

The Law: The Executive Branch and Propaganda: The Limits of Legal Restrictions

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Legal restrictions on executive branch agency use of funds for public relations activities and propaganda can be found in statutory law, appropriations law, and federal regulations. Nevertheless, executive agencies frequently expend public funds to promote aggressively the agendas of presidents. The legal restraints against propaganda have proven ineffective for three reasons: first, agencies do not track spending on public relations activities, which makes congressional oversight difficult; second, the line between appropriate public relations activities and propaganda is blurry; and, third, enforcement of the laws against propaganda runs headlong into the separation of powers.

The Executive Branch and Propaganda

During the administration of President George W. Bush, a number of executive agencies have expended public funds to promote the president and his policies. In some cases, the efforts would appear to be merely wasteful of public funds. For example, the White House has expended public funds to create and maintain Barney.gov, a child-friendly Web site that celebrates the president's Scottish terriers, Barney and Miss Beazley (Froomkin 2004).

In many instances, though, executive agencies have employed propaganda to promote the president's policies (propaganda, as I define it, is "government communications that selectively employ facts to persuade members of the public of a particular viewpoint.") To cite just a few examples: in June 2003, the Department of Education hired Armstrong Williams, a conservative commentator and syndicated columnist, to trumpet the positive aspects of the No Child Left Behind Act (P.L. 107-110) on his television program.¹ In April 2004, the Internal Revenue Service issued press releases to

1. The Department of Education (ED) contracted with Ketchum Communications, which then subcontracted, at ED's urging, with a public relations firm co-owned by Williams. The subcontract specified the promotional activities Williams was to provide, and ED signed this contract. See Office of Inspector General, U.S. Department of Education (2005).

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remind taxpayers of the looming income tax filing deadline. The missives also told readers that “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” (Aversa 2005). In 2005, the Social Security Administration (SSA) drew up a “strategic communications plan” to promote through speeches, public events, mass media, and other means the president’s contention that Social Security faces a funding crisis and the benefits program needs to be partially privatized (Pear 2005). Going public, President Bush himself undertook a “60 stops in 60 days” tour of the United States at which he and a number of government officials exhorted Social Security reform.² Meanwhile, the U.S. Department of Agriculture has a “Broadcast Media and Technology Center” that produces news-like segments that it distributes to local television stations advocating the administration’s policies (Barstow and Stein 2005).³ These are but a few recent examples of executive branch propaganda.⁴

Of course, the administration of George W. Bush is not the only one that has engaged in public relations activities that provoke criticism. Presidents have employed propaganda for at least a century (McCamy 1939). During the presidency of William J. Clinton, the Department of Health and Human Services produced videos promoting the administration’s legislation to reform Medicare (Kosar 2004a, 5). And, lest it be forgotten, President Woodrow Wilson through executive order set up the Committee on Public Information, which produced propaganda and enlisted both journalists and filmmakers to promote the United States’ efforts in World War I and quash bad news reports thereon (Creel 1920).

There is nothing inherently inappropriate in an agency expending appropriated funds to communicate with the public.⁵ 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 of personal and administra-

2. Samuel Kernell defines going public as “a strategy whereby a president promotes himself and his policies . . . by appealing to the American public for support” (Kernell 1997, 2). As used by Kernell, “going public” appears to have referred to public relations activities involving the president himself (e.g., direct addresses and speeches, whistle-stop tours, etc.). Here, though, I use “going public” more broadly to refer to executive branch public relations activities that promote a president’s positions and policies.

3. The U.S. Department of Agriculture (USDA) also, reportedly, has produced video and radio segments that advocated the adoption of the Central American Free Trade Agreement while it was being considered by Congress. These segments are distributed by USDA to rural radio and television stations. Andrew Martin and Jeff Zeleny, “USDA Plants Its Own News,” *Chicago Tribune*, June 16, 2005, p. C1. USDA 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 outdoorsmen (Lee 2005, A15).

4. President Bush announced that he had forbade his administration from paying columnists and commentators to promote his policies. However, he did defend the use of video news releases—video segments designed to look like news broadcasts (Kornblutt 2005; Stevenson 2005).

5. Indeed, the federal courts have “indicated that it is not illegal for government agencies to spend money advocating their positions, even on controversial issues.” U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, vol. 1, 3rd ed. (Washington, DC: U.S. General Accounting Office, 2004), 4-197.

tive integrity. But of the basic obligation there can be little doubt. (Commission on Organization of the Executive Branch of the Government 1949, 57)

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 that urges hikers and campers to avoid setting forest fires.

However, executive agency communications with the public that promote a president or his policies are a matter for concern for a number of reasons. First, they expend funds that might otherwise be used to alleviate public policy problems. Second, such promotional activities may reduce the ability of the public to assess the wisdom of particular policies and, by implication, the competency of public officials and the president, which may have electoral ramifications. Finally, by virtue of his office, the president is more visible than any judge or member of Congress. With visibility comes power—a president may “go public” by delivering a speech or holding a press conference in order to persuade the public and Congress to do as he wishes. Executive agency propaganda, then, exacerbates the natural communication advantage that the president has over Congress and the courts and may threaten the balance of power between the branches.

Legal Restrictions

There are five major legal restraints on executive agency communications activities: the publicity expert statute, appropriations law prohibitions against “publicity and propaganda,” the lobbying statute, the Information Quality Act, and Federal Communications Commission (FCC) sponsorship identification guidelines. The first three restrictions are dealt with jointly and the Information Quality Act and FCC guidelines are treated separately.

Publicity Experts, Publicity and Propaganda, and Lobbying

On October 22, 1913, Congress passed an appropriations act which included a provision stating: “No money appropriated by this or any other Act shall be used for the compensation of any publicity expert unless specifically appropriated for that purpose” (38 Stat. 212; 5 U.S.C. 3107). This provision was added to the act at the urging of Representative Frederick H. Gillett (R-MA), who was displeased to learn that the Office of Public Roads of the Department of Agriculture sought to hire a publicity expert. The amendment was discussed for a short time and its purpose was illuminated in a colloquy between Representatives Gillett and Asbury F. Lever (D-SC).

Mr. Lever: The gentleman has defined the publicity expert . . . [as] a man whose business is to extol and exploit the virtues of [an] agency. The gentleman does not undertake in this amendment to prevent some one employed by the Department of Agriculture, for instance, giving to the country information as to the work of the department?

Mr. Gillett: Of course not. . . .

Representative Lever asked whether the amendment would prevent a department from hiring a person whose job was to take technical reports and render them more accessible to the public, to which Representative Gillett replied, “I do not object to this at all.”⁶

Further statutory restrictions on agency communications activities may be found in annual appropriations laws. Since 1952, appropriations acts have carried straightforward language like this: “No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not heretofor [sic] authorized by Congress” (P.L. 108-447, Div. H, Sec. 624).⁷

Federal agencies, almost inevitably, crave larger and larger appropriations with each passing year. Therefore, agencies have an incentive to spend funds to persuade the public and members of Congress that their work is critical and requires increased support. Long ago, Congress recognized this temptation existed. In 1919, it enacted a statute (41 Stat. 68, chapter 6, sec. 6) that prohibited the use of appropriated funds

directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, 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, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation. (18 U.S.C. 1919)⁸

The law, until recently, threatened violators with possible fine and imprisonment for up to one year. In 2002, the antilobbying statute was amended (P.L. 107-273, sec. 205(a)); criminal punishment was dropped; nevertheless, the penalties are stiff. Violators face fines of \$10,000 to \$100,000 per infraction.

The Information Quality Act

The Office of Management and Budget announced its “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies” on January 3, 2002 (hereafter 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 (Copeland and Simpson 2005). 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

6. *Congressional Record* (1913, 4409-11).

7. 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.

8. Similarly, 31 U.S.C. 1532 prohibits recipients of “a federal contract, grant, loan, or cooperative agreement” from using said funds to “to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress.”

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

FCC Broadcasting Guidelines

Radio and television broadcasters and cable operators are required to obey federal “sponsorship identification rules.” These rules have their origins in the radio payola scandals of the late 1950s and early 1960s, where record companies were paying radio stations to play their songs instead of other companies’ songs. The sponsorship identification rules (47 U.S.C. 317, 508 and 47 C.F.R. 73.1212, 76.1615) 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” (FCC 2005, 3).

The Limits of Legal Restrictions

In light of the aforementioned legal restrictions, it might appear that an agency’s freedom to spend public funds for public relations or propaganda is quite limited. This, as the aforementioned and many other recent incidents indicate, is not the case. The limits of the present legal restrictions are explicated below.

Publicity Experts, Publicity and Propaganda, and Lobbying

Inspectors general, under their general charge to investigate agencies’ activities for waste, fraud, and abuse, may examine and audit agency communications (5 U.S.C. Appendix). But no federal agency has the responsibility to monitor agencies’ use of funds for publicity activities to determine whether they are legal (public relations) or illegal (propaganda). Instead, there exists “fire alarm oversight” of agency expenditures on communications (McCubbins and Schwartz 1984). 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 (GAO) asking for a legal opinion on the activities in question. Thereafter, Congress may hold hearings, if sufficiently incensed by what it has seen, and call agency administrators to task.

Unfortunately, in crafting the publicity expert statute and propaganda restrictions, Congress failed to define the terms “publicity,” “propaganda,” and “publicity expert.” Thus, to the GAO has fallen the task of delineating what these terms encompass. The GAO has done this on a case-by-case basis over the past half-century and, generally speak-

ing, the GAO has narrowly defined these terms.⁹ The 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.”¹⁰ The GAO 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,” that is, is “designed to aid a political party or candidate”; or
- is “covert propaganda,” that is, the communication does not reveal that government appropriations were expended to produce it.¹¹

Thus interpreted, 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. To cite just two examples, the GAO has found legal the hiring of public relations companies or the expenditure of appropriated funds on

- 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 public¹²; and
- an Office of Personnel Management (OPM) press release denouncing some members of Congress who desired to delay a civil service policy that OPM favored.¹³

Additionally, GAO’s definition of “propaganda”—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 governmental communications. Executive agencies appear to remain free 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) and sculpt the public’s understanding of both present and proposed policies.

As for the antilobbying statute, while it has been on the books for well over eighty years, it appears nobody has been indicted for breaking it. The GAO has taken the view that the law was mainly intended to prohibit some forms of “grassroots” lobbying, that is, explicit agency encouragement of constituents to contact their elected representatives

9. For a review of the GAO’s definition of these terms, see U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, 4-188-4-233.

10. U.S. Government Accountability Office, *Forest Service*, B-302992, September 10, 2004.

11. U.S. General Accounting Office, *Decision of the Comptroller General*, B-223098, October 10, 1986, pp. 8-9; and U.S. Government Accountability Office, *Application of Anti-Lobbying Laws to the Office of National Drug Control Policy’s Open Letter to State Level Prosecutors*, B-301022, March 10, 2004.

12. U.S. Government Accountability Office, *Forest Service*, 13.

13. U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, vol. 1, 4-200.

to demand support for the same agency or activities thereof. Thus, absent a direct call by an agency head or agency communication for members of the public to contact Congress, the GAO has, in effect, held that an agency may lobby the public to support a program, a proposed reform, or to encourage the public to adopt a particular viewpoint. Thus, for example, the GAO said that the SSA did not violate the law when it included in its regular mailings to 140 million Americans warnings that Social Security was facing a funding crisis and needed reform (at, it must be noted, a time when President George W. Bush was stumping for a proposal to reform the program).¹⁴

The Information Quality Act

Prima facie, the Guidelines place strong limits on agency 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 a 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 inter-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)

Clearly, the effect this law will have on agency public relations activities will be determined, in great part, by the definition of “press release.” Will it include agency Internet communications that promote particular policies, such as the present administration’s pro-Social Security Web page?¹⁵ Will it include posters, blimps, public speeches, or mass mailings? If not, then the law will not curb agency propaganda. In light of the fact that many executive agencies have shown a propensity toward expansive public relations activities, it seems unlikely that agencies will broadly define the term “press release” to encompass most forms of public outreach, thereby rendering the Guidelines’ restraints toothless.

FCC Broadcasting Guidelines

The FCC may investigate and punish a broadcaster that airs material for consideration and fails to notify listeners of this consideration.¹⁶ It does not appear, however, that

14. U.S. Government Accountability Office, *Social Security Administration—Grassroots Lobbying Allegation*, B-304715, April 27, 2005.

15. The Social Security reform Web site may be found at <http://www.whitehouse.gov/infocus/social-security/>.

16. “Consideration” means compensation, which includes monetary compensation, the provision of goods or services, or other benefits.

the FCC actively monitors broadcasts for violations of the law. Instead, the FCC appears to act when someone pulls an alarm. Thus, for example, in response to “a large number of requests” from the public and public interest groups, the FCC issued a public notice on April 13, 2005 to “remind” broadcasters and cable operators of their disclosure responsibilities under federal sponsorship identification rules (FCC 2005, 1).

If the FCC’s admonition encourages radio and television stations to follow the sponsorship disclosure rules, there may be fewer controversies regarding government-produced video news releases being run as news. However, the reach of the FCC and the 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).

So it was, then, that in 2000, the FCC investigated a complaint against major television broadcasters. The networks had, the FCC determined, included antidrug and antialcohol abuse messages in their programming under an arrangement with the Office of National Drug Control Policy (ONDCP) without informing viewers.¹⁷ 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 into such relationships with the government provided they were not clearly promised consideration by the federal government.¹⁸

The Challenges of Reform

The 108th and 109th Congresses have considered a number of bills that are intended to reduce agency propaganda.¹⁹ Congress also has proposed more explicit prohibitions on agency communications in appropriations bills. For example, one appropriation bill would prohibit the expenditure of funds “to produce any prepackaged news story . . . unless the story includes a clear notification within the text or audio that [it] was prepared or funded by [an] executive agency.”²⁰

17. The networks provided air time to match ONDCP’s purchase of air time to show antidrug and antialcohol abuse public service announcements. Federal Communications Commission, “Letter of David H. Solomon, Chief, Enforcement Bureau, FCC,” DA 00-2873, December 20, 2000.

18. “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.*, 5.

19. For example, the Stop Government Propaganda Act (S. 266) and the Federal Propaganda Prohibition Act (H.R. 373) in the 109th Congress.

20. For example, Transportation, the Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, the Executive Office of the President, and Independent Agencies: FY2006 Appropriations, H. Con. Res 95, 109th Congress.

Yet, any effort to curb agency expenditures on inappropriate communications with the public will face three substantial challenges not easily remedied by legislation: (1) tracking government expenditures on communications, (2) drafting language that distinguishes legitimate agency communications with the public from propaganda, and (3) the separation of powers.

Tracking Expenditures

At present, the federal government has little knowledge of the extent of agency expenditures on public communications. A recent rough estimate put annual expenditures at over \$1 billion (Kosar 2004b). While the Federal Procurement Data System (FPDS) does provide some information on these expenditures, its utility is limited. It contains only records of contracts valued at \$25,000 or more (Riehl 2004). And the FPDS only records contracted expenditures; agencies' direct expenditures, commitment of personnel, and so forth are not included. Furthermore, agencies' budgets do not provide a separate line item for public relations expenditures.

It might be argued that agencies should be compelled to include line item accounts of public relations spending. While this would, probably, assist Congress to better discern who is spending what, doing this is easier said than done and any figures for public relations produced may be deceptive or artificial. A seemingly simple and not wholly hypothetical example illustrates the difficulties involved. Say an agency wants to produce a press release that notifies the public of a new government service. One employee (GS-12) spends one hour drafting a one-page press release and two other agency employees (one GS-14, one appointee) spend forty-five minutes each editing and proof-reading the piece. Another employee, a GS-8, is asked to make two hundred copies of the press release. These copies are to be handed out to members of the press at a thirty-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 fifteen minutes posting a copy of the press release to the agency's Web site. After the press conference, two agency employees (GS-11), over the course of a few days, field occasional calls from reporters seeking further information. Sorting out how to cost out the factors related to producing this press release would be daunting. Moreover, any administrator who wished to downplay public relations costs might simply fail to include certain elements (e.g., photocopying might be listed under the agency's "printing costs" line).

Defining "Public Relations" Versus "Propaganda"

Another significant challenge to reform is distinguishing propaganda from public relations. The *Oxford English Dictionary* defines "propaganda" as the "systematic propagation of information or ideas by an interested party, especially in a tendentious way in order to encourage or instill a particular attitude or response." This definition is quite broad and not especially helpful in the present context, because it captures any coordi-

nated 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.²¹ The Bureau of the Budget (now the Office of Management and Budget [OMB]), in 1970, attempted to define "public relations." The result, though, was so broad as to include propaganda:

[P]ublic relations activities are those which strive to publicize or promote the objectives, operations, facilities, or programs for which the agency has a responsibility or in which it has an interest—whether or not they are specifically authorized by law. These include, but are not limited to, activities concerned with press contacts, broadcasting advertising, exhibits, films, publications, and speeches.²²

Not surprisingly, this definition did not catch on with agencies. A GAO study a decade and a half later that sought to determine public relations spending struggled with this task because it found that "[f]ederal agencies do not uniformly define 'public affairs.'"²³

It might be argued that propaganda can be prohibited by permitting federal agencies to convey only factual information. Perhaps initially attractive, though, this instruction would not solve the problem. 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.²⁴

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-twentieth 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.²⁵

It might be objected that the definition of propaganda given by me will suffice ("government communications that selectively employ facts to persuade members of the public of a particular viewpoint"). Alas, it too is inadequate. For one, any communica-

21. 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.

22. Office of Management and Budget, *Bulletin No. 70-10, Agency Public Relations Activities*, April 2, 1970.

23. U.S. General Accounting Office, *Public Affairs: Public Affairs and Congressional Affairs Activities of Federal Agencies*, GAO/GGD-86-24, February 1986, p. 9.

24. The spokesperson also might have deceived the listener by defining the public policy problem differently.

25. These are not the only forms of deception by conveyance of facts. See Stone (2001).

tion that endeavors to impart information may persuade an individual to alter his behavior. A person learning that the United States runs a trade deficit with China may, without government urging, feel obliged to buy American-produced goods. For another, when crafting a communication, inevitably one must choose to include some facts and exclude other facts as irrelevant, excessive, inappropriate, and so on. So, then, if the secretary of the Treasury wanted to inform the public that in the past year the U.S. dollar has fallen in value relative to other foreign currencies, few listeners would expect him to place his comments in the context of the 200+ years of U.S. monetary relations with other nations, say, contrasting the current strength of the dollar versus its strength during the Vietnam War, the Great Depression, and so forth.

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, when an agency misuses appropriated funds for propaganda, the GAO cannot punish the agency. Its only enforcement tool is to report its findings to Congress and refer cases to the Department of Justice (DOJ) for consideration. Prosecution of violations, in short, requires executive branch action, and when it comes to propaganda, the executive branch has demonstrated little interest in punishing wayward executive agencies. A search of U.S. attorney general and Office of Legal Counsel opinions failed to locate a single opinion on the publicity expert prohibition statute. Westlaw and Nexis searches failed to reveal any criminal prosecutions under this statute.²⁶

But what of the enforcement of publicity and propaganda restrictions in appropriations laws? Here too, the executive branch has exhibited little interest in stopping agencies from engaging in propaganda. In March 2005, the DOJ and OMB issued memoranda that stated that executive branch agencies need not heed the GAO's interpretations of appropriations law.²⁷ 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.²⁸ The OMB memorandum agrees that executive agencies must comply with applicable laws; however, it states, it is "OLC [Office of Legal Counsel] . . . not the GAO, that provides the controlling interpretations of the law for the Executive Branch."²⁹ Those in the executive

26. For its part, the GAO has only once found that an agency illegally hired a publicity expert. U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, 4-233.

27. 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*, March 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, March 11, 2005.

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

29. Bolten, *Use of Government Funds for Video News Releases*, 1.

branch with questions about the interpretation of appropriations laws were directed to contact the general counsel of their respective departments or agencies.

The DOJ memorandum took 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 the GAO’s interpretation of what constitutes propaganda. The DOJ argues, against the 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. The DOJ asserted that government communications that are “purely informational”—even if they do not notify the audience that they are government produced—are not propaganda and, hence, are “legitimate.”³⁰ The DOJ then declared that each agency, not the DOJ, is “responsible for reviewing their [promotional materials] to ensure that they do not cross the line between legitimate governmental information and improper government-funded advocacy.”³¹

Similarly, the DOJ has taken a narrow interpretation of the Anti-Lobbying Act. According to a 1989 OLC memorandum, the president’s constitutional duties to “give to the Congress information on the State of the Union,” “to recommend to their Consideration such measures as he shall judge necessary” (Art II, Sec. 3, Cl. 1), and to “take care that the laws be faithfully executed” require the executive, and, by implication, the agencies he directs, to “communicate freely with those who make the laws, as well as those who are governed by them.”³² Thus, the Anti-Lobbying Act is said to prohibit little; it “may prohibit substantial ‘grass roots’ lobbying campaign [directed by executive agencies] . . . designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals.”³³ Interestingly, an interpretation this broad would seem to prohibit activities such as the present Bush administration’s “60 stops in 60 days” publicity campaign to generate public support for the president’s plans for reforming Social Security. Nevertheless, as of July 2005, the DOJ had taken no action.

30. In its own opinion on the controversial Medicare video news releases (VNRs), the DOJ found “[t]he VNRs . . . did not advocate a particular policy or position of HHS and CMS, but rather provided accurate (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 Web site at <http://www.usdoj.gov/olc/opfinal.htm>—carries the title “Expenditure of Appropriated Funds for Informational Video News Releases.”

31. Bradbury, *Re: Whether Appropriations May Be Used for Informational Video News Releases*, March 11, 2005, pp. 1-2.

32. Department of Justice, Office of Legal Counsel, *Memorandum for Dick Thornburgh, Re: Constraints Imposed by 18 U.S.C. 1913 on Lobbying Efforts*, September 28, 1989, pp. 6-7. See also Department of Justice, Office of Legal Counsel, *Legal Constraints on Lobbying Efforts in Support of Contra Aid and Ratification of the INF Treaty*, February 1, 1988; Department of Justice, Office of Legal Counsel, *Anti-Lobbying Restrictions Applicable to Community Services Administration Grantees*, June 17, 1981; and Department of Justice, Office of Legal Counsel, *Memorandum Opinion for the Attorney General: Applicability of Antilobbying Statute (18 U.S.C. 1913)—Federal Judges*, January 30, 1978. OLC opinions may be found in annual volumes, *Opinions of the Office of Legal Counsel of the United States Department of Justice* (Washington, DC: Government Printing Office).

33. *Ibid.*, 2.

Conclusion

Any effort to rein in executive agencies' public relations and propaganda activities faces great hurdles. Congress may pass new legislation that more sharply defines legal and illegal activities—an effort, as noted above, not without its own challenges. In fact, reformers in the 108th and 109th Congresses have introduced legislation to do this. S. 266 would make illegal any government communications that fail to carry clear notifications that they are government produced. Legislation that better clarifies the legal from the illegal would increase the probability that executive agencies—and the DOJ, especially—would agree with Congress's interpretation of the law.³⁴ The GAO may also, then, feel more able to declare more agencies' actions unlawful.

But would better laws encourage more prosecutions and determinations of guilt? Absent an infusion of antipropaganda prosecutorial zeal into the DOJ, the answer would appear to be “not likely.” Indeed, if the above shows anything, it is that passing laws is not sufficient. Executive agencies have an interest in aggressively promoting themselves and have shown themselves willing to do so in spite of the plain language of the law (inadequate though it may be) and Congress's wishes. The current president and his predecessors have been more than happy to use executive agencies as mouth-pieces for their policy views. This will not cease unless Congress uses its powers to punish wayward agency behavior. Congress may discourage agencies from pushing the public relations envelope by calling its administrators before hearings for sharp questioning, directing the GAO to more aggressively investigate agency public relations activities and threatening to reduce an agency's appropriation or powers. In wielding these powers, not only will Congress curb propaganda, it will also bolster its own power vis-à-vis the executive branch by limiting its power to dominate political dialogue by “going public.”

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34. These clarifications of the law might also be included in appropriations reports. On the tools of oversight, see Fisher (1998, 68-105).

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