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Public Relations and Propaganda: Restrictions on Executive Agency Activities

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Public Relations and Propaganda: Restrictions on Executive Agency Activities

Summary

Controversies recently have arisen over certain executive branch agencies' expenditures of appropriated funds on public relations activities, some of which have been characterized as propagandistic. Generally speaking, there are two legal restrictions on agency public relations activities and propaganda. 5 U.S.C. 3107 prohibits the use of appropriated funds to hire publicity experts. Appropriations law "publicity and propaganda" clauses restrict the use of funds for puffery of an agency, purely partisan communications, and covert propaganda. No federal agency monitors federal public relations activities, but a Member or Committee of Congress may ask the Government Accountability Office (GAO) to examine an agency's expenditures on public relations activities with a view to their legality. Any effort to reform current statutory restrictions on agency public relations activities will face three challenges: tracking public relations activities by agencies, defining "propaganda," and enforcing laws against agency use of funds for publicity experts and propaganda.

On January 26, 2005, H.R. 373 was introduced in the House of Representatives. The bill would require a federal agency to notify the Congress no later than 30 days after entering into a public relations contract, codify the publicity and propaganda clause and provide penalties for violations of it, and require federal agencies to label their communications as having been paid for with appropriated funds.

On February 2, 2005, S. 266 was introduced in the Senate. The bill would define "publicity and propaganda," codify the types of communications that constitute publicity and propaganda, provide financial penalties for executive agency officials who authorize the use of appropriated funds for publicity and propaganda, empower both the Attorney General and private citizens to bring civil actions against agency officials who authorize the use of appropriated funds for publicity and propaganda, and provide "whistleblower protection" from agency retribution for employees who take actions in support of this law.

S. 967 was introduced on April 28, 2005. The bill would amend Part I of Title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.) to require audio and video news releases to contain announcements that inform viewers that the media segment they are viewing was "produced by the U.S. government." S. 967 was referred to the Senate Committee on Commerce, Science, and Transportation.

This report will be updated as events warrant.

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Public Relations and Propaganda: Restrictions on Executive Agency Activities

Recent Controversies

Recently, a number of promotional and public outreach actions by executive branch agencies have provoked controversy.[1] Some salient examples follow below.

- The Department of Education hired Armstrong Williams, a television commentator and syndicated columnist, to promote the No Child Left Behind Act on his television program.[2]

- The Federal Communications Commission (FCC) launched a high profile public relations campaign (DTV — Get It!) to encourage consumers to purchase digital television sets. As part of this effort, former Chairman Michael K. Powell appeared on *Monday Night Football*, and the FCC created a website [http://www.dtv.gov] that promotes digital television (DTV) and includes hyperlinks to the websites of a number of large corporations with significant financial interests in DTV.[3]

- The Division for Human Resources Products and Services of the Office of Personnel Management (OPM) reportedly issued

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[1] Of course, the current Administration is not the only one that has engaged in public relations activities that provoke criticism. For example, the Department of Health and Human Services during the Presidency of William J. Clinton produced video news releases (VNRs) to promote its Medicare reform proposal. Indeed, government public relations activities have raised concerns for at least a century. See, respectively, CRS Report RS21811, *Medicare Advertising: Current Controversies*, by Kevin R. Kosar; and James L. McCamy, *Government Publicity* (Chicago: The University of Chicago Press, 1939).

[2] The Department of Education (ED) contracted with Ketchum Communications, which then subcontracted with a public relations firm co-owned by Williams. The subcontract with specified the promotional activities Williams was to provide, and ED signed this contract. Michelle R. Davis, "Department's PR Activities Scrutinized," *Education Week*, Jan. 19, 2005, p. 1. The Department of Health and Human Services paid columnist Maggie Gallagher to write brochures on the benefits of marriage, to ghost-write an essay — for publication in a magazine — for an HHS assistant director, and to produce a training presentation on the benefits of marriage. Reportedly, while under contract, she promoted the Bush Administration's marriage initiative in some of her columns. Howard Kurtz, "Writer Backing Bush Plan Had Gotten Federal Contract," *Washington Post*, Jan. 26, 2005, p. C1; and Maggie Gallagher, "Statement of Maggie Gallagher," Jan. 26, 2005, retrieved at [http://www.marriagedebate.com/].

[3] Anne Marie Squeo, "FCC Tries to Sell Consumers on Digital TVs," *The Wall Street Journal*, Oct. 5, 2004, p. D10.

guidelines to OPM staff who were preparing presentations and promotional materials for a conference. Staff were instructed to include a "picture" of President George W. Bush in slide shows and to make the President's presence "prevalent."[4]

- The White House has reportedly expended public funds to create and maintain *Barney.gov*, a child-friendly website that celebrates the President's Scottish Terriers, Barney and Miss Beazley. The site features photographs and videos of the dogs, along with their biographies and "answers" letters from children.[5]

- As part of a $1 million public education campaign, the Environmental Protection Agency hired a public relations firm to produce a public service announcement (PSA) urging home owners to help reduce pollution.[6] The PSA, which came in video format, spoofed one man's effort to reduce pollution by decreasing the quantity of gasoline required to run his automobile. The video told viewers that a home "can cause twice the green house gases of a car," and directed consumers to a webpage, available online at [http://www.energystar.gov/], that listed energy-efficient household appliances; it did not provide information on the varying levels of emissions produced by different automobiles.[7]

- In early April 2004, the Internal Revenue Service issued four press releases to remind taxpayers of the looming filing deadline. The press releases also included a policy assertion — "America has a choice: It can continue to grow the economy and create new jobs as the president's policies are doing, or it can raise taxes on American families and small businesses, hurting economic recovery and future job creation."[8]

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[4] As quoted in Al Kamen, "The Electric Slide, OPM Style," *Washington Post*, Sept. 10, 2004, p. A27.

[5] Dan Froomkin, "White House Launches Barney.gov," *WashingtonPost.com*, May 14, 2004.

[6] Environmental Protection Agency, "Five-Step Energy Star Campaign Can Save Energy, Money, Environment," press release, June 16, 2004, retrieved via [http://www.nexis.com]; Editorial, "Not a Laughing Matter: The New E.P.A. TV Ad Is Neither Funny Nor Effective," *The Miami Herald*, July 2, 2004, p. A18.

[7] The difference between vehicles can be dramatic: the 2005 Ford Explorer SUV releases 11.5 tons of "greenhouse gas emissions" each year; the 2005 Toyota Prius, just 3.5 tons. Automobile emission rates can be found at [http://www.fueleconomy.gov].

[8] Jeannine Aversa, "Treasury News Releases on Taxes Attacked," *Associated Press*, Apr. 9, 2004, retrieved at [http://www.nexis.com]. Critics were especially incensed because these same words were reportedly found on a fact sheet issued two days earlier by the Republican National Committee. Al Kamen, "A Weak Too Late," *Washington Post*, Apr. 26, 2004, p. A21.

- The Forest Service hired a public relations firm to produce a brochure which promoted increased logging in the Sierra Nevada forest.[9] The brochure argued that the forest had grown too dense and that tree removal was a tool in the "campaign against catastrophic wildfires" that would be beneficial to the forest and its fauna. The brochure included photographs that purported to show that the forest had become overgrown in the past century. However, the photograph showing low forest density in 1909 was taken after the forest had been logged.[10]

- The Social Security Administration (SSA) has reportedly drawn up a "strategic communications plan" that urges SSA employees to disseminate the message that "Social Security's long-term financing problems are serious and need to be addressed soon" through speeches, public events, and mass media, and by other means.[11] President Bush has undertaken a "60 stops in 60 days" tour of the United States in which he and a number of government officials are promoting the President's plan for reforming social security.[12]

- Reportedly, the Department of Agriculture has a "Broadcast Media and Technology Center" that produces news-like segments that it distributes to local television stations, which have aired them.[13] USDA reportedly also hired a freelance writer to produce articles that speak well of agency conservation programs and to attempt to place these articles in magazines aimed at outdoors enthusiasts.[14]

In other cases, GAO has stated that certain public relations activities were illegal, as the following examples illustrate.

- The Office of National Drug Control Policy produced video news releases (VNRs) that looked like evening news segments and strongly discouraged the use of illegal drugs. These VNRs were distributed to local news stations which, mistakenly, aired them as

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[9] OneWorld Communications also created a video, which generated less controversy.

[10] U.S. Government Accountability Office, *Forest Service — Sierra Nevada Forest Plan Amendment brochure and video materials*, B-302992, Sept. 10, 2004.

[11] Robert Pear, "Social Security Is Enlisted to Push Its Own Revision," *New York Times*, Jan. 16, 2005.

[12] SSA also has set up a "Social Security Information Center" and website [http://www.strengtheningsocialsecurity.gov] that touts the President's proposed reforms. Jonathan Weisman, "Cost of Social Security Drive Cited,"*Washington Post*, Apr. 7, 2005, p. A29.

[13] David Barstow and Robin Stein, "Under Bush, a New Age of Prepackaged News," *New York Times*, Mar. 13, 2005, pp. A1, A18-A19.

[14] Christopher Lee, "USDA Paid Freelance Writer $7,500 for Articles," *Washington Post*, May 11, 2005, p. A15.

actual news. GAO reviewed the videos and judged that they violated appropriations laws.[15]

- Home Front Communications, a public relations firm, produced VNRs for the Department of Health and Human Services' (HHS) Centers for Medicare & Medicaid Services (CMMS). A GAO opinion on the VNRs — which contained newscast-like interviews and reports — found them to be a violation of the publicity or propaganda prohibition of the Consolidated Appropriations Resolution of 2003 (P.L. 108-199) and the Anti-Deficiency Act (31 U.S.C. 1341).[16]

Generally, critics have complained that these public relations activities are inappropriate, are a waste of taxpayers' dollars, and constitute a form of propaganda aimed at selling the policies of President George W. Bush. Critics also have complained that federal dollars are being used to influence media coverage.[17] Proponents of these activities argue that there is nothing wrong with agencies educating the public about their programs, activities, and positions on policies. Moreover, proponents argue that utilizing communications techniques and media commonly found in the private sector, such as video news releases, direct mail, and advertisements, makes sense because they are effective communications tools.[18]

In part, the division between these viewpoints is rooted in longstanding competing notions over the nature of federal executive agencies: should agencies be apolitical and semi-autonomous, or should they be politically responsive? Should they serve first the President, Congress, the public, or the law? And, should federal agencies behave cautiously, taking their cues for action from federal law, regulations, and rules, or should they be entrepreneurial and risk-taking like private sector companies?[19]

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[15] U.S. Government Accountability Office, *Office of National Drug Control Policy — Video News Release, B-303495*, Jan. 4, 2005.

[16] HHS contracted with Ketchum, Inc., which hired Home Front Communications; the VNRs were then distributed by CMMS. CRS Report RS21811, *Medicare Advertising: Current Controversies*, by Kevin R. Kosar.

[17] Some argue that reporters, columnists, and editors and government employees should maintain a professional distance from one another. Historically, though, this has not always occurred. See, for example, John F. Stacks, *Scotty: James B. Reston and the Rise and Fall of American Journalism* (Boston: Little Brown, 2002).

[18] A Department of Education (ED) spokeswoman, Susan Aspey, said the congressional request for a GAO examination of VNRs produced for ED was just "politics and an attempt to distract attention from President Bush's great record on improving education." Ben Feller, "Two Democrats Request Probe of Spending as Propaganda," *Associated Press*, Oct. 14, 2004, retrieved from [http://www.nexis.com]. On government advertising and its controversial aspects, see CRS Report RS21746, *Government Advertising Expenditures: An Overview*, by Kevin R. Kosar.

[19] See, for example, Louis Fisher, *The Politics of Shared Power: Congress and the Executive* (College Station: Texas A&M University Press, 1998), chapter 4; William F. West and

(continued...)

Legal Restrictions

Publicity Experts and Publicity and Propaganda

The diverse activities described above share one basic feature ; they involve the expenditure of federal funds on agency communications with the public. Article I, Section 7, clause 7 of the U.S. Constitution requires that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Statutory restrictions on agency communications with the public are limited to one nearly century-old statute and prohibitions in annual appropriations laws.[20]

- 5 U.S.C. 3107 — passed in 1913 — prohibits the use of appropriated funds "to pay a publicity expert unless specifically appropriated for that purpose."

- Annual appropriations laws, such as the 2004 omnibus statute, usually provide a standard prohibition that funds may not be used "for publicity or propaganda purposes within the United States not heretofor authorized by Congress."[21] These restrictions have appeared in appropriations laws for over a half-century, and are little commented on by Congress in the accompanying reports.[22]

It would appear that agency freedom to expend appropriated funds for public relations and propaganda is quite limited. However, this is not the case, for the following two reasons.

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[19] (...continued)
Joseph Cooper, "Legislative Influence v. Presidential Dominance: Competing Models of Bureaucratic Control," *Political Science Quarterly*, vol.104, no. 4, winter 1989-1990, pp. 581-606; and Ronald C. Moe, "The Importance of Public Law: New and Old Paradigms of Governmental Management," in Phillip J. Cooper and Chester A. Newland, eds., *Handbook of Public Law and Management* (San Francisco: Jossey-Bass Publishers, 1997), pp. 41-57.

[20] Two addenda are warranted. First, the Hatch Act prohibits employees from engaging in partisan campaign activity on federal property on official duty time. See CRS Report 98-885, *"Hatch Act" and Other Restrictions in Federal Law on Political Activities of Government Employees*, by Jack Maskell. Second, the Anti-Deficiency Act (31 U.S.C. §1341(a)) also limits these activities, but only as a consequence of violating the publicity and propaganda restrictions — which forbid expenditures that exceed available budget authority. CRS Report RL30795, *General Management Laws: A Compendium*, Clinton T. Brass, coordinator, pp. 93-97.

[21] P.L. 108-447, Div. H, Sec. 624. Note also that these restrictions apply only to agency communications directed at a U.S. audience. Thus, for example, the Department of State may legally publish and distribute *Hi*, a glossy magazine aimed at improving the image of the United States in Middle Eastern states.

[22] For example, H.Rept. 108-671 on the 2005 appropriation for the Departments of Transportation and Treasury and Independent Agencies (P.L. 108-447, Div. H, Sec. 624) states, "Section 624. The Committee continues the provision prohibiting the use of funds for propaganda and publicity purposes not authorized by Congress."

(1) No federal entity is required to monitor agency compliance with the publicity and propaganda statutes. At present, the federal government has what has been termed "fire alarm oversight" of agency expenditures on communications.[23] Scrutiny typically occurs when a Member of Congress is alerted by the media or some other source that an agency's spending on communications may be cause for concern. A Member then sends a written request to the Government Accountability Office asking for a legal opinion on the activities in question.

(2) The terms "publicity," "propaganda," and "publicity expert" have been interpreted to forbid a very limited number of activities. Congress has not defined the terms "publicity," "propaganda," and "publicity expert." Thus, to GAO has gone the task of delineating what these terms encompass. GAO has done this on a case-by-case basis over the past half-century.[24] Generally speaking, GAO has narrowly defined these terms. It has held that the "publicity or propaganda" prohibition in appropriations laws forbids any public relations activity that:

- involves "self-aggrandizement" or "puffery" of the agency, its personnel, or activities;
- is "purely partisan in nature" (i.e., it is "designed to aid a political party or candidate"); or,
- is "covert propaganda" (i.e., the communication does not reveal that government appropriations were expended to produce it).[25]

GAO has interpreted "publicity expert" to mean someone who "extols or advertises" an agency, "an activity quite different from disseminating information to the citizenry about the agency, its policies, practices, and products."[26]

Thus construed, the laws prohibiting the hiring of publicity experts and the expenditure of appropriated funds on publicity and propaganda place very few limits on agency public relations activities. GAO findings of agency wrongdoing have been infrequent. It has said that the public relations and propaganda laws did not forbid, to cite three examples, the hiring of public relations companies or the expenditure of appropriated funds on:

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[23] Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,"*American Journal of Political Science*, vol. 28, no. 1, Feb., 1984, pp. 165-179.

[24] For a dated, but useful, introduction to this topic, see U.S. General Accounting Office, *Principles of Federal Appropriations Law, Volume 1*, GAO/OGC-91-5, July, 1991, pp. 4-161 - 4-166.

[25] See U.S. General Accounting Office, *Decision of the Comptroller General*, B-223098, Oct. 10, 1986, pp. 8-9; and GAO, *Application of Anti-Lobbying Laws to the Office of National Drug Control Policy's Open Letter to State Level Prosecutors*, B-301022, Mar. 10, 2004.

[26] U.S. Government Accountability Office, *Forest Service*, B-302992, p. 12. Apparently, only once has GAO judged that an agency illegally hired a publicity expert. GAO, *Principles of Federal Appropriations Law, Volume 1*, pp. 4-191 - 4-192.

- promotional materials that did "not present both the negative and positive consequences" of increased logging of forests and that contained inaccuracies that might have deceived the public;[27]

- CMMS brochures that included "several noteworthy omissions [of fact]" and that "overstate[d] the access beneficiaries will have to the prescription drug program";[28] or

- an Office of Personnel Management (OPM) press release denouncing some Members of Congress who desired to delay a civil service policy that OPM favored.[29]

Additionally, GAO's definition of "propaganda" — as government communications that fail to disclose that they are paid for with appropriated funds (i.e., "covert propaganda") — only prohibits executive agencies from attempting to persuade or deceive the public through surreptitious means. It does not prevent executive agencies from propagandizing in obviously public communications. Under GAO's definition of propaganda, executive agencies appear to remain free to use appropriated funds to issue communications that are impossible to verify (e.g., "this policy promotes liberty") and engage in activities that attempt to manipulate the emotions of the domestic public (e.g., placing a revered symbol, such as the flag of the United States, behind a government spokesperson delivering a speech).

Information Quality

OMB announced its "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" on January 3, 2002 (herein Guidelines). The Guidelines were required by Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554), also known as the Information Quality Act.[30] The Guidelines were designed to assist agencies to develop and "issue their own information quality guidelines" that shall ensure and maximize the "quality, objectivity, utility, and integrity" of information disseminated to the public (67 *Federal Register* 34489). Agencies would also be required to create procedures for reviewing information before it is disseminated and to establish "administrative mechanisms" that permit parties affected by the information to "seek and obtain correction of information."

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[27] U.S. Government Accountability Office, *Forest Service*, B-302992, p. 13.

[28] U.S. Government Accountability Office, *Medicare Prescription Drug, Improvement, and Modernization Act of 2003 — Use of Appropriated Funds for Flyer and Print and Television Advertisements*, B-302504, Mar. 10, 2004. For more information on the Medicare advertising controversies, see CRS Report RS21811, *Medicare Advertising: Current Controversies*, by Kevin R. Kosar.

[29] U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, p. 4-167.

[30] CRS Report RL32532, *The Information Quality Act: OMB's Guidance and Initial Implementation*, by Curtis W. Copeland and Michael Simpson.

The Guidelines require agencies to provide reports to the Director of the Office of Management and Budget on agency activities and resolutions of complaints.

Prima facie, the Guidelines appear to place strong limits on agencies communications. Terms such as "quality," "objectivity," "utility," and "integrity" are defined at length. The Guidelines apply to all "information," which is defined as "any communication or representation of knowledge such as facts, or data, in an medium or form" (67 *Federal Register* 8460). However, the Guidelines' definition of "dissemination" does omit a broad range of communications. "Dissemination" does not encompass

> distribution limited to government employees or agency contractors or grantees; intra- or intra-agency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Federal Advisory Committee Act, or similar law. This definition also does not include distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes. (67 *Federal Register* 8460)

That said, agency public relations communications that are not exempted by the Guidelines — such as the creation of a publicly accessible website that offers an analysis of the condition of a federal program — may need to be subjected to the pre-dissemination agency review (as outlined by the Guidelines) and persons affected by the publication thereof — such as the recipient of aid from said program — may be permitted administrative redress.

Recent Administrative Action

In response to "a large number of requests," the Federal Communications issued a public notice on April 13, 2005, that informed broadcasters and cable operators of their disclosure responsibilities under federal "sponsorship identification rules."[31] These rules (47 U.S.C. 317, 508 and 47 C.F.R. 73.1212, 76.1615), the FCC stated, require broadcasters and cable operators to "inform their audience at the time of airing: (1) that such matter is sponsored, paid for or furnished, either in whole or in part; and (2) by whom or on whose behalf such consideration was supplied."[32] The FCC declares that it "will take appropriate enforcement action against entities that do not comply with these rules."[33]

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[31] Federal Communications Commission, "Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators," Public Notice, FCC 05-84/MB Docket No. 05-171, April 13, 2005, p. 1.

[32] Ibid., p. 3.

[33] Ibid., p. 2. The FCC also has filed a request for comments on the use of VNRs. Federal Communications Commission, "Request for Comments on the Use of Video News Releases by broadcast Licensees and Cable Operators," *Federal Register*, vol. 70, no. 90, p. 24791, May 11, 2005.

Should radio and television stations faithfully follow the FCC's recent admonition regarding sponsorship disclosure, there may be fewer controversies regarding government-produced VNRs being run as news. However, the reach of federal sponsorship rules is limited. For one, these sponsorship rules are aimed solely at broadcasters; they do not forbid federal agencies from attempting to use these media for public relations or covert propaganda. Second, the federal sponsorship identification rules do not apply to all media; they cover broadcast radio, broadcast television, and cable television. They do not apply to satellite television and radio, the Internet, direct mail, and other forms of media. Finally, the sponsorship identification rules do not forbid all covert government public service messages (propaganda, some say). Thus, for example, in 2000, the FCC investigated a complaint against major television broadcasters. The networks had, the FCC determined, included anti-drug and anti-alcohol abuse messages in their programming under an arrangement with the Office of National Drug Control Policy (ONDCP) without informing viewers.[34] The FCC concluded that the networks had not knowingly violated federal identification sponsorship rules and therefore did not deserve to be fined. The broadcasters, moreover, were deemed free to enter such relationships with the government provided they were not clearly promised compensation (i.e., "consideration") by the federal government.[35]

Recent Legislation

Congress has enacted legislation that provides some limitation on activities that might be construed as propaganda. P.L. 109-13, an emergency supplemental appropriations measure enacted on May 11, 2005, includes a prohibition against "prepackaged news."

> SEC. 6076. Unless otherwise authorized by existing law, none of the funds provided in this Act or any other Act, may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution in the United States unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency.

However, this legislation only applies to appropriated funds and to video news releases. During the 108th and 109th Congresses, legislators have proposed a number of bills that take different approaches to curbing agency public relations activities.

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[34] The networks provided air time to match for ONDCP's purchase of air time to show anti-drug and anti-alcohol abuse public service announcements. Federal Communications Commission, "Letter of David H. Solomon, Chief, Enforcement Bureau, FCC," DA 00-2873, Dec. 20, 2000, available at [http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-00-2873A1.pdf].

[35] "While there is no doubt that there was an understanding between the Networks and the ONDCP, it is difficult to find that such an understanding rose to the level of a promise to compensate the Networks for programming that contained anti-drug or anti-alcohol themes.... Even where the Networks or program producers sought the ONDCP's 'technical advice,' there does not appear to have been a promise of compensation." Ibid., p. 5.

109th Congress

On January 26, 2005, H.R. 373 was introduced in the House of Representatives. The bill would make four major changes to present law. It would:

- require a federal agency to notify the House Committee on Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the appropriations committees of both the House and the Senate no later than 30 days after entering into a contract for public relations activities (Section 3(a));

- codify the publicity and propaganda clause so that "[a]n officer or employee of the United States Government may not make or authorize an expenditure or obligation of funds for publicity or propaganda purposes within the United States unless authorized by law" (Section 4(a));

- provide penalties for violations of the publicity and propaganda clause by an officer or employee of the government (Section 4(b)(1)-(2)); and

- require federal agencies to label their communications as having been paid for with funds from the respective agencies (Section 5(a)).

H.R. 373 was referred to House Committee on Government Reform.

On February 2, 2005, a second bill was introduced. S. 266 would:

- codify the types of communications that constitute "publicity and propaganda" (Section 3);

- provide financial penalties for executive agency officials who authorize the use of appropriated funds for publicity and propaganda (Section 4(a));

- require the Attorney General to "diligently" investigate the use of appropriated funds for publicity and propaganda (Section 4(b));

- permit both the Attorney General and private citizens to bring civil actions against agency officials found to have violated the law;

- allow private citizens to collect financial damages against executive agency officials found guilty of appropriating funds for publicity and propaganda (Section 4(e)(1)); and

- provide "whistleblower protection" from agency retribution for employees who take actions in support of this law (Section 4(h)).

S. 266 was referred to the Senate Committee on the Judiciary.

On April 28, 2005, S. 967 was introduced.[36] The bill would amend Part I of Title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.) to require that

> [a]ny prepackaged news story produced by or on behalf of a Federal agency that is broadcast or distributed by a network organization, broadcast licensee or permittee, or multichannel video programming distributor in the United States shall contain [the] announcement [produced by the U.S. government].

This requirement would apply to all video and audio news segments "designed to be indistinguishable from a news segment produced by an independent news organization." S. 967 would prohibit any person, such as a video editor at a local television station, from removing the announcement from the news segment. S. 967 was referred to the Senate Committee on Commerce, Science, and Transportation, which held a hearing on the bill on May 12, 2005.[37]

108th Congress

In the 108th Congress, S. 2416 was introduced in the Senate on May 13, 2004; its companion bill, H.R. 4639, was introduced in the House on June 22, 2004. Both bills would have required GAO to review any advertisement costing more than $10 million. Agencies would not have been allowed to expend appropriated funds on advertisements deemed false, deceptive, or political. Both pieces of legislation expired at the end of the 108th Congress.

The Challenges of Reform

Tracking Expenditures

There is nothing inherently inappropriate in an agency expending appropriated funds to communicate with the public.[38] As one of the Hoover Commission task forces wrote a half-century ago:

> Apart from his responsibility as spokesman, the department head has another obligation in a democracy: to keep the public informed about the activities of his agency. How far to go and what media to use in this effort present touchy issues

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[36] This bill was originally offered as an amendment to S. 714 on April 14, 2005. U.S. Congress, Senate Committee on Commerce, Science, and Transportation, *S. 714, The Junk Fax Prevention Act of 2005: Trade, Tourism, and Economic Development Hearing*, April 13, 2005, available online in video format at [http://commerce.senate.gov/hearings/witnesslist.cfm?id=1457].

[37] U.S. Congress, Senate Committee on Commerce, Science, and Transportation, *S. 967: Pre-packaged News Stories*, May 12, 2005, available online in video format at [http://commerce.senate.gov/hearings/witnesslist.cfm?id=1497].

[38] Indeed, the federal courts have "indicated that it is not illegal for government agencies to spend money advocating their positions, even on controversial issues." Ibid., p. 4-163.

> of personal and administrative integrity. But of the basic obligation [to inform the public] there can be little doubt.[39]

Even government communications which attempt to persuade members of the public to behave differently may not necessarily be inappropriate. For example, few would likely criticize government-sponsored advertising that encourages citizens to wear their seatbelts while driving motor vehicles or urges hikers and campers to avoid inadvertently setting forest fires.

Any effort to curb agency expenditures on allegedly inappropriate communications with the public will face two challenges: (1) tracking government expenditures on communications, and (2) drafting language that distinguishes legitimate agency communications with the public from puffery and propaganda.

At present, the federal government has little knowledge of the extent of agency expenditures on public communications.[40] According to a minority staff report, the federal government awarded over $88 million in public relations contracts in 2004. Of course, this measure of public relations activities captures only those activities that were contracted out — not those done in-house.[41] Agencies' budgets do not line-item list public relations expenditures, and any effort to do so must grapple with the question of what activities and costs are to be included. A seemingly simple and not unusual example illustrates this point:

- An agency employee (GS-12) spends one hour drafting a one-page press release; two other agency employees (one GS-14, one appointee) spend 45 minutes each editing and proofreading the piece. Another employee, a GS-8, is asked to make 200 copies of the press release. These copies are to be handed out to members of the press at a 30-minute press conference, where another agency employee (an appointee) is to issue the release and take questions. The room used for the press conference is prepared by three agency employees (GS-9), who must bring in chairs, set up the podium and sound system, and so forth. The agency's webmaster (GS-12) spends 15 minutes uploading a copy of the press release to the

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[39] The Commission on Organization of the Executive Branch of the Government, *Report of the Task Force on Departmental Management: Prepared for the Commission on Organization of the Executive Branch of the Government* (Washington: GPO, 1949), Appendix E, p. 57.

[40] A rough estimate of government expenditures on advertising, a subset of public relations and communications, puts annual spending at over $1 billion. CRS Report RS21746, *Government Advertising Expenditures: An Overview*, by Kevin R. Kosar.

[41] Moreover, the methodology used by the authors of this report involved searching for contracts in the Federal Procurement Data System (FPDS), which contains only records of those contracts of $25,000 or more. U.S. Congress, House Committee on Government Reform, *Federal Public Relations Spending*, Jan. 2005, which is available online at [http://www.democrats.reform.house.gov/Documents/20050126124833-88792.pdf]. On FPDS, see CRS Report 98-79, *Federal Funds: Tracking Their Geographic Distribution*, by James R. Riehl.

agency's website. After the press conference, two agency employees (GS-11), over the course of a few days, field occasional calls from reporters seeking further information.

All of these diverse activities were part of this single, modest public relations effort. Which ones should be counted? Who is to do the counting? And how are these activities to be tracked?

Defining "Propaganda"

Beyond accounting for public relations activities is the challenge of distinguishing propaganda from appropriate agency communications with any precision. The *Oxford English Dictionary* gives one definition of "propaganda" as, "The systematic propagation of information or ideas by an interested party, especially in a tendentious way in order to encourage or instil a particular attitude or response."[42] This definition is quite broad and not especially helpful in the present context, since it captures any coordinated activity aimed at persuading others of the wisdom and veracity of one's ideas and positions, something that is part and parcel of politics and governance.[43]

Some might suggest that agencies should be permitted to convey only factual information. This instruction, though, would not solve the problem. For example, one can mislead another by communicating just facts but not all the facts. An agency spokesperson might announce that thanks to his agency's tireless efforts, public policy problem X has been eradicated. On hearing this, the listener might think highly of the agency and believe it to be effective. However, his opinion might be less sanguine if he were informed that in the pursuit of eradicating this one public policy problem, the agency had grossly exceeded its budget and neglected its statutorily required duty to attend to a dozen other public policy problems.[44]

Furthermore, even the conveyance of pure facts can have persuasive effects on an audience, depending on how the facts are presented. For example, a government official might state, "5,000 persons are killed by lightning each year." On hearing this, a listener might become wary of venturing outside on cloudy days. If, on the other hand, the same government official said, "On average, you have only a one-two hundredth of one-percent chance of being killed by lightning this year," the same listener might feel the risk is so small as not to be worth changing his behavior. However, assuming a population of 100 million, both of these statements are true. The facts are the same; the inference drawn is quite different.[45]

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[42] *Oxford English Dictionary* online, retrieved at [http://dictionary.oed.com/].

[43] And persuasion has been institutionalized; nearly all federal agencies along with Members of Congress and the President have public relations offices or employees who issue communications that provide, usually, positive reports on their activities.

[44] The spokesperson also might have deceived the listener by defining the public policy problem differently.

[45] These are not the only forms of deception by conveyance of facts. Debra Stone, *Policy* (continued...)

Enforcement and the Separation of Powers

The enforcement of restrictions against agency use of funds to employ publicity agents or to produce propaganda faces hurdles rooted in the separate branches of government established by the U.S. Constitution. In great part, the legislative branch makes the law, but the executive branch administers and enforces it.

In this instance, the power to enforce the statutory restriction against the employment of publicity experts rests with the Department of Justice (DOJ), an executive agency. If DOJ does not find fault with an executive agency's actions, Congress has limited tools available to change the behavior of DOJ or the agency in question. (See below for further discussion.)

But what of the enforcement of publicity and propaganda restrictions in appropriations laws? In March 2005, the Department of Justice and Office of Management and Budget (OMB) issued memoranda that stated that executive branch agencies need not heed GAO's interpretations of appropriations law.[46] The DOJ and OMB memoranda were issued in response to a GAO memorandum circulated to executive branch departments and agencies providing guidance on the use of video news releases for publicity purposes.[47] The OMB memorandum agrees that executive agencies must comply with applicable laws; however, it states, it is the "OLC [Office of Legislative Counsel] ... not the GAO, that provides the controlling interpretations of the law for the Executive Branch."[48] Those in the executive branch with questions about the interpretation of appropriations laws are directed to contact the general counsel of their respective departments or agencies.

The DOJ memorandum takes the same position. "Because GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO's legal advice." The DOJ memorandum also contests GAO's interpretation of what constitutes propaganda. DOJ argues, against GAO, that it is not enough for an executive branch communication to be covert as to the source. It also must contain advocacy of a particular viewpoint. DOJ states that government communications that are "purely informational" — even if they do not inform the audience that they are government-produced — are not propaganda and, hence, are "legitimate."[49] DOJ

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[45] (...continued)
Paradox: The Art of Political Decisionmaking (New York: W. W. Norton, 2001).

[46] Steven G. Bradbury, Principal Deputy Assistant Attorney General, Memorandum for the General Counsels of the Executive Branch, *Re: Whether Appropriations May Be Used for Informational Video News Releases*, Mar. 1, 2005; and Joshua Bolten, Director, Office of Management and Budget, Memorandum for Heads of Departments and Agencies, *Use of Government Funds for Video News Releases*, M-05-10, Mar. 11, 2005.

[47] David M. Walker, Comptroller General, Memorandum for Heads of Departments, Agencies, and Others Concerned, *Re: Prepackaged News Stories*, B-304272, Feb. 17, 2005.

[48] Bolten, *Use of Government Funds for Video News Releases*, p. 1.

[49] In its own opinion on the controversial Medicare VNRs, DOJ found "[t]he VNRs ... did not advocate a particular policy or position of HHS and CMS, but rather provided accurate
(continued...)

then states that agencies "are responsible for reviewing their VNRs to ensure that they do not cross the line between legitimate governmental information and improper government-funded advocacy."[50]

Thus, the enforcement of restrictions on executive agency spending on publicity experts and propaganda encounters a separation of powers impediment. Congress, however, does possess tools to compel changes in agency behavior. Congress may threaten to reduce, or reduce, an agency's appropriation or powers in order to encourage an agency to follow congressional interpretation of the law. Alternatively, Congress may pass new legislation that more sharply delineates its definition of legal and illegal activities — an effort, as noted above, not without its own challenges — which, then, would increase the probability that executive agencies — and DOJ, especially — would agree with Congress's interpretation of the law.[51]

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[49] (...continued)
(even if not comprehensive) information about the benefits provided under [the new medicare program]." Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Memorandum for Alex M. Azar II, General Counsel, Department of Health and Human Services, *Re: Whether Appropriations May Be Used for Informational Video News Releases*, July 30, 2004. Nota bene: The DOJ memorandum of March 1, 2005. refers to the DOJ memorandum of July 30, 2004, by the title, *Re: Whether Appropriations May Be Used for Informational Video News Releases*, which is identical to the title of the March 11, 2005, memorandum. However, the memorandum of July 30, 2004 — as found on the DOJ website at [http://www.usdoj.gov/olc/opfinal.htm] — carries the title *Expenditure of Appropriated Funds for Informational Video News Releases*.

[50] Bradbury, *Re: Whether Appropriations May Be Used for Informational Video News Releases*, Mar. 11, 2005, pp. 1-2.

[51] These clarifications of the law might also be included in appropriations reports. On the tools of oversight, see Louis Fisher, *The Politics of Shared Power: Congress and the Executive* (College Station: Texas A&M University Press, 1998), pp. 68-105.