

MICHAEL F. DiMARIO

PUBLIC PRINTER

**PREPARED STATEMENT BEFORE THE
COMMITTEE ON RULES AND ADMINISTRATION
U.S. SENATE
ON
PROPOSED REVISIONS TO TITLE 44, U.S. CODE**

THURSDAY, APRIL 24, 1997
ROOM 301, RUSSELL SENATE OFFICE BUILDING
9:30 A.M.

Mr. Chairman, Senator Ford, and Members of the Committee on Rules and Administration, thank you for inviting me here this morning to provide comments on proposed revisions to Title 44, U.S. Code. From the outset, Mr. Chairman, I want to commend you for the high level of interest you are giving to protecting public access to Government information. In previous hearings on public access and on the Government Printing Office (GPO), held before this Committee last July and before the Joint Committee on Printing (JCP) in March, you conveyed your deep interest in this important issue as well as your determination to effect needed changes. I know that Senator Ford as Ranking Member also shares a deep concern for protecting public access from my experience in working with him as the previous Chairman of this Committee. In addition, I appreciate the process of consultation that has been conducted by the staff director of the JCP, Mr. Eric Peterson, in preparing the proposed revisions to Title 44.

I support the Title 44 revision objectives that you are pursuing: (1) resolving the constitutional separation of powers issue; (2) establishing an effective and enforceable compliance mechanism; (3) ensuring public access to taxpayer-supported information as well as preserving and protecting the Federal Depository Library Program (FDLP); and (4) ensuring that both Title 44 and the FDLP can continue to operate effectively in this era of changing information technologies. I have been involved in these issues and efforts to resolve them for many years.

I think the process that so far has resulted in the unnumbered draft bill known as the "Government Printing Office Act of 1997" is a positive beginning. However, I strongly believe that this draft will need several changes and a great deal of further development before I could support it as a sound and effective approach to the resolution of our jointly held concerns. My statement today outlines these changes, and I look forward to working closely with you to develop the necessary legislative language.

Separation of Powers. In my view, the transfer of JCP authorities to the Public Printer, who would exercise them as a Presidential appointee, would resolve the problem of congressional control over executive branch printing. The transfer of GPO to the executive branch in any form is neither necessary nor desirable if Congress wishes to continue ensuring cost-effectiveness and efficiency in Government printing as well as comprehensive and equitable public access to taxpayer-supported information.

The 1996 memorandum opinion of the Justice Department's Office of Legal Counsel (OLC) to the General Services Administration (GSA) appears to be the basis of the proposal to transfer GPO to the executive branch (Memorandum for Emily C. Hewitt, General Counsel, General Services Administration, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Government Printing Office Involvement in Executive Branch Printing, May 31, 1996). Yet without exception, for twelve years prior to this opinion the OLC had taken the far more limited position that the separation of powers problem lies in the statutes authorizing direct JCP control over executive branch printing (Memorandum for William H. Taft IV, Deputy Secretary of Defense, Department of Defense, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: Effect of INS v. Chadha on 44 U.S.C. 501, "Public Printing and Documents", March 2, 1984; Memorandum for Michael J. Horowitz, Counsel to the Director, Office of Management and Budget, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: Constitutionality of Proposed Regulations of Joint Committee on Printing under Buckley v. Valeo and INS v. Chadha, April 11, 1984; and Memorandum for Michael J. Horowitz, Counsel to the Director, Office of Management and Budget, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: Government Printing, Binding, and Distribution Policies and Guidelines of the Joint Committee on Printing, August 21, 1984).

Before 1996, the OLC only once addressed the constitutionality of GPO operations themselves. In 1993, the OLC opined that the statutory requirement that no appropriated funds may be used by executive branch agencies to procure the production of any Government publication except through GPO, found in section 207 of the Legislative Branch Appropriations Act for FY 1995,

...does not violate the separation of powers by delegating executive authority to the GPO...It does not give the GPO the authority to refuse to print any materials, but merely requires that printing be procured "by and through" the GPO. Moreover, because 44 U.S.C. 1101 provides that "the Public Printer shall execute such printing and binding for the President as he may order and make requisition for," the executive branch retains its ability to ensure that materials are printed. (Memorandum for Emily C. Hewitt, General Counsel, General Services Administration, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: General Services Administration Printing Operations, September 13, 1993; this principle was reaffirmed in Memorandum for Emily C. Hewitt, General Counsel, General Services Administration, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Reconsideration of September 13, 1993, Opinion, March 11, 1994.)

Since the *Chadha* decision, many observers thought that any constitutional challenge to the validity of the JCP's control would result in severing those provisions from the statute, and that the rest of Title 44 covering GPO would stand. I suggested in statements before this Committee in 1994 and last July, and before the House Oversight Committee in 1995, that a transfer of JCP authorities to the Public Printer offered a workable solution to the problem.

In 1996, the OLC stated for the first time that GPO's "extensive control" over executive branch printing violates the separation of powers. Why did the OLC change its mind after twelve years? I don't know, but it is clear that the 1996 opinion underscored the goal of the National Performance Review (NPR) to allow the executive branch to establish its own printing policy.

As I stated before this Committee last July, I think the OLC's 1996 opinion was wrongly decided. GPO has no "extensive control" over executive branch printing. As the OLC itself stated, GPO has no veto authority over executive branch work. Instead, GPO handles executive work in a purely ministerial capacity. Under Title 44, we cannot refuse to fulfill an executive branch requisition for printing, and we have no control over the editorial or information content of executive branch publications. Our job is only to ensure that printing requisitions are fulfilled in the most economical and timely manner possible, and to provide for the cost-effective, comprehensive, and equitable dissemination of Government information to the public through information products obtained with GPO funds. These functions are performed under the authority of the Public Printer who, like many officers in the executive branch, is appointed by the President and confirmed by the Senate and serves solely at the pleasure of the President.

I believe that the source of the problem is not *where* GPO is located in the Government's organization chart. GPO has operated effectively in its current location for more than a century. The issue instead is the entanglement of the JCP's control with GPO operations under several provisions of Title 44. The OLC's 1996 opinion stated as much when it said, "the constitutional doctrine of separation of powers forbids Congress from vesting non-legislative functions -- specifically, in the case of your inquiry, executive functions -- in the GPO *if Congress retains control over the GPO*" (p. 9, emphasis added). In a recent letter to the Chairman conveying responses to questions for the record submitted by this Committee to the Justice Department following the hearing last July, the Department again made the claim that "the Constitution prohibits Congress from vesting an entity *over which Congress has control* with executive functions," and went on to itemize specifically those controls that it finds objectionable. Each one pertains to statutory controls exercised by the JCP over GPO (Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to the Honorable John W. Warner, Chairman, Committee on Rules and Administration, U.S. Senate, April 7, 1997, response to question 2, emphasis added).

The question remains, then, whether the satisfactory resolution of the separation of powers issue lies in the targeted, surgical removal of the offending provisions of the current statute through the transfer of JCP authorities to the Public Printer, or whether a wholesale transfer of GPO to the executive branch is necessary or even desirable. Transferring JCP authorities to the Public Printer would leave intact the operational requirements for GPO, including the requirement in 44 U.S.C. 501 that all Government printing be performed through GPO as well as the enforcing mechanism in section 207 of the 1995 Legislative Branch Appropriations Act. The disadvantages of the proposal to transfer GPO to the executive branch, on the other hand, are potentially significant.

First, if the proposition is accepted that in order to be constitutional GPO must be transferred to the executive branch, the legislative and judicial branches will immediately be provided with a constitutional pretext for withdrawing their work from GPO. The costs of establishing separate production or procurement entities for each of these branches would be significant, and it would erect new barriers to public access to congressional and judicial information through GPO's programs. I am especially uncertain that Congress could or would continue to depend on an executive branch agency for its printing needs, and I recall that a proposal to transfer GPO to the executive branch in the 103rd Congress was quickly amended to retain it in its current location.

In a redrawn Title 44 which simply transfers current JCP authorities to the Public Printer, this issue would be avoided. If the sense is that, once the constitutional problem with JCP control is removed, executive branch agencies will not come to GPO in its current location simply because they do not like cooperating with a centrally managed information production, procurement, and dissemination authority, transferring GPO to the executive branch itself would not make any difference.

Second, I seriously doubt whether GPO can be reconstituted in the executive branch with sufficient protections to prevent its control by the Office of Management and Budget (OMB), an agency which has not always had a strong record of commitment to comprehensive and equitable public access to taxpayer-supported information and to the cost-effective production and procurement of Government information products.

I have commented several times before this Committee, the House Oversight Committee, the JCP, and our Appropriations Committees on the costs and public access problems posed by the proliferation of agency printing operations, a situation that OMB has taken no interest in correcting despite the ability to do so through policy circulars issued by its Office of Information and Regulatory Affairs. OMB has also continued to actively promote the NPR proposals that would decentralize, and thereby raise the costs of, Government printing. I am skeptical of OMB's interest in protecting public access to Government information. OMB has only weakly supported the FDLDP. It has not enforced the statutory requirement that agencies provide copies of publications produced elsewhere than GPO for distribution to depository libraries. It has stood by when agencies have attempted to use copyright or copyright-like controls on Government information that impede public access in spite of statutes on copyright and in the Paperwork Reduction Act that prohibit such activity. The problems with OMB's own legislative proposal for the FDLDP, circulated last year and which I commented on before this Committee last July, only reinforce my concerns about its commitment to public access.

Establishing GPO as an independent agency in the executive branch would require a significant range of guarantees that OMB, and other agencies, could not interfere with the operation of statutory objectives assigned by Congress to GPO. I am far from certain that these guarantees could be provided. OMB's controls are sweeping and pervasive throughout the executive branch. If GPO remains in its current location, it would not be subject to those controls. Moreover, placing GPO in the executive branch would put our policies for information production, procurement, and dissemination in direct competition with those of larger, more influential departments and agencies, and I am not confident that we would be able to effectively carry out our mission in such an environment.

Finally, placing GPO in the executive branch would subject us to a host of laws, regulations, and policies for which we are currently unprepared and which may be injurious to our programs, and could lead to higher costs for the taxpayers. For example, it would potentially subject our printing procurement program to the Federal Acquisition Regulation (FAR), which provides for a far less effective and competitive procurement system than our current Printing Procurement Regulation (section 402 of the current draft bill appears to contain an exemption for GPO from the FAR, but such language would need to be much clearer and more specific than is currently provided). As another example, if GPO were in the executive branch, would it be possible to use

the Freedom of Information Act to obtain from us a copy of a manuscript, perhaps a congressional report, before it is printed and issued? Our personnel systems would require substantial revision, as would other programs and operations, all of which would impose additional costs on GPO.

For all of these reasons, therefore, the option to transfer JCP authorities to GPO seems to me to be a far more simple, direct, and effective method of dealing with the separation of powers issue than transferring GPO to the executive branch, and we can provide this Committee with the appropriate language to accomplish this purpose.

As to the future of the JCP, the draft bill calls for the remaining JCP oversight authorities and control over congressional printing to be shared between this Committee and the House Oversight Committee. While the final disposition of this matter is for Congress to decide, I have previously said that JCP authority over these matters has been very useful to GPO, particularly in the area of resolving issues between the two Chambers on questions of congressional format, style, and printing priorities and especially during extremely busy periods such as sine die sessions. Appropriate legislative oversight over Government printing and information dissemination issues may be more effectively accomplished through a joint body, such as a Joint Committee on Information Management, as proposed in the House report of the Joint Committee on the Organization of Congress in the 103rd Congress. If you wish we can provide you with proposed language to do this.

In one final matter regarding the transfer of JCP authorities to GPO, the authority to resolve wage disputes between GPO management and labor could not be exercised by the Public Printer, nor by any congressional committee if there is to be a complete severing of congressional control over GPO. There are undoubtedly several alternatives that could be devised that would allow for the fair and impartial resolution of wage disputes at GPO, and we can provide language to this Committee.

Compliance Mechanism. When Congress consolidated the Superintendent of Documents function with GPO in the Printing Act of 1895, it set up a system whereby the production and procurement of publications and information products were automatically linked with the documents distribution function. Under this system, publishing entities, including Congress and Federal agencies, obtain the most economical and timely production of their publications while the operations and costs for disseminating information products are transparent to them, since GPO selects, distributes, and pays for the cost of publications made available to the public.

As long as the linkage between production, procurement, and dissemination continues to operate, the Government and the public will have one of the most effective mechanisms for ensuring comprehensive and equitable access to Government information. When that linkage is enhanced with the operational capabilities that GPO has on hand -- especially the capability to combine packages of expert electronic services, procurement facilitation, and creative dissemination systems such as was developed for the new *Commerce Business Daily* -- agencies have an additional incentive to utilize GPO's operations and programs for their information products, and the public has an additional guarantor of access.

Backing up the requirement that agencies utilize GPO for printing and procurement is the section 207 prohibition on utilizing appropriated funds to procure the production of Government publications. This is a useful compliance tool, and with the removal of the constitutional issue regarding the JCP and GPO, it will help limit the activities of other Federal printing entities. If the reference in this provision to "appropriated funds" is being interpreted as preventing its applicability to publications produced through revolving or other funds, we can devise language to clarify Congress's intention.

I recognize the Committee's concern to develop methods that would prevent agencies from using copyright and copyright-like controls on information products that impede public access to taxpayer-supported information. The current draft bill contains sections establishing civil penalties for such actions. However, I think these penalties are unnecessarily harsh and I question whether they would be effective. There already is a criminal penalty for fraudulently copyrighting information under Title 17 of the U.S. Code, although I don't know how much it is used.

Establishing new definitions would be helpful in clarifying Congress's intent to ensure continued public access to Government information. The draft bill contains proposed definitions, although as I explain below I believe they need to be changed. Other compliance tools available are the 1994 position of the Comptroller General that agencies contracting directly for work in violation of section 207 may not pay contractors for such work, and various agency inspectors general can be called on to help ensure that lawful requirements are observed. Beyond these, there are other ways to address the problem of compliance that could be effective without necessarily penalizing employees.

One such measure would be to eliminate the current exemption from depository distribution requirements found in 44 U.S.C. 1903 for cooperative publications, those publications that necessarily must be sold to be self-sustaining. There is little evidence that depository distribution of publications injures public sales (all of the titles we carry in our sales program are also distributed to depository libraries). The exemption for cooperative publications is used by some agencies as authority to evade the requirement for depository distribution of their publications, particularly the National Technical Information Service (NTIS) of the Commerce Department. The elimination of the exemption would remove that obstacle to NTIS cooperation with the FDLP without necessarily interfering with its ability to recover costs. Similar language could be developed to specifically state that Government publications developed as the result of joint ventures and related agreements must be placed in the FDLP.

The draft bill contains language requiring the Public Printer to consult with advisory councils of agencies and others doing business with GPO. We already do this as a matter of practice through the Interagency Council on Printing and Publications and the Depository Library Council. These mechanisms improve communications and decrease the necessity for enforcement measures, but I am not convinced they need to be required by statute.

Ensuring Public Access and Protecting the FDLP. In this day when we see an increased number of entrepreneurial actions by agencies with Government information products, it would be very useful to reaffirm Congress's intention that permanent public access to taxpayer

supported information cannot be restricted or impaired. This will help protect the mission of the FDLP. An explicit reference in the law to GPO's role in making information available in "any form or format" is also necessary to remove any ambiguity about GPO's role in the electronic era.

I agree with the need for a new definition of "Government publication," as currently provided in 44 U.S.C. 1901. However, I am concerned that the draft bill's definitions of "Government publication" and "public information" may be interpreted to mean that only those materials which an agency takes action to "disclose, disseminate, make available to the public, or make available for dissemination to the public" must be included in the FDLP. Such an interpretation could result in the exclusion of many Government information products that are developed for internal use or for a very narrow target audience, but which have significant public interest or educational value.

Instead of "public information," I would suggest the use of the term "Government information" which is reflective of the public's broader interest, as currently expressed in 44 U.S.C. 1902. This section of law does not apply just to products developed specifically for dissemination to the public. I would also suggest the term "Government information product" instead of "Government publication." This term can cover all "works of the United States Government" in any form or format, whereas the term "publication" is associated primarily with print products.

In my view, the language "at Government expense, or as required by law" must be included in the definitions, as found currently in 44 U.S.C. 1901. Many Government information products, particularly those of a scientific and technical nature, are developed at Government expense by private contractors and grantees, so this language is necessary to ensure that such products are included in the FDLP. I would also suggest that a new term, "Government electronic information service," be used to describe the many electronic sites, such as Web sites and bulletin boards, now being operated by Federal agencies. These "services" constitute the platforms that enable the use of information products which reside on them.

Finally, the definition of "work of the U.S. Government" under section 102 of the draft bill would amend 44 U.S.C. 3502, a provision of the Paperwork Reduction Act, which applies only to the executive branch. In order to have a Government-wide application, some other vehicle for this definition should be considered. We will work with you to devise the needed changes.

The suggested legislative changes to chapter 19 of Title 44 that we submitted to this Committee by letter dated August 22, 1996, should be reviewed for incorporation into the draft bill. The changes resulted primarily from the *Study to Identify Measures Necessary for a Successful Transition to a More Electronic Federal Depository Library Program* (GPO: June 1996) that was requested by Congress. The study included the task of an "evaluation of current laws governing the FDLP and recommendation of legislative changes." Working on this task were GPO staff along with representatives of the American Library Association (ALA), the American Association of Law Libraries (AALL), the Association of Research Libraries (ARL), and the Information Industry Association (IIA), although all members of the study group, including OMB, were invited to participate. After publishing the final study report, we informally discussed and reviewed the suggestions for changes with Government information groups of the

ALA, the AALL, members of the depository library community, and GPO's Depository Library Council, and the changes we sent to the Committee reflected that consultative process. In addition to offering changed definitions of "Government publication" as described above, the changes include specific language for establishing mechanisms for ensuring permanent public access to Government information in all formats and for generally modernizing the depository library statutes.

Meeting New Technology Challenges. The draft bill contains general language authorizing the Public Printer to issue regulations relating to the use of developing technologies, to provide "cost-effective delivery systems for Government information," and relating to the dissemination of Government publications or public information "in electronic forms or formats." Such provisions would also resolve the ambiguity of GPO's role in the electronic era and in general I believe they are useful. However, I envision our role with respect to electronics as one of cooperation and coordination with Congress and publishing entities, and the language in the bill should reflect this. We will work with you to develop language that clearly conveys this intent.

Funding Provisions. In testimony before this Committee last July, I summarized my views regarding concepts to reform GPO's funding mechanism. Outside of the small annual appropriation we receive for the Superintendent of Document's depository library, cataloging and indexing, by-law distribution, and international exchange programs, we are required by 44 U.S.C. 309 to recover all of our costs from the prices we set for our work, including costs for a number of functions that do not contribute to production and distribution but which every Federal agency is required to perform. Our printing rates must recover costs for our Inspector General's office, budgeting and accounting, personnel, equal employment opportunity, health and safety, security, data systems, and so on. Recovering these expenses requires us to increase the prices of GPO's products and services beyond their direct costs. Most agencies receive an annual salaries and expenses appropriation to cover these costs. With an appropriation to GPO for general administrative expenses, the costs charged to Congress and agencies for printing and related products would decrease substantially. We would like to submit language to revise GPO's funding mechanism to reflect these views. With particular regard to the language in the draft bill under section 208, I have a great deal of uncertainty and concern over how such a provision, allowing committees of Congress to obtain unobligated funds appropriated to GPO, would work.

Review of Agency Plants. Last July before this Committee I also discussed the need to review the operation of printing plants in Federal agencies. While some of the work done in these plants is justified (e.g., work for the Central Intelligence Agency, Defense Intelligence Agency, and the National Security Agency, and short run work for limited internal administrative purposes only, which was the reason the plants were originally established), much of it could be procured far less expensively. Over the past 15 years, there have been a number of studies that compared the cost of performing procurable printing in agency plants with the cost of purchasing it through GPO. Most have concluded that it is far less expensive to procure through GPO. Also, printing procured through GPO is automatically eligible for dissemination to the public through the FDLP and sales programs. A review of agency plants that results in ensuring they are limited to the performance of internal administrative printing that is outside the requirements for public distribution contained in the FDLP provisions of Title 44 would reduce the cost of Federal printing and improve public access to Government information through established

dissemination programs. Language in the draft bill to direct the conduct of such a study either directly by GPO, or in cooperation with other entities such as the General Accounting Office, would establish a baseline for Federal printing operations against which improvements could be undertaken and measured.

Review of Conflicting Authorities. Finally, as part of the effort to improve Federal information policy and public access but perhaps not necessarily as part of this specific effort to revise Title 44, I would recommend, as I did before this Committee last July, that Congress examine the authorities of other agencies to perform printing and dissemination functions that are being used to conflict with those GPO is required to perform.

During the conduct of the recent study concerning the electronic transition of the FDLP, the Congressional Research Study of the Library of Congress compiled the various statutes authorizing the dissemination of Government information to the public. Approximately 400 statutes were identified, although only a handful are of real significance to GPO in terms of conflicting authorities (most appear to be requirements to produce and/or disseminate information related to specific program authorities, a feature of law that became common in the 1960's and 1970's with the unwritten assumption that statutory information functions would be carried out in accordance with Title 44). The statutes that are being used to conflict with GPO's responsibilities are those governing the operations of NTIS, those that authorize the Federal prisons to perform Government printing (Federal Prison Industries, or UNICOR), and laws that authorize printing for other Federal agencies by the GSA.

In each of these cases, statutes were originally enacted for sound but limited public policy purposes--to provide for the dissemination of scientific and technical information resulting from Federal research to American business (NTIS), the use of Federal prisoners to perform labor intensive work to keep them occupied (UNICOR), and the performance of administrative printing as a central service for Federal agencies physically located together in the field (GSA). However, in recent years operations conducted under these authorities have been expanded beyond their original intent to conflict directly with GPO's statutory mission.

NTIS is using its authority to establish printing and dissemination arrangements for a wide range of information products, not just scientific and technical information products. UNICOR has invested in labor-saving, long-run printing equipment as a revenue-generating measure, equipment that paradoxically leads to idle rather than busy prison labor. GSA has established cross-servicing arrangements for its printing and duplicating plants to assist agencies in some cases with a wide variety of printing, expanding beyond its original central administrative service unit (CASU) authority.

These operations remove work from the GPO procurement stream and frequently result in decreased public access when the publications are not made available to the Superintendent of Documents for dissemination. Some of the recommendations I have made today, such as removing the separation of powers problem and eliminating the exemption for cooperative publications, would be effective in limiting some of the activities of these organizations that conflict with the goals of economical production and ensuring public access. However, subsequent to any enactment of Title 44 reform legislation, I would recommend that Congress

review the operation of these authorities to ensure they are staying within the original legislative intent. Such a review would also be a major contribution to reform of the printing statutes.

* * *

Mr. Chairman, again I commend you and the Members of this Committee for undertaking this important project. We will provide legislative language to achieve the objectives I have outlined in this presentation, and I look forward to continuing to work with you to achieve a revision of Title 44 that will provide cost-effective and openly accessible information services for Congress, Federal agencies, and the public. This concludes my prepared statement, and I would be pleased to answer any questions you may have.