of propriety, even if they are not illegal, will enter the public record. The threat of media exposure, the possibility of political backfire, accusations of questionable or unprofessional conduct, and potential

embarrassment were described to us as the most effective deterrents to abuses taking place. While the vague prospect of civil investigation or criminal prosecution is now in the background, it is but one element in an interlocking set of disincentives to abuse of prevailing norms that adds up to an effective, though not highly structured, control system. The underlying confidence in this system is emphasized by the finding that fewer than one in ten of the individuals we interviewed said that executive branch lobbying presents a serious current threat to the integrity of the legislative process.

This point of view is similar to that of the House Select Committee on Lobbying Activities, which was established in 1949 to investigate lobbying activities by departments and agencies of the federal government as well as by private organizations and individuals. The Committee's report fully endorsed the provisions of 18 U.S. Code 1913, concluding that:

> "this statute, together with the other continuing safeguards discussed in our general interim report, provide adequate means for ascertaining and checking any abuses of the executive role in the legislative process."[2]

The "other continuing safeguards" cited by the Committee were similar to those cited in our interviews a third of a century later. They included appropriation act restrictions, GAO audits and reports, specific congressional investigations, an "alert press," the "accessibility of bureaus and departments to public scrutiny," and the "ultimate political responsibility of administrative officers to the people." In the Committee's view, these were "but a few of the restrictions, continuously operative, which inhibit executive efforts to affect legislative policy." Conceding that these restrictions were "not absolute, however," the Committee noted that "both our domestic society and our world position demand a Government which is not afraid to speak its mind on those issues which intimately affect us all."[3]

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[2]House Select Committee on Lobbying Activities, 81st Congress, 2nd session, Report and Recommendations on the Federal Lobbying Act (1951), p. 36.

[3]General Interim Report of the House Select Committee on Lobbying Activities, H.R. Rep. No. 3138, 81st Congress, 2nd session, pp. 60-61.

CONCLUSION AND RECOMMENDATION

The Committee on Government Operations requested our recommendations with regard to the need for better controls over executive branch lobbying of the Congress. Recognizing the limitations of the data collected in this review, we nevertheless share the predominant opinion expressed in the interviews that the costs, risks, and conceptual problems associated with setting more precise legal boundaries on permissible lobbying activities outweigh the benefits. While the existing framework of control based on both formal and informal sanctions does not prevent occasional improper practices from occurring, it also does not seriously inhibit a generally flexible, constructive, and beneficial relationship between the executive and legislative branches. The available alternatives to deter objectionable incidents of inappropriate lobbying with more certainty would likely inhibit the legitimate participation of the executive branch in the legislative process.

We accept the proposition that the branches of the federal government are not, and should not be, isolated from each other. The "separation of powers" doctrine does not require absolute segregation of legislative from executive functions. The Constitution gives the President a qualified veto power and the responsibility to recommend to the Congress "such measures as he shall judge necessary and expedient." The practice of nearly 200 years has ratified the custom that Presidents are expected to take positive legislative leadership. In similar fashion, the Congress has come to exert substantial influence over the substance of executive branch decisionmaking.

Formal provisions of law channel and guide the interrelationships between the branches of government. They are supplemented, however, by informal rules and understandings--based on historical tradition as well as contemporary adjustments--that make government a dynamic mechanism procedurally as well as substantively. These informal arrangements are highly complex and vary considerably with agency-committee relationships.

It is this combination of formal and informal rules that regulates the executive branch's attempts to influence the outcome of the legislative process. This regulatory framework permits an appropriate and flexible set of cooperative executive-legislative branch relationships, while occasionally exposing incidents that appear to be improper, and even illegal. It operates most dependably to deter what in our view is the most objectionable form of improper executive branch lobbying--the use of federal funds as a catalyst to generate private sector pressures on the Congress.

This framework is reasonably effective even though we found that, with scattered exceptions, few departments and agencies make purposeful efforts to instruct their employees in detail on proper and improper lobbying practices. A reasonable explanation for this is that available written guidelines--such as our Principles of Federal Appropriations Law and the White House Counsel's memorandum reprinted in appendix IV--are confined to the formal, legal strictures against improper lobbying practices. None of them discuss the subtle informal factors that may weigh more heavily than legal factors in deciding how to present an agency's views--such as the potential for political backfire, the possibility of media exposure, the prospect of offending one's appropriations subcommittee, and the knowledge that allegations of inappropriate or excessive "lobbying" can be a useful tactic by opponents in legislative debate. In view of the divergence of opinion on what practices and activities ought to be permissible, it is unlikely that comprehensive and universally applicable instructions could be written.

Recommendation to the Congress

While we are not recommending new statutory restraints on executive branch lobbying, we do recommend that the Congress enact one of the currently temporary appropriation restrictions on indirect lobbying into permanent law as section 1352, Title 31, United States Code. This would help correct problems identified in Chapter 2 (see page 7), namely that many agencies and departments do not issue internal guidelines to alert and sensitize their employees to the annually enacted governmentwide antilobbying restrictions contained in the Treasury, Postal Service, and General Government Appropriation Act. It would also ensure that civil law restrictions remain in effect and visible, as a supplement to the criminal law provisions of 18 U.S.C. 1913, when parts of the government are operating under a continuing resolution. We prefer an adaptation of the language of the annual Labor, Health and Human Services, and Education and Related Agencies Appropriation Act because it directly applies to grantees and contractors as well as to federal employees, and because it allows for normal executive branch involvement in the legislative process. We propose the following provision:

> "Except as otherwise provided by law, an appropriation may not be used other than for activities that involve direct communications between executive and legislative branch officials: (1) for publicity and progaganda purposes, 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; and, (2) to pay the salary or expenses of any grant or contract recipient or agent acting for such recipient to engage in any activity designed to influence legislation or appropriations pending before the Congress."

House and Senate Committees Where We Conducted Interviews

House of Representatives

1. Committee on Agriculture
2. Committee on Appropriations
3. Committee on Armed Services
4. Committee on Banking, Finance and Urban Affairs
5. Committee on the Budget
6. Committee on Education and Labor
7. Committee on Energy and Commerce
8. Committee on Foreign Affairs
9. Committee on Interior and Insular Affairs
10. Committee on the Judiciary
11. Committee on Merchant Marine and Fisheries
12. Committee on Post Office and Civil Service
13. Committee on Public Works and Transportation
14. Committee on Science and Technology
15. Committee on Veterans' Affairs
16. Committee on Ways and Means

Senate

17. Committee on Armed Services
18. Committee on Appropriations
19. Committee on Commerce, Science, and Transportation
20. Committee on Environment and Public Works
21. Committee on Governmental Affairs

Federal Departments and Agencies Where We Interviewed The Senior Officials Responsible for Legislative Liaison Activities

1. Department of Agriculture
2. Department of Commerce
3. Department of Defense
4. Department of the Air Force
5. Department of the Army
6. Department of the Navy
7. Department of Education
8. Department of Energy
9. Department of Health and Human Services
10. Department of Housing and Urban Development
11. Department of the Interior
12. Department of Justice
13. Department of Labor
14. Department of State
15. Department of Transportation
16. Department of the Treasury
17. Environmental Protection Agency
18. General Services Administration
19. National Aeronautics and Space Administration
20. Office of Management and Budget
21. Office of Personnel Management
22. Small Business Administration
23. Veterans Administration

Federal Departments, Agencies, and Independent Regulatory Commissions From Which We Requested a Copy of Written Guidelines on Permissible and Impermissible Lobbying Activities

Departments	Agencies and Independent Regulatory Commissions
Agriculture	Central Intelligence Agency
Commerce	Civil Aeronautics Board
Defense	Consumer Product Safety Commission
Army	Environmental Protection Agency
Navy	Federal Maritime Commission
Air Force	Federal Trade Commission
Education	General Services Administration
Energy	National Aeronautics and Space Administration
Health and Human Services	National Foundation for the Arts
Housing and Urban Development	National Foundation for the Humanities
Interior	National Science Foundation
Justice	Nuclear Regulatory Commission
Labor	Office of Management and Budget
State	Office of Personnel Management
Transportation	Securities and Exchange Commission
Treasury	Small Business Administration
	Veterans Administration

APPENDIX IV

THE WHITE HOUSE

WASHINGTON

February 23, 1981

MEMORANDUM FOR MEMBERS OF THE WHITE HOUSE OFFICE STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Support of Administration Legislative Programs

This memorandum is intended to alert members of the White House staff to proscriptions on lobbying activities imposed by federal law and to provide general guidelines to staff members working in this area so as to insure compliance with those laws.

Simply stated, the so-called "Anti-Lobbying Act" (18 U.S.C. §1913) prohibits the use of appropriated funds, directly or indirectly, to pay for "any personal service, advertisement, telegram, telephone, letter, printed or written matter or other device" intended to influence a Member of Congress in acting upon legislation, before or after its introduction. There is also an appropriation rider, which has appeared in appropriation bills since 1951, barring the use of appropriated funds for "publicity or propaganda purposes" designed to support or defeat legislation pending before Congress.

Interpretations of 18 U.S.C. §1913 by the Department of Justice make it clear that an employee of the Executive Branch, while acting in his or her official capacity, may communicate with a member of Congress for the purpose of providing information or soliciting that member's support for the Administration's position on matters before Congress, whether or not such contact is invited and whether or not specific legislation is pending. Thus, the ordinary and traditional inter-action between the Executive and Legislative Branches is permitted. Likewise, it is not improper for an Executive Branch employee to provide legitimate informational background and material to the public in support of an Administration policy effort.

Problems arise where employees of the Executive Branch become involved, directly or indirectly, in efforts to induce or encourage members of the public to lobby members of Congress on Administration programs or legislation. Unfortunately, the line separating proper and improper conduct is imprecise

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and the propriety of an activity may well depend on each individual situation. The following comments and examples are intended to provide general guidance for the more frequently encountered contacts and activities:

1) Executive Branch officials may speak freely in meetings with individuals or groups, at public forums, at news conferences, and during news interviews, but where these appearances of personnel become so excessive as to be deemed to be a publicity campaign, the activity might be challenged. Any undue degree of direct contact with the private sector by persons who do not ordinarily engage in such activities is evidence of prohibited conduct.

2) Appropriated funds should not be used to produce written, printed or electronic communications for distribution with the intent to induce members of the public to lobby members of Congress. For example, an organized mailing to members of the public initiated by Executive Branch personnel, stating the Administration's position and asking the recipients to contact their Senators and Representatives in support of that position should be avoided. Moreover, asking recipients to contact their elected representatives should also be avoided in communications sent in response to inquiries received by the Executive Branch. However, responses to incoming communications may include information which responds to the specific inquiries as well as explanations of the Administration's position on matters of public policy, including proposed legislation.

Massive distribution by the Executive Branch of unsolicited copies of a public document, such as the reprint of a public official's speech or other informational materials, may raise a question even though the contents are only informational and do not suggest that the recipients contact members of Congress. Normal unsolicited distribution of press releases, public officials' speeches, fact sheets and other informational materials to persons, because of governmental or organizational position or expression of interest in the subject matter, would not ordinarily create a problem. Each such proposed distribution must be separately judged based on the purpose and content of the communication and the number and kind of people who will receive the information.

3) Officials and employees of the Executive Branch may properly have regular contact with non-governmental organizations which have among their purposes lobbying members of Congress or attempting to influence the general public to lobby the Congress. However, in these dealings, the officials should not or even appear to dominate the group or use the group as an arm of the Executive Branch.

(a) Examples of the kinds of activities in which Executive Branch officials might participate in dealing with independent outside organizations include:

(i) exchange information, as long as it is not privileged.

(ii) make suggestions, respond to or raise particular inquiries, or discuss the merits of various legislative strategies and related matters, so long as the Executive Branch officials do not suggest organization of grass roots pressure;

(iii) address meetings (non-fundraisers) sponsored by such organizations:

(iv) Upon the request of an independent organization provide to it for reproduction and distribution by the organization:

-- sample copies of documents prepared by Executive Branch officials (such as press releases, public officials' speeches, fact sheets) that are otherwise available for public distribution.

-- letters on specific subjects written by Executive Branch officials.

(Note that the materials must not suggest that the recipients contact Members of Congress urging support of particular positions; also the decision to publish or distribute any such material must be left to the independent organization.)

(b) Examples of the kinds of things which Executive Branch officials should <u>avoid</u> include:

(i) responsibility for the on-going operation of an outside organization;

(ii) requesting that an organization activate its membership at large to contact members of Congress on behalf of a legislative proposal;

(iii) gathering information or producing materials specifically for such an organization which cannot properly or would not ordinarily be gathered or produced as part of the official's regular work;

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(iv) producing or providing multiple copies of materials to be distributed by such organizations;

(v) requesting an organization to prepare or distribute any materials that suggest directly or indirectly that the recipients contact members of Congress, or playing any substantial role in advising an organization regarding the content of material it may wish to distribute;

(vi) providing to such organizations lists of or correspondence from persons who favor or oppose particular policy positions;

(vii) involvement in fundraising activities by such organizations (because of the varying forms that such involvement might take, any involvement should be discussed in advance with the Counsel's office).

These legal provisions are not intended to prohibit an on-going dialogue or interaction between the Executive Branch and the public in an educational effort to explain Administration positions, but where that conduct develops into a publicity and propaganda campaign designed or intended to pressure citizen groups into contacting Congressional representatives, the boundary of propriety has been crossed.

18 U.S.C. §1913 is a criminal statute and should be taken seriously. In addition, any specific allegation against White House staff members (Level IV and above) for violation of 18 U.S.C. §1913 potentially could trigger the "Special Prosecutors Act", 28 U.S.C. §591, et seq. The General Accounting Office is also authorized to undertake audits in this area, and any disallowed expenditures would have to be borne by the individual supervising the activity that resulted in the unauthorized use of government funds.

Because §1913 and the Appropriation rider have not often been interpreted it is difficult to be more specific in setting forth guidelines. Any difficult factual situation should be brought to the attention of this office before any action is taken.

POSSIBLE FEDERAL AGENCY ACTIVITIES RELATED TO LOBBYING OF CONGRESS

A. Self-initiated agency contacts with members/staff of Congress on behalf of the Administration's legislative program.

B. Direct persuasion of members/staff of Congress by Agency officials on the Administration's legislative program, in response to an explicit Congressional inquiry.

C. Agency officials offering political inducements to legislators in exchange for their support on elements of the Administration's program (e.g. promises of electoral help or support on unrelated legislation).

D. Agency preparation of any classification or characterization of voting records of individual members of Congress.

E. Agencies offering benefits such as free air travel and/or "wining and dining" of Congressional members or staff in connection with imparting information on activities of the agencies.

F. Congressional members or staff accepting benefits such as free air travel and/or "wining and dining" from agencies in connection with gaining information on activities of the agencies.

G. Administration spokespersons urging the public, through speeches, news releases, and by-line articles, to support elements of the Administration's legislative program.

H. Engaging any outside consultant to advise on legislative strategy or to lobby Congress on agency behalf.

I. Agencies requesting the voluntary lobbying help of certain private citizens, such as former officials of the agency.

J. Use of agency periodical publications to support legislative objectives, without giving the opposition's side of the story.

K. An on-going dialogue or interaction between agencies and outside groups in an educational effort to explain Administration positions on pending legislation, without directly urging the groups to contact Congress.

L. Cooperative or joint development of legislative strategies with outside interest or constituency groups.

M. Exchange of information between agencies and their constituency groups on legislative prospects and problems, which is not directly related to tactical lobbying decisions.

N. Agency advice or assistance to interest groups, grantees or contractors who independently express a desire to contact members of Congress on behalf of agency-supported legislation or appropriations.

O. Agency officals providing position papers on pending legislation to outside groups who then reproduce and distribute the material broadly.

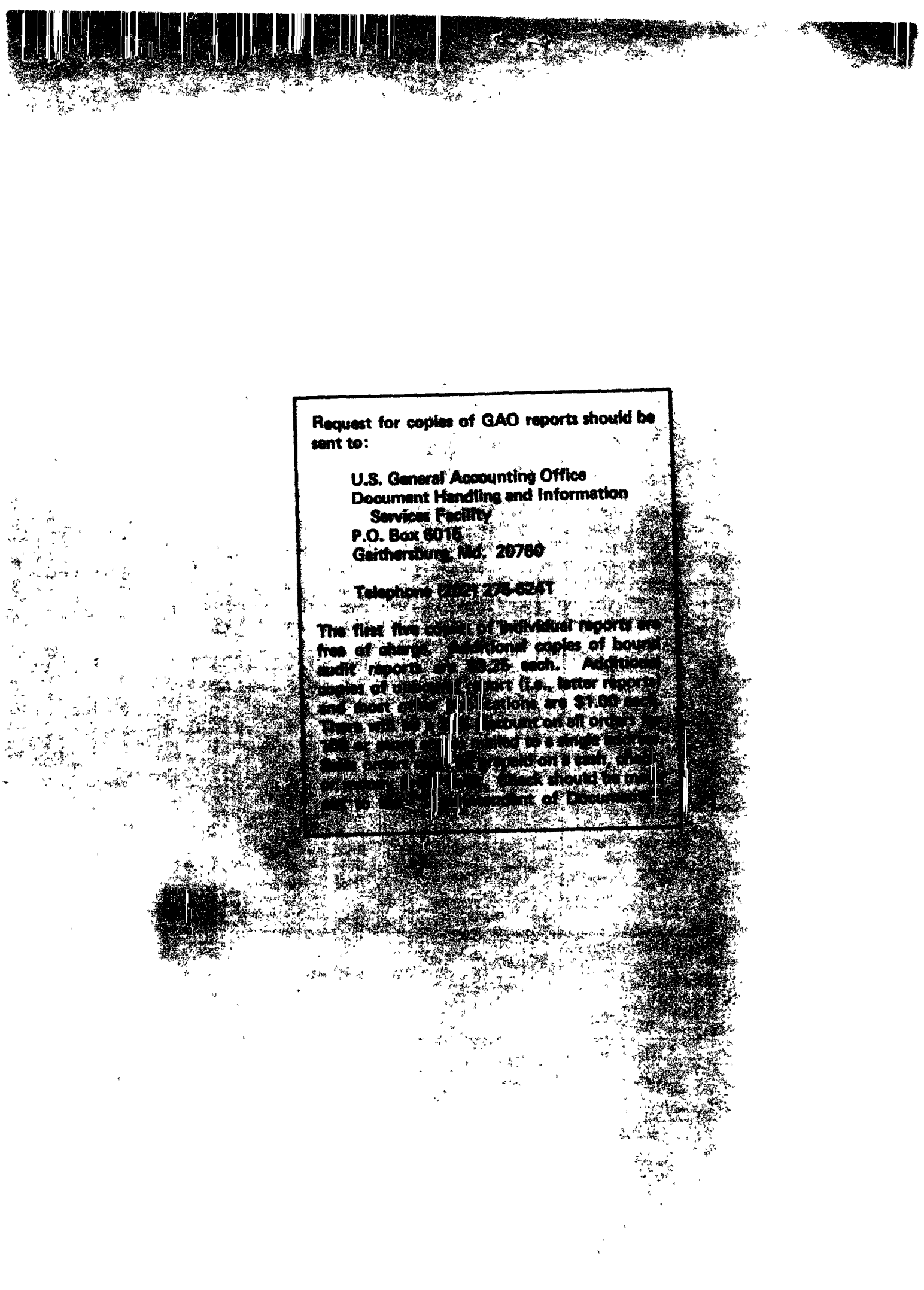
P. Presidentially-appointed officials making campaign appearances in support of Congressional candidates of the President's party.

Q. Agency officials departing from official Administration policy in private communications with representatives of Congress.

R. Agency officials' support of or participation in fundraising events for the benefit of organizations that engage in legislative lobbying.

S. Use of Executive Branch personnel as temporary staff to committees or members of Congress.

T. Agencies scheduling a conference in Washington at a time when Congress is considering legislation that is of special importance to the people invited to the conference.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