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United States General Accounting Office
Washington, DC 20548

B-301022

March 10, 2004

The Honorable Ron Paul
House of Representatives

Subject: Application of Anti-Lobbying Laws to the Office of National Drug Control
Policy's Open Letter to State Level Prosecutors

Dear Mr. Paul:

This responds to your letter dated April 2, 2003, requesting our opinion on whether statements made in a letter issued by the Deputy Director for State and Local Affairs, Office of National Drug Control Policy (ONDCP), violate applicable anti-lobbying provisions. Specifically, you ask that we determine whether a November 1, 2002, letter sent by the Deputy Director to various state level prosecutors in the United States violates the ban on spending funds for "publicity or propaganda." In addition, apart from considerations of whether any particular law has been violated, you ask whether the Deputy Director's letter disseminated misleading information in connection with statements relating to the debate over legalization of marijuana.

As discussed below, we conclude that the Deputy Director did not violate applicable anti-lobbying provisions. In addition, apart from considerations of whether any particular law has been violated, we do not have a basis for criticizing the Deputy Director's November 1, 2002, statements relating to the debate over legalization of marijuana. Even though the statements may have been controversial, they were made within the context of ONDCP's statutory responsibilities, which include taking such actions as necessary to oppose efforts to legalize certain controlled substances such as marijuana.¹

BACKGROUND

The Deputy Director's letter, dated November 1, 2002, is entitled "An Open Letter to America's Prosecutors." The letter was sent through the National District Attorneys Association (NDAA), with a cover letter from the NDAA President, to state level prosecutors who were members of NDAA. This letter states, in general, that the "serious drug problem in this country" could be exacerbated by "well-financed and

¹ See 21 U.S.C. §§ 1702(a)(1)-(2), 1703(b)(12).

deceptive campaigns to normalize and ultimately legalize the use of marijuana.” The letter, citing the role of prosecutors as indispensable in fighting the normalization of marijuana, further states that, among other things, prosecutors “can work with your legislators to update local laws impeding marijuana prosecutions and treatment.” The letter continues that “[o]ne of the best ways to make a difference is for local leaders—like you—to take a stand publicly and tell Americans the truth.” The letter provides seven statements relating to what it asserts is “the truth” about marijuana. The letter provides, in part, that (1) “[t]he truth is that marijuana is not harmless,” (2) “[t]he truth is that marijuana is addictive,” (3) “[t]he truth is that marijuana and violence are linked,” (4) “[t]he truth is that we aren’t imprisoning individuals for just ‘smoking a joint,’” (5) “[t]he truth is that marijuana is a gateway drug for many people,” (6) “[t]he truth is that marijuana legalization would be a nightmare in America,” and (7) “[t]he truth is that marijuana is not a medicine, and no credible research suggests that it is.” [Emphasis omitted.] The letter has two attachments that further elaborate on these and other marijuana-related issues: one attachment is entitled *Changing the Way Americans Think About Marijuana: Talking Points*, and the second is entitled *Summary of Counterarguments to Questions Concerning Marijuana Legalization*.²

ANALYSIS

Our analysis focuses on whether the Deputy Director’s actions were carried out in conformance with applicable appropriations act restrictions on the use of appropriated funds for lobbying purposes. Over the years, lobbying-related appropriations act restrictions have applied at different times to different agencies and have used different wordings with varying degrees of specificity. Two appropriations act anti-lobbying restrictions were applicable to ONDCP on November 1, 2002—the date of the Deputy Director’s open letter.³ Both of the anti-lobbying provisions apply government wide and appear in the Treasury and General Government Appropriations Act, 2002, in sections 623 and 626, respectively.⁴ The first of these two provisions, found at section 623 of the Treasury and General Government Appropriations Act, 2002, provides that:

“No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation *designed to support or defeat legislation pending before the Congress*,

² ONDCP has informally reported to us that appropriated funds were used with respect to the development and dissemination of the letter and attachments.

³ Anti-lobbying provisions in ONDCP’s fiscal year 2002 appropriations act are controlling in this instance. Although November 1, 2002—the date of the Deputy Director’s letter—is in fiscal year 2003, fiscal year 2002 appropriations act provisions were in effect through a series of Continuing Resolutions until ONDCP’s fiscal year 2003 appropriations act was enacted into law on February 20, 2003, in Pub. L. No. 108-7, 117 Stat. 11 (2003).

⁴ Pub. L. No. 107-67, 115 Stat. 514, 551, 552 (2001).

except in presentation to the Congress itself.” Pub. L. No. 107-67, 115 Stat. 514, 551 (2001). (Emphasis added.)

The language of section 623, by its terms, applies only with respect to communications aimed at influencing legislation pending before the Congress and does not apply to activity relating to legislation pending before state or local legislative bodies.⁵ Consequently, the Deputy Director’s appeal to prosecutors to work with legislators to “update local laws impeding marijuana prosecutions and treatment” is not subject to the restriction in section 623.⁶

The second applicable anti-lobbying appropriations act provision is contained in section 626 of the Treasury and General Government Appropriations Act, 2002, and provides that: “No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress.” Pub. L. No. 107-67, 115 Stat. 514, 552 (2001).⁷

We have held that the type of language contained in section 626 does not bar an agency’s legitimate informational activities. B-212069, Oct. 6, 1983. Public officials may report on the activities and programs of their agencies, may justify those policies to the public, and may rebut attacks on those policies. B-114823, Dec. 23, 1974. In the case at hand, ONDCP has statutory responsibilities for developing the national drug control policy, coordinating and overseeing its implementation and, most significantly, for taking “such actions as necessary to oppose any attempt to legalize the use of [certain controlled substances]” including marijuana.⁸ In our view, the

⁵ Unless an anti-lobbying restriction contained in a particular appropriations act specifically prohibits lobbying at the state level, the restriction applies to legislation pending before the United States Congress, not a state legislature. *See* B-193545, Mar. 13, 1979; B-193545, Jan. 25, 1979. *See also*, U.S. General Accounting Office, *Highway Safety: NHTSA’s Activities Concerning State Motorcycle Helmet Laws*, GAO/RCED-97-185R (Washington D.C.: June 25, 1997). Some appropriations act restrictions do specifically apply with respect to pending legislation at the state level. For example, section 503 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-116, 115 Stat. 2177, 2217, (2002), provides that: “No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or video presentation designed to support or defeat legislation pending before the Congress or any State legislature, except in presentation to the Congress or any State legislature itself.”

⁶ Like the provisions of section 623, 18 U.S.C. § 1913, which was a criminal provision at the time of the Deputy Director’s letter, prohibits certain lobbying activities at the federal level. At the time of the Deputy Director’s letter, section 1913 provided that no appropriated funds could be spent for communications or activities “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*,” and provided that violations are punishable by fines and imprisonment. (Emphasis added.)

⁷ We recognize that section 623 also contains a publicity and propaganda restriction. We need not decide for the purposes of this analysis whether these provisions are coextensive.

⁸ *See* 21 U.S.C. §§ 1702(a)(1)-(2), 1703(b)(12). Pursuant to 21 U.S.C. § 1712, the provisions relating to ONDCP found at Title 21, chapter 22 (21 U.S.C. §§ 1701-1711), were “repealed” effective September 30, 2003. There are two ONDCP reauthorization bills currently pending (H.R. 2086 and S.1860) that would extend the ONDCP termination date to September 30, 2008. However, ONDCP continues to operate pursuant to the Consolidated Appropriations Act, 2004 (Pub. L. No. 108-199, 118 Stat. 3 (2004)). The

Deputy Director's statements, even if controversial, were made within the context of ONDCP's statutory responsibility to oppose efforts to legalize certain controlled substances such as marijuana.⁹

We have also construed language similar to section 626 as prohibiting covert propaganda activities of an agency. *See* B-229257, June 10, 1988. Our decisions have defined covert propaganda as materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency.¹⁰ *See* B-229257, June 10, 1988; B-229069, 66 Comp. Gen. 707 (1987). A critical element of covert propaganda is the concealment of the agency's role in sponsoring such material. In the present case, ONDCP was clearly identified as the source of the letter and the attachment entitled *Changing the Way Americans Think About Marijuana: Talking Points*. While the second attachment, entitled *Summary of Counterarguments to Questions Concerning Marijuana Legalization*, does not identify ONDCP as its source, the document does not evidence any attempt to portray its contents as the ostensible position of parties outside the agency. In addition, the second attachment was included as part of a package with two other documents (a letter and one other attachment) that clearly identified ONDCP as their source. Therefore, there is no basis for concluding that the information in the Deputy Director's letter or attachments constitutes "covert propaganda."

Finally, apart from considerations of whether any particular law has been violated, you have asked whether the Deputy Director's letter disseminated misleading information in connection with statements relating to the debate over legalization of marijuana. Clearly, the Deputy Director's statements reflect one perspective regarding marijuana—a perspective that is disputed by others with different viewpoints. However, ONDCP is specifically charged with the responsibility for "taking such actions as necessary to oppose any attempt to legalize the use" of certain controlled substances such as marijuana¹¹—a responsibility which logically

act provides funding for fiscal year 2004 for necessary expenses of ONDCP, as well as for research activities pursuant to the ONDCP Reauthorization Act of 1998 (21 U.S.C. §§ 1701 *et seq.*).

⁹ In contrast, the "publicity or propaganda" restriction prohibits the use of appropriated funds solely for partisan purposes, and for publicity in which the "obvious purpose is 'self-aggrandizement' or 'puffery.'" *See, e.g.*, B-302504, Mar. 10, 2004. With respect to the prohibition on the use of appropriated funds solely for partisan purposes, the use of appropriated funds is improper only if the activity is "completely devoid of any connection with official functions" or completely "political in nature." B-147578, Nov. 8, 1962. With respect to self-aggrandizement, we have defined such term as "publicity of a nature tending to emphasize the importance of the agency or activity in question." B-212069, Oct. 1983 (quoting 31 Comp. Gen. 311 (1952)). The Deputy Director's letter and attachments do not constitute self-aggrandizement and they are not purely partisan, given that they were made in furtherance of ONDCP's statutory responsibilities.

¹⁰ *See, e.g.*, B-223098, Oct. 10, 1986, where we found "that editorials in support of a proposed reorganization of the Small Business Administration (SBA) prepared by SBA for publication as the ostensible editorial position of newspapers to which the editorials were submitted, were misleading as to their origin and reasonably constituted 'propaganda' within the common understanding of that term." 66 Comp. Gen. 707, 709 (1987).

¹¹ Under 21 U.S.C. § 1703(b)(12), ONDCP shall "take such actions as necessary to oppose any attempt to legalize the use of a substance (in any form) that—(A) is listed in schedule I of section 202 of the

could include the making of advocacy statements in opposition to legalization efforts.¹² The Deputy Director's statements about marijuana are thus within the statutory role assigned to ONDCP. Given this role, we do not see a need to examine the accuracy of the Deputy Director's individual statements in detail.¹³

CONCLUSION

The Deputy Director's November 1, 2002, letter cites the role of state level prosecutors as indispensable in fighting the normalization of marijuana and advises them, among other things, to "work with your legislators to update local laws impeding marijuana prosecutions and treatment." Because these statements are directed to legislative activities at the state level rather than the federal level, they are not subject to section 623 of ONDCP's fiscal year 2002 appropriations act (Public Law 107-67). In addition, because the Deputy Director's statements pertaining to marijuana were made within the context of ONDCP's statutory role as an opponent of efforts to legalize certain controlled substances such as marijuana, and because the package of materials identifies ONDCP as its source, there is no basis for concluding that the Deputy Director's letter and attachments violated section 626 of ONDCP's fiscal year 2002 appropriations act.¹⁴

The Deputy Director's letter further contains statements relating to the debate over legalization of marijuana. As discussed earlier, while the Deputy Director's statements pertaining to marijuana may be disputed by some with different viewpoints, they were made within the context of ONDCP's statutory responsibilities,

Controlled Substances Act (21 U.S.C. 812); and (B) has not been approved for use for medicinal purposes by the Food and Drug Administration." Marijuana currently meets these criteria as it is listed in schedule I of section 202 of the Controlled Substances Act and has not been approved for use for medicinal purposes by the Food and Drug Administration.

¹² ONDCP also has statutory responsibilities to develop the national drug control policy and to coordinate and oversee the implementation of the national drug control program. 21 U.S.C. § 1702(a)(1), (2). Within ONDCP, the Deputy Director is responsible for conducting activities intended to reduce the availability and use of drugs, including, among other things, (1) the coordination and facilitation of federal, state, and local law enforcement drug control efforts, (2) the promotion of coordination and cooperation among the drug supply reduction and demand reduction agencies of the various states, territories, and units of local government, and (3) such other cooperative governmental activities which promote a comprehensive approach to drug control at the national, state, territory, and local levels. 21 U.S.C. § 1702(b)(3)(C).

¹³ We note that the statements in the letter reflect the kinds of statements conventionally made against legalization of marijuana and are not without a base of support in the considerable body of research and study that has been done on both sides of the issues. For example, the debate on marijuana's medical effectiveness and some studies on the issue are described in U.S. General Accounting Office, *Marijuana: Early Experiences With Four States' Laws That Allow Use for Medical Purposes*, GAO-03-189 (Washington, D.C.: Nov. 1, 2002).

¹⁴ Letters similarly addressing marijuana-related issues were also disseminated to National Sheriffs' Association (NSA) members through the NSA's President as well as directly to the 98 United States Attorneys. The appropriation act anti-lobbying restrictions applicable to these two other letters are the same as those applicable to the Deputy Director's November 1, 2002, letter. Therefore, a similar analysis would apply. We note that the letter sent to the United States Attorneys does not urge the recipients to work with legislators, at any level of government, regarding laws relating to marijuana.

which include taking such actions as necessary to oppose efforts to legalize certain controlled substances such as marijuana.

Sincerely yours,

A handwritten signature in black ink that reads "Anthony H. Gamboa". The signature is written in a cursive style with a large initial 'A'.

Anthony H. Gamboa
General Counsel