

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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January 17, 2018

Mr. Eric D. Hargan
Acting Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Mr. Hargan:

The Committee on Science, Space, and Technology is conducting oversight of Linda Birnbaum's activity as it relates to an editorial entitled, *Regulating toxic chemicals for public and environmental health*,¹ published by the Public Library of Science (PLOS). This editorial is part of a series of editorials entitled, Challenges in Environmental Health: Closing the Gap between Evidence and Regulations Collection.² The Committee is concerned that Birnbaum may be violating anti-lobbying rules given that the editorial encourages citizens to petition government officials to make policy decisions in line with the views depicted within.

The Anti-Lobbying Act forbids executive branch employees to lobby Congress using federal dollars.³ In 1989, the Office of Legal Counsel (OLC) within the U.S. Department of Justice issued guidelines to help the Attorney General and executive branch agencies understand what actions are prohibited under the Act. According to the guidelines, the Act is meant to apply to "grass roots" lobbying "designed to encourage members of the public to pressure Members of Congress" on legislative matters.⁴ Specifically, "grass roots" was interpreted to mean

¹ Linda S. Birnbaum & Liza Gross, *Regulating toxic chemicals for public and environmental*, PLoS Biol 15(12): e20004814 (2017).

² *Id.*

³ 18 U.S.C. § 1913 (2012).

⁴ Memorandum Opinion to Attorney Gen. Richard L. Thornburgh from the Assistant Attorney Gen. William P. Barr on Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts (Sept. 28, 1989).

“communications by executive officials directed to members of the public at large, or particular segments of the general public, intended to persuade them in turn to communicate with their elected representatives on some issue of concern to the executive.”⁵

In 1995, OLC issued a memorandum that further enumerated prohibitions and allowances under the Act. The memorandum referenced the Comptroller General’s interpretation, which construed the Act as being triggered any time there are “explicit requests for citizens to contact their representatives in support of or opposition to legislation.”⁶ Therefore, agencies may place greater restrictions to executive officials beyond just grass roots campaigning in order to “err on the side of caution.”⁷

The U.S. Department of Health and Human Services (HHS) Office of the General Counsel, Ethics Division, established supplementary guidelines. A recommendation on the website states that department officials should not make statements like, “contact your congressional representatives in support of the Administration’s position,” or “urge the members of your organization to contact Congress.”⁸ Additionally, HHS indicated that government employees may not “prepare editorials . . . that will be disseminated without an accurate disclosure of the government’s role in their origin.”⁹

The Committee is concerned that Birnbaum’s role as an author in the PLOS editorial may go against the Anti-Lobbying Act and the interpretation guidelines issued by OLC and HHS. The editorial states that “closing the gap between evidence and policy will require that engaged citizens, both scientists and nonscientists, work to ensure our government officials pass health-protective policies[.]”¹⁰ Birnbaum, an executive branch employee, urges citizens to reach out to government officials, or members of Congress, to push the agenda laid out in this and the other editorials in the series. This communication does exactly what the Anti-Lobbying Act prohibits: it targets the general public to persuade citizens to communicate certain issues to elected representatives.¹¹

⁵ Memorandum Opinion to Attorney Gen. Richard L. Thornburgh from the Assistant Attorney Gen. William P. Barr on Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts n.6 (Sept. 28, 1989) (on file with the U.S. Dept. of Justice).

⁶ Memorandum to Attorney Gen. Janet Reno from Assistant Attorney Gen. Walter Dellinger on Anti-Lobbying Act Guidelines (April 14, 1995) (on file with the U.S. Dept. of Justice).

⁷ *Id.*

⁸ HEALTH AND HUMAN SERVICES OFFICE OF THE GENERAL COUNSEL, *Lobbying and Publicity or Propaganda Guidelines* (Feb. 19, 2013), <https://ethics.od.nih.gov/topics/Lobby-Publicity-Guide.htm>.

⁹ National Institutes of Health, *Lobbying Activities* (Feb. 19, 2013), <https://ethics.od.nih.gov/topics/lobbying.htm>.

¹⁰ Birnbaum, *supra* note 1.

¹¹ Memorandum Opinion, *supra* note 5.

An executive branch employee may, however, participate in lobbying activities on their own, personal time.¹² This exception is limited and employees “may not use their government computer, phone, fax or other supplies” in this activity.¹³ Additionally, HHS requires that even if on personal time, an employee must clearly indicate that “views expressed are those of the employee or others and do not necessarily reflect the position of the individual's employing agency.”¹⁴ Birnbaum’s contact on the editorial is her official NIEHS email¹⁵ and in no way did she indicate that these opinions were her own and not part of her work with NIEHS.

The Committee has a responsibility to ensure that executive branch employees are not participating in dissemination of science that is undermined by violations of the Anti-Lobbying Act and its corresponding guidelines. To understand the extent of Birnbaum’s lobbying activity while working on the PLOS editorial, please provide all documents and communications regarding the PLOS collection of articles. We ask that you provide this information no later than January 31, 2018.

The Committee has jurisdiction over environmental and scientific research and development programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X. This request and any documents created as a result of this request will be deemed congressional documents and property of the House Science Committee.

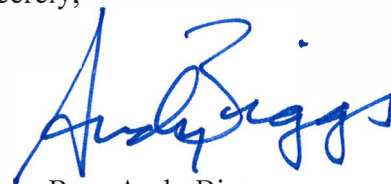
When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter provides additional information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,



Rep. Lamar Smith
Chairman
Committee on Science,
Space, and Technology



Rep. Andy Biggs
Chairman
Subcommittee on
Environment

¹² National Institutes of Health, *supra* note 9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Birnbaum, *supra* note 1.

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cc: The Honorable Eddie Bernice Johnson, Ranking Member, House Committee on Science,
Space, and Technology
The Honorable Suzanne Bonamici, Ranking Member, Subcommittee on Environment
