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United States General Accounting Office
Washington, DC 20548

B-300192

November 13, 2002

The Honorable Robert C. Byrd
Chairman, Committee on Appropriations
United States Senate

Dear Mr. Chairman:

This responds to your letter of October 18, 2002, requesting our opinion on the effect of section 117 of Pub L. No. 107-229, 116 Stat. 1465 (September 30, 2002) (the fiscal year 2003 Continuing Resolution), as amended by section 4 of Pub. L. No. 107-240, 116 Stat. 1492 (October 11, 2002). Public Law 107-240 extended the fiscal year 2003 Continuing Resolution. For the reasons explained below, we conclude that, under section 117, agencies are prohibited from using any funds to implement the Office of Management and Budget (OMB) Memorandum M-02-07 (hereafter, Memorandum),[1] including private sector printing, and no funds are available to pay for the printing of the President's Budget other than through the Government Printing Office (GPO). Failure to abide by section 117 would constitute a violation of the Antideficiency Act.

Background

For more than a decade there has been a continuing dispute between the Congress and the executive branch concerning the application of the laws governing the acquisition of printing by the departments and agencies of the executive branch.[2] To date, the dispute has focused on essentially two statutes--44 U.S.C. § 501 and section 207 of the Legislative Branch Appropriations Act, 1993, Pub. L. No. 102-392, 106 Stat. 1703, 1719 (1992), as amended by Pub. L. No. 103-283, 108 Stat. 1423, 1440 (1994) (reproduced at 44 U.S.C. § 501 note) (hereafter, section 207). Reduced to its essence,

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[1] Procurement of Printing and Duplicating through the Government Printing Office, Memorandum from Mitchell E. Daniels, Jr., Director, OMB, to Heads of Executive Departments and Agencies, May 3, 2002.

[2] See, e.g., Public Printing Reform: Issues and Actions, CRS 98-687 GOV (May 10, 2002) (contains a summary of the longstanding dispute).

section 501 of title 44 of the United States Code requires that all printing for the executive departments and independent offices and establishments of the government be done through the GPO. In 1992, in section 207, Congress reinforced the policy embodied in 44 U.S.C. § 501 by enacting a specific restriction on the use of funds appropriated for any fiscal year for the procurement of any printing of government publications other than by or through the GPO.

On May 3, 2002, the Director of OMB issued Memorandum M-02-07 to heads of executive departments and agencies encouraging them to acquire printing from sources other than GPO. The Memorandum relies specifically on a 1996 Department of Justice, Office of Legal Counsel (OLC) opinion, 20 Op. Off. Legal Counsel 214 (1996), for the proposition that Congress may not constitutionally require federal agencies to go through GPO to obtain printing services. Id. In the words of the OLC opinion, 44 U.S.C. § 501 and section 207 "violate constitutional principles of separation of powers," because, in OLC's opinion, the GPO is subject to congressional control and performs executive functions. Accordingly, OLC concluded that 44 U.S.C. § 501 and section 207 are "unconstitutional and, therefore, inoperative," id. at 226, and "executive branch departments and agencies are not obligated to procure printing by or through the GPO." Id. at 221.

The OMB Memorandum M-02-07 announces that executive departments and agencies should not be "required" to procure printing through GPO and advises agencies to select printing and duplicating service based on best quality, cost, and time of delivery. OMB Memorandum M-02-07 at 3. The Memorandum does not object to executive agencies' use of GPO printing services: "If GPO can provide a better combination of quality, cost, and time of delivery, . . . then Executive Branch departments and agencies should continue to use GPO printing services." Id. The Memorandum specifies, however, that "[w]henever the private sector can provide the better combination of quality, cost, and time of delivery, the department or agency should contract with the private sector." Id. In addition, the Memorandum's guidelines allow for in-house printing and require annual reporting of agency printing and duplicating costs. Id.

On October 11, 2002, Congress enacted Pub. L. No. 107-240, 116 Stat. 1492 (October 11, 2002), section 4 of which amended section 117 of Pub. L. No. 107-229, 116 Stat. 1465 (September 30, 2002).[3] Section 117, as amended, is straightforward. In subsection (a), Congress "finds" that 44 U.S.C. § 501 and section 207(a) require all government printing to be done by and through GPO (except as those provisions

[3] As first enacted on September 30, section 117 provided that "[n]one of the funds made available under this Act, or any other Act, shall be used by an Executive agency to implement any activity in violation of section 501 of title 44, United States Code."

provide otherwise). Subsection (b) consists of two paragraphs that restrict the use of any funds appropriated through the continuing resolution for fiscal year 2003, Pub. L. No. 107-229, as amended, or any other act. Paragraph (1) prohibits the use of appropriated funds to implement or comply with OMB Memorandum M-02-07. Paragraph (2) is narrowly drawn to prohibit the use of any appropriated funds "to pay for the printing (other than by the [GPO]) of the budget of the United States Government submitted by the President of the United States under [31 U.S.C. §1105]."[4]

By letter dated October 18, 2002, you asked for our opinion on the effect of section 4 of Pub. L. 107-240, as it amended section 117 of Pub. L. 107-229, focusing specifically on sections 117(b)(1) and (b)(2). Pursuant to our standard practice, we asked OMB for its views on the effect of section 117. Letter from Susan A. Poling, Associate General Counsel, General Accounting Office, to Philip J. Perry, General Counsel, OMB, October 23, 2002. In its response of October 29, 2002, OMB reiterated its reliance on the 1996 OLC opinion noted above and referred also to an October 22, 2002, OLC memorandum.[5] Letter from Philip J. Perry, General Counsel, OMB, to Anthony H. Gamboa, General Counsel, General Accounting Office, and Susan A. Poling, Associate General Counsel, General Accounting Office, October 29, 2002.[6] Although the October 2002 OLC memorandum concludes that section 117 violates separation of powers, it does so by relying on the 1996 OLC opinion's analysis of

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[4] Section 1105 of title 31, U.S. Code, requires the President, on or after the first Monday in January but no later than the first Monday in February of each year, to submit to the Congress a proposed budget for the U.S. government for the following fiscal year.

[5] Constitutionality of Pub. L. 107-240, Which Purports To Require the Executive Branch To Procure Virtually All Printing Needs Through the Government Printing Office, Memorandum from Sheldon Bradshaw, Deputy Assistant Attorney General, Office of Legal Counsel, to Adam F. Greenstone, General Counsel, Office of Administration, Executive Office of the President, October 22, 2002 (hereafter, October 2002 OLC opinion).

[6] As part of its justification, OMB made a policy-based argument that the executive branch would achieve certain economies by considering private sector sources for its printing needs. The Comptroller General in February 2000 testimony before the Senate Committee on the Budget (GAO/T-AIMD-00-73, Feb. 1, 2000) identified various policy factors for the Congress to consider in deciding whether to authorize executive agencies to contract with private sector vendors for their printing needs. This legal opinion does not address policy considerations, or the operations and control of GPO.

44 U.S.C. § 501 and section 207; it does not independently analyze the language of section 117.

Discussion

We start with the recognition that it is neither our role nor our province to opine on or adjudicate the constitutionality of legislation passed by Congress and signed by the President. B-215863, July 26, 1984; B-248111.2, Apr. 15, 1993. Such laws come to us with a heavy presumption in favor of their constitutionality.[7] Like the courts, we construe statutes narrowly to avoid constitutional issues. INS v. St. Cyr, 533 U.S. 289, 299 n. 12 (2001). Given our authority to settle and audit the accounts of the government, 31 U.S.C. §§ 3526, 3523, 712, we will apply the laws as we find them absent a controlling judicial opinion that such laws are unconstitutional. B-215863, July 26, 1984; B-248111.2, Apr. 15, 1993.

Turning to the language of section 117, as amended, we find it clear and unambiguous. As noted earlier, section 117(b)(1) prohibits the use of any "funds appropriated under this joint resolution [the fiscal year 2003 continuing resolution] or any other Act" to "implement or comply with [OMB] Memorandum M-02-07 . . . or any other memorandum or similar opinion reaching the same, or substantially the same, result as such memorandum." OMB has not raised any construction or interpretive issues concerning the plain import of the language of section 117(b)(1). In our opinion, section 117(b)(1) provides that OMB may not use any appropriated funds to implement its memorandum, and that no executive department or agency may use appropriated funds to acquire printing services in accordance with the guidance provided in the memorandum. Consequently, the effect of section 117(b)(1) is that executive branch departments and agencies may not contract with private sector sources for printing except as otherwise specifically provided by law.

Section 117(b)(2) specifically targets the President's annual budget proposal required by 31 U.S.C. § 1105 to be submitted to the Congress in January or February of each year, and precludes the use of funds appropriated in the continuing resolution for fiscal year 2003 or any other act to pay for its printing other than by GPO. Again, like section 117(b)(1), the language of section 117(b)(2) is clear and unequivocal–no funds may be drawn from the Treasury to pay any source other than GPO for the cost of printing the President's budget. The effect of section 117(b)(2) is to require the President to make a choice: if he elects to have his budget printed, he must use GPO; if he chooses not to use GPO's printing services, he must submit his budget to Congress without engaging a printer to produce it since no funds are available for

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[7] DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988). See also INS v. Chadha, 462 U.S. 919, 944 (1983) (The Court, in addressing a law's constitutionality, said, "We begin, of course, with the presumption that the challenged statute is valid.").

that purpose. Because OMB, in its Memorandum, permits executive agencies to use GPO's printing services when GPO is the most efficient and cost-effective option, Memorandum M-02-07 at 3, OMB does not find it unconstitutional for executive agencies on a voluntary basis to use GPO as a source of supply for their printing needs.

It is, we think, too well established to require much discussion that the Constitution grants to the Congress the power to appropriate the resources of the government. U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); art. I, § 8, cl. 18 (the "necessary and proper" clause). Equally clear is that the Congress may restrict, condition, or limit the executive branch's use of appropriations,[8] including the use of funds for particular purposes, consistent with the Constitution.[9] There is no constitutional imperative that requires a presidential budget, let alone a printed one.[10] Accordingly, section 117 represents Congress' judgment not to authorize the use of appropriated funds for printing the budget other than by or through GPO.[11]

OLC and OMB have advised contracting, certifying, and disbursing officers of the government that, given their view of the constitutionality of the statutory provisions

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[8] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Oklahoma v. Schweiker, 655 F.2d 401, 406 (D.C. Cir. 1946); National Treasury Employees Union v. Devine, 733 F.2d 114 (D.C. Cir. 1984).

[9] United States v. Dickerson, 310 U.S. 554 (1940). Accord United States v. Lovett, 328 U.S. 303, 313-14 (1946) (appropriation restriction violating Constitution's bar on Bills of Attainder was an improper exercise of congressional appropriations power).

[10] Article I, § 9, cl. 7, envisions that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." This provision, found in the article of the Constitution that delineates the legislative powers of the Congress, clearly is not a grant of authority to the President, but a requirement that can be effectuated only by the Congress in an exercise of its legislative powers. See generally Kate Stith, Congress' Power of the Purse, 1988 Yale L. J. 1343, 1357 (1988); 2 M. Farrand, The Records of the Federal Convention of 1787 at 618-19 (1911).

[11] We previously addressed whether agencies procuring printing services contrary to the mandates of 44 U.S.C. § 501 and section 207 could pay contractors who performed the printing, and concluded that agencies could not. In a 1994 opinion to the Chair, Joint Committee on Printing, we concluded that "section 207 prohibits an executive agency from paying a contractor for services procured directly by the agency either on a contractual basis or under the equitable doctrine of quantum meruit." B-251481.4, Sept. 30, 1994. We see no reason to change our position today.

at issue, these administrative officials need not fear risk of prosecution.[12] We do not decide the validity of the position of the executive branch that the President, under his constitutional duty "to take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, may conclude that a duly enacted statute is "unconstitutional and therefore, inoperative." 20 Op. Off. Legal Counsel at 226.[13] However, federal courts have criticized such a position. Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), rev'd en banc, 893 F.2d 205 (9th Cir. 1989, as amended Jan. 10, 1990); Ameron, Inc. v. United States Army Corps of Engineers, 787 F.2d 875, 889 (3d Cir. 1986) ("The claim of right for the President to declare statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend them in court, statutes which he regards as unconstitutional, is dubious at best."). These opinions are not isolated judicial anomalies, unsupported by prior precedent. As early as 1838, the Supreme Court in Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 613 (1838), observed that "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."[14]

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[12] October 2002 OLC Opinion; 20 Op. Off. Legal Counsel 214 (1996). See generally OMB Memorandum M-02-07, May 3, 2002.

[13]On another occasion, Assistant Attorney General Walter Dellinger, the signator of the 1996 OLC opinion, had this to say when asked if the President would tell the Defense Department not to enforce a provision of the 1996 Defense authorization act that the President believed was unconstitutional:

> "When the President's obligation to execute laws enacted by Congress is in tension with his responsibility to act in accordance with the Constitution, questions arise that really go to the very heart of the system. And the President can decline to comply with the law, in our view, only where there is a judgment where the Supreme Court has resolved the issue."

http://clinton6.nara.gov/1996/02/1996-02-09-quinn-and-dellinger-briefing-on-hiv-provision.html (emphasis added).

[14] See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). See generally Arthur S. Miller, The President and Faithful Execution of the Laws, 40 Vand. L. Rev. 389, 398 (1987) ("To 'execute' a statute . . . emphatically does not mean to kill it. Execution means implementation."); Eugene Gressman, Take Care, Mr. President, 64 N.C. L. Rev. 381, 382 (1986) ("[O]nce a bill has passed through all the constitutional forms of enactment and has become a law, perhaps even over a presidential veto grounded on constitutional objections, the President has no option under article II but to enforce the measure faithfully.").

Antideficiency Act

Under the Antideficiency Act, an officer or employee of the U.S. government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation. 31 U.S.C. § 1341. If Congress has not appropriated funds for a particular purpose, or has specifically prohibited a use of appropriated funds, we view any obligation for that purpose as in excess of the amount available. 71 Comp. Gen. 402 (1992); 62 Comp. Gen. 692 (1983); 60 Comp. Gen. 440 (1981). In the absence of an appropriation, executive officers and employees may not draw funds from the Treasury to effectuate an otherwise authorized purpose.[15] If an agency does so, it has violated the Antideficiency Act. Id. Officers and employees who violate the Act are subject to adverse personnel actions and, possibly, criminal penalties. 31 U.S.C. §§ 1349, 1350. Certifying and disbursing officers who certify and make payments in excess of available amounts are personally liable for, and must repay to the government, the amounts of those payments. 31 U.S.C. §§ 3322(a), 3527(c), 3528(a).

Section 117 establishes that an agency that obligates funds to acquire printing from some source other than GPO would violate the Antideficiency Act. Agencies must report violations to the President and the Congress. 31 U.S.C. § 1351. Consistent with our longstanding practice, when we learn of an unreported violation, and the agency, after notification of its failure to report, fails to do so, we will report the violation to Congress. We also will continue to refer cases to the Department of Justice where Justice Department enforcement of the Act or of debt collection processes is appropriate.

Conclusion

The legal effect of section 117 is clear--section 117 precludes the use of appropriated funds to implement or comply with Memorandum M-02-07, or to print the President's budgets other than through GPO. An administrative action contrary to section 117 constitutes a violation of the Antideficiency Act, and will result in certifying and disbursing officer liability.

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[15] In re: Oliver L. North (George Fee Application), 62 F.3d 1434, 1435-36 (D.C. Cir. 1994) ("However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his power, -- it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power."). See also, Babbitt v. Oglala Sioux Tribal Public Safety Dept., 194 F.3d 1374, 1380 (Fed. Cir. 1999) (government could not pay contractor's claim when payment of the claim is contrary to a statutory appropriation).

This opinion focuses on the legal effect of subsection 117(b). Whether it is appropriate to require departments and agencies to use GPO in circumstances where it may not make business sense is a wholly separate matter, beyond the scope of this opinion. Indeed, this is a policy matter for resolution by our elected officials. If you have any questions about this opinion, please contact me or Susan A. Poling, Managing Associate General Counsel, at 202-512-5400. We are sending copies of this opinion to interested congressional committees as well as OMB and the Justice Department. The letter will be available on GAO's web site at http://www.gao.gov.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel