

# Congress of the United States House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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January 17, 2018

The Honorable Daniel R. Levinson  
Inspector General  
U.S. Department of Health and Human Services  
330 Independence Avenue, S.W.  
Washington, DC 20201

Dear Inspector General Levinson:

The Committee on Science, Space, and Technology is conducting oversight of an editorial co-written by Linda Birnbaum, the director of the National Institute of Environmental Health Sciences (NIEHS) within the U.S. Department of Human Services (HHS).<sup>1</sup> The editorial, *Regulating toxic chemicals for public and environmental health* was published by the Public Library of Science (PLOS) as part of a series of editorials.<sup>2</sup> In it, Birnbaum encourages citizens to petition the government to make certain policy decisions. The Committee suspects this activity may be a violation of the Anti-Lobbying Act.<sup>3</sup>

According to the Anti-Lobbying Act, no congressional funds may be used to “pay for any . . . printed or written matter . . . intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation . . . before or after the introduction of any bill. . . [or] policy.”<sup>4</sup> In 1989, in order to provide further clarity, the Office of Legal Counsel (OLC) within the U.S. Department of Justice issued further guidelines. According to the OLC, the Act applies to “grass roots” lobbying, meaning all “communications by executive officials directed to members of the

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<sup>1</sup> National Institute of Environmental Health Sciences, *Director* (March 2, 2017), <https://www.niehs.nih.gov/about/od/director/index.cfm>.

<sup>2</sup> Linda S. Birnbaum & Liza Gross, *Regulating toxic chemicals for public and environmental*, PLoS Biol 15(12): e20004814 (2017).

<sup>3</sup> 18 U.S.C. § 1913 (2012).

<sup>4</sup> *Id.*

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.”<sup>5</sup>

Then in 1995, OLC issued a memorandum suggesting that agencies that wish to “err on the side of caution” may choose to place additional restrictions on what constitutes lobbying.<sup>6</sup> HHS established such supplementary guidelines. The Office of the General Counsel, Ethics Division, indicates on the HHS webpage that executive employees should not make statements such as, “[c]ontact your congressional representatives in support of the Administration’s position,” or “[u]rge the members of your organization to contact Congress.”<sup>7</sup> 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.”<sup>8</sup>

The PLOS editorial that Birnbaum co-wrote makes a statement similar to those prohibited by the HHS Ethics Division. She writes 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[.]”<sup>9</sup> As an executive branch employee, she is restricted by both the Anti-Lobbying act and the additional HHS ethics guidelines from participating in such lobbying activities. She is prohibited to pressure citizens to contact their government representatives to favor or oppose any policy, even before the introduction of an actual piece of legislation.<sup>10</sup>

Although HHS ethics guidelines allow for lobbying by government employees in certain cases, Birnbaum’s activities do not fall into this narrow exception. An executive branch employee may lobby in their personal time as long as no “government computer, phone, fax or other supplies,” are used.<sup>11</sup> Additionally, employees must clearly state that “views expressed are those of the employee or others and do not necessarily reflect the position of the individual’s employing agency.”<sup>12</sup> Not only did Birnbaum fail to clearly distinguish her personal views from that of NIEHS, she also used her official work email as her contact.<sup>13</sup>

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<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> 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>.

<sup>8</sup> National Institutes of Health, *Lobbying Activities* (Feb. 19, 2013), <https://ethics.od.nih.gov/topics/lobbying.htm>.

<sup>9</sup> Birnbaum, *supra* note 2.

<sup>10</sup> 18 U.S.C. § 1913 (2012).

<sup>11</sup> National Institutes of Health, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> Birnbaum, *supra* note 2.

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In light of issues raised by the Committee of Linda Birnbaum's potential violations of the Anti-Lobbying Act and its corresponding guidelines, we request that your office analyze these concerns to determine whether it is appropriate to launch a full scale review of the situation. Please contact Committee Staff at 202-225-6371 to provide an update 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.

Thank you for your attention to this matter. We look forward to hearing from you.

Sincerely,



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



Rep. Andy Biggs  
Chairman  
Subcommittee on  
Environment

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