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GOVERNMENT INFORMATION AND PROPAGANDA: HOW TO DRAW A LINE?

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INTRODUCTION

A government cannot be held accountable if citizens don't know its policies, its plans and its progress in implementing them. Democratic governments must be transparent about much they spend each year and for what purposes. Deploying modern tools to collect and analyze data also can help the public make informed decisions on questions large and small. As one example, businesses rely on U.S. Commerce Department trade statistics to assess foreign markets. As another, the National Weather Service tells us if we need to take an umbrella when we go outdoors.

But that same massive information machinery sometimes goes beyond enlightening citizens and is employed instead to persuade the public to favor certain policies. Is democracy well-served when the government uses taxpayer dollars to shape voter opinions?

A notable example can be found in a recent U.S. Labor Department campaign in favor of raising the minimum wage, a topic on which there is considerable congressional and aca-



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demic debate. The nonpartisan Congressional Budget Office has pointed out that raising the minimum wage would eliminate some jobs.¹ Yet, the Labor Department's webpage treats raising the minimum wage as an unalloyed good and labels possible job losses a "myth."²

A message on the department's webpage invited visitors to: "See how raising the national minimum wage will benefit America's workers." In July 2015, the department's Twitter account shared video of a squiggle of mustard that spelled out "#RaiseTheWage" on a hot dog, directly referencing a hashtag associated with recent interest-group advocacy to pressure fast-food employers to raise wages.

1. Congressional Budget Office, "The Effects of a Minimum-Wage Increase on Employment and Family Income," February 2014. <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/44995-MinimumWage.pdf>

2. U.S. Labor Department, "Minimum Wage Myth-Busters," accessed Sept. 15, 2016. <https://www.dol.gov/featured/minimum-wage/mythbuster>

FIGURE 1: DOL'S 'RAISE THE WAGE' TWEET



SOURCE: U.S. Labor Department Twitter account, @USDOL

As significant as the corruption of public opinion is for democracy, it receives nowhere near the attention that other information issues do. The National Security Agency's collection of citizens' personal data and the excessive wielding of "secret" stamps by various agencies are front-page news. In contrast, the press only episodically covers the issue of government propaganda. Where it does, the attention usually is driven by a partisan attack over a specific executive branch effort to sway voters or by a Government Accountability Office study that turns up a transgression in the course of an investigating a different subject. Congressional committees rarely take up the issue in a systematic way and the executive branch, for obvious reasons, avoids the subject.

The limited attention the topic receives is all the more striking when one realizes the immense scope of government communications. As demonstrated in Figure 2, the federal government spent nearly \$800 million on advertising and public-relations contracts with the private sector in 2015. This includes money spent on advertising in all forms of media, marketing research, opinion polling, message-crafting assistance and more. Over the past five years, such spending has totaled \$3.8 billion.

Contract expenditures do not include the salaries of the innumerable federal employees who promote their agencies' work in print, on air and online. The total does not include anti-drug media campaigns or the cost of printing and publishing reports and government journals, such as the Federal Highway Administration's

Public Roads magazine.³ The Government Publishing Office, which costs \$117 million to operate, has more than 1 million publications online.⁴ The total government spending on public communications certainly exceed \$1 billion per year.⁵

The internet has made it much easier for agencies to communicate with the public. Not long after President Barack Obama took office, the administration carried out an audit of federal government websites that found there were 24,000 of them.⁶ Every federal agency has an internet presence. The U.S. Justice Department has a YouTube channel.⁷ The Environmental Protection Agency alone – to name just one of the 120 government agencies – has about two dozen Twitter accounts.⁸

Federal agencies have established units devoted solely to communication. The U.S. State Department coined the term "ediplomacy" to describe its vast array of internal and external communications. In 2002, the department's Office of eDiplomacy had six staffers; a decade later, the figure was 80. Altogether, the department counts some 150 people scattered through various offices who work on ediplomacy and who connect with more than 900 staffers overseas. A 2012 report on ediplomacy concluded the State Department "now operates what is effectively a global media empire, reaching a larger direct audience than the paid circulation of the 10 largest US dailies and employing an army of diplomat-journalists to feed its 600-plus platforms."⁹

If its information-gathering powers represent the first dimension of government information and its ability to withhold information represents the second, then the third dimension is the government's ability to propagate information. This paper, which grew out of a spring 2016 R Street Institute

3. "Public Roads is the bimonthly magazine of the Federal Highway Administration (FHWA). Reading Public Roads is the easiest way to keep up-to-date on developments in federal highway policies, programs, and research and technology." <http://www.fhwa.dot.gov/publications/publicroads/>

4. Government Publishing Office, "Budget Justification, FY2017," Jan. 25, 2016, p. 2. https://www.gpo.gov/pdfs/congressional/Budget_Justification_2017.pdf

5. Government Accountability Office, "Public Relations Spending: Reported Data on Related Federal Activities," GAO-16-877R, Oct. 5, 2016. <http://www.gao.gov/assets/690/680183.pdf>

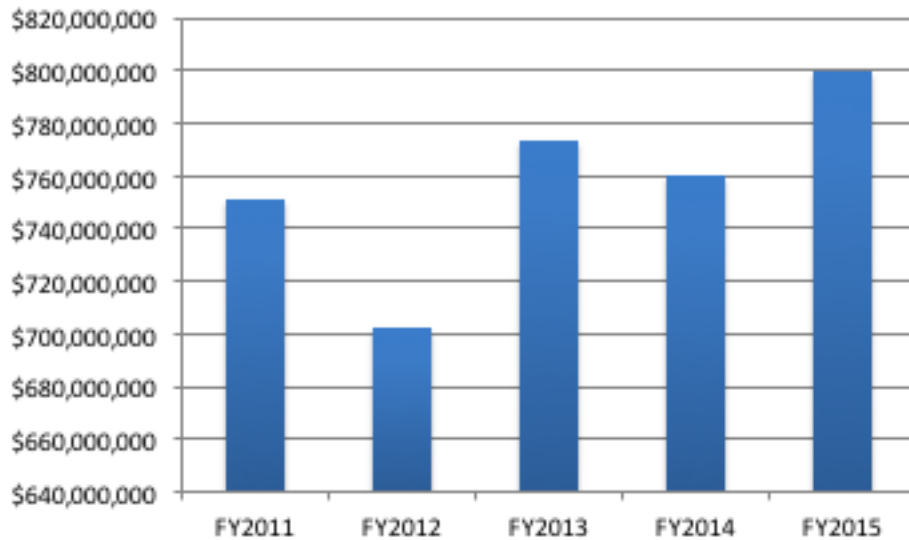
6. Macon Phillips, "Too Many Websites.gov," WhiteHouse.gov, June 13, 2011. <https://www.whitehouse.gov/blog/2011/06/13/toomanywebsitesgov>

7. See <https://www.youtube.com/user/TheJusticeDepartment>.

8. See <https://twitter.com/search?f=users&q=EPA>.

9. Fergus Hanson, "Revolution @ State: The Spread of Ediplomacy," Lowy Institute for International Policy, p. 1, 2012.

FIGURE 2: FEDERAL SPENDING ON ADVERTISING/PR CONTRACTS



SOURCE: USASpending.gov

roundtable and quotes from roundtable participants,¹⁰ looks to bring government information out of the shadows both by identifying the sometimes knotty issues and by suggesting possible palliatives. This is not meant to be the last word on the subject, but an impetus to further discussion and debate.

BRIEF HISTORY OF U.S. GOVERNMENT PERSUASION

Government agencies have been crossing the blurry line between public information and propaganda for nearly the whole life of the republic. Way back in 1791, Treasury Secretary Alexander Hamilton used reports on the nascent nation's economy and finances to wage a campaign to promote policies that would establish a national commercial republic.¹¹ But it wasn't until World War I that the nation saw the beginnings of a systematic, pervasive program of government propaganda.

The proximate cause, as it was in other countries, was the need to marshal the entire national population to wage total war. With the growth of industrial societies, citizens acquired more political and economic power. The number of publications increased, as had the number of people capable of read-

ing them, thanks to more pervasive literacy. With these shifts came attention to a new concept – public opinion.

“Step by step, proceeding by trial and error, the analysis of the nation's morale became a major preoccupation,” French historian Jean-Jacques Becker wrote of his own country during the war.¹² But governments weren't limited just to analysis; they also created institutions to shape attitudes and actions, employing the same communication tools that had empowered citizens.

Each nation proceeded in its own way. In the United States, Congress had a longstanding congressional aversion to the federal government using its power to shape public opinion. When Theodore Roosevelt used press releases to further his policies, legislators complained strenuously. They viewed such efforts as a strategy to subvert their power. The president was supposed to carry out policy, not initiate it. “This press-bureau business is a sort of political campaigning,” one legislator complained. “Apparently the motive is self-aggrandizement of officials – entrenchment of officials in power.”¹³

Pushing back against the executive branch, Congress passed legislation in 1913 forbidding, without its express approval, any expenditure of appropriated funds on “publicity experts,” a term then gaining currency.¹⁴ “It does not seem to me that it is proper for any department of the government

10. Conference attendees included: Alissa Ardito, Administrative Conference of the United States; Gisselle Bourns, Administrative Conference of the United States; Wendy Ginsberg, Congressional Research Service; John Maxwell Hamilton, Louisiana State University; Craig Holman, Public Citizen; Margo Jolet, Louisiana State University; Kevin R. Kosar, R Street Institute; Mordecai Lee, University of Wisconsin-Milwaukee; Jack Maskell, Congressional Research Service; Lisa Rein, *Washington Post*; Kathleen Searles, Louisiana State University; and Peter Warren, U.S. Senate Committee on the Budget.

11. Bruce Katx and Jessica Lee, “Alexander Hamilton's Manufacturing Message,” Brookings Institution, Dec. 5, 2011, <https://www.brookings.edu/articles/alexander-hamiltons-manufacturing-message/>

12. Jean-Jacques Becker, “The Great War and the French People,” translation by Arnold Pomerans, Berg Publishers, p. 7, 1993.

13. Government Printing Office, “Department Press Agents,” Hearing before House Committee on Rules, under H. Res. 545, May 21, 1912.

14. James L. McCamy, “Government Publicity: Its Practice in Federal Administration,” University of Chicago Press, p. 6, 1939.

FIGURE 3: WORLD WAR I PROPAGANDA POSTER



SOURCE: Wikipedia

to employ a person simply as a press agent,” said the bill’s author, Rep. Frederick Gillett, R-Mass., who would go on to become speaker of the House.¹⁵

But Gillett’s legislation would prove a futile finger in the dike. The Committee on Public Information, created by President Woodrow Wilson one week after the United States entered the Great War, inundated Americans with propaganda. The CPI managed much of the government’s press and public relations, including those of President Wilson, who stopped having press conferences.

What had been an irregular trickle of press relations became a gusher. A brand-new publication, the *Official Bulletin*, published government news for all to read. Separate branches of the CPI drew on the expertise of advertising executives, educators, artists and movie moguls. In a moment of genius, the head of the CPI, journalist George Creel, created the “Four Minute Men,” a volunteer corps of speakers who would recite four-minute speeches from talking points provided to them by the CPI. The Four Minute Men promoted Liberty Loans, food conservation and other wartime efforts during intermissions in local movie houses. By the end of the war, they were 75,000 strong.

15. *Congressional Record*, 63rd Congress, first session, p. 4409, Sept. 6, 1913.

The provision of information during the war was accompanied by the suppression of contrary ideas, through the Espionage Act and other measures.¹⁶ These limits on speech, which were carried to extremes during the war, did not continue long afterward. Weighing the costs to civil liberties, the courts over the succeeding decades would render several opinions that strengthened First Amendment rights.¹⁷

But government propaganda has proven more difficult to moderate than suppression of speech. As noted by legal scholar Geoffrey R. Stone:

The question raised by the activities of the CPI is how far the government should go. ... This may not be a constitutional question. It would have to be a very extreme case to imagine a court holding that the government’s own speech violates the First Amendment because it has, in effect, swamped, the marketplace of ideas. As a *constitutional* matter, we tend to give broad leeway to the government’s own propagandizing, and there is not judicial precedent declaring government speech itself unconstitutional under the First Amendment. But even if there is no constitutional barrier to government advocacy of its own policies, there are certainly limits on how far the government *should* go. The line between responsible advocacy and irresponsible manipulation of public opinion may not be legally enforceable, but it is critical as a matter of sound governance.¹⁸

The controversial CPI was shuttered, although specific elements continued; the *Official Bulletin* later was reborn as the *Federal Register*. The United States would never again have a single, central information ministry. It simply was much more efficient and effective for government entities to manage their own decentralized information programs. This proved especially true as the executive branch continued to expand, taking on more and more programs that shaped Americans’ lives. Perhaps the CPI’s most enduring legacy was the government’s continuing preoccupation with “the manufacture of consent,” as Walter Lippmann put it in his classic book lamenting the perversion of public opinion.¹⁹

INFORMATION OR PROPAGANDA?

The line between advocacy and manipulation is hard to define, nearly impossible to enforce and arguably must be drawn differently for different classes of government work-

16. 18 U.S.C. § 791.

17. Lee Epstein and Thomas G. Walker, “Constitutional Law for a Changing America: Rights, Liberties, and Justice,” CQ Press, 2nd edition, chapters 3-5, 1995.

18. Geoffrey R. Stone, “Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism,” W. W. Norton, p. 154, Oct. 17, 2005.

19. Walter Lippmann, “Public Opinion,” Harcourt, Brace and Co., 1922.

FIGURE 4: CLEAN POWER PLAN PROMOTIONAL WEBPAGE



SOURCE: Environmental Protection Agency

ers. Mordecai Lee, a professor of public administration at the University of Wisconsin-Milwaukee, parses these differences with a model that accords more latitude to elected officials and political appointees and less to civil servants.²⁰ The former engage in political communications; the latter in public-administration communications. Policymakers are expected to explain their policies; civil servants are supposed to implement them. In the recent R Street roundtable, legislative attorney Jack Maskell noted of the president:

He has a constitutional duty to take care that laws are faithfully executed so he has to be able to explain the laws and to tell everybody what we want. [Communications restrictions] can't apply to his direct appointees, the people in the cabinet, because they are part of the administration and they have to be able to tell Congress what kind of laws they want and they have to be able to communicate that to the public.

During the roundtable, Mordecai Lee observed that civil servants navigate gray areas. At one end of the spectrum is the provision of factual information in dry government reports. At the opposite end is “PR to gain public support.” In the middle are programs to persuade the public to do something, such as give up smoking or use government services. Messages such as these implicitly carry endorsements for government policy.

20. Mordecai Lee, “Public Relations in Public Administration,” *Encyclopedia of Public Administration and Public Policy*, 3rd edition, Taylor and Francis, pp. 2830-2836, 2016. <http://www.crcnetbase.com/doi/10.1081/E-EPAP3-120053513>

As longtime congressional staffer Peter Warren noted during the roundtable, agencies “want to create demand for their programs.” It does not take much imagination to see how a civil servant working for a political appointee in, e.g., the Labor Department would want to help with a campaign to press Congress to raise the minimum wage. Equally understandable is that EPA communications to the public include both factual updates, such as the status of the agency’s response to the Colorado Gold King Mine toxic spill, and aggressive advocacy, such as for the EPA’s carbon-emissions-curbing Clean Power Plan.²¹ Legislators continue to find it difficult to limit this type of persuasion. “Based on my research, the de facto winner was almost always the agencies, the civil servants, and the de facto loser was almost always Congress,” Lee observed.

While it’s essential to the deliberative process in a democracy that political leaders be able to sell their policies, the useful functioning of government requires that the public receive sufficient information to make sound independent judgments. Legal scholar Cass Sunstein has written about how the need for government secrecy on some issues is offset by journalists’ right to pursue news independently, which

21. Respectively, see Michael Biesecker and Matthew Brown, “EPA Knew of Blowout Risk Ahead of Colorado Mine Accident,” Associated Press, Aug. 22, 2015; and Environmental Protection Agency, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 79 *Federal Register* 34829, Oct. 23, 2015. <https://www.federalregister.gov/documents/2015/10/23/2015-22842/carbon-pollution-emission-guidelines-for-existing-stationary-sources-electric-utility-generating>

he calls “an equilibrium model.”²² There similarly needs to be equilibrium between the government’s voice and competing voices. With a large budget and communications apparatus, the government has an advantage in getting out its message. This advantage is amplified further still by the financial struggles of newspapers and other media, leading to a shrinking corps of reporters who cover government, as well as by government’s growing ability to circumvent the press through social media.

Paradoxically, despite the government’s unrivaled capacity to collect and report data, government agencies offer only the sketchiest details about how much information they provide each year or the number of people engaged in that process. Job titles are not an adequate gauge of how many people are employed communicating to the public. Many government workers have communications duties as just part of their jobs. It’s possible to count the publications produced by the Government Publishing Office each year, but far more difficult to assess the extent of the government’s online communications activities. As mentioned earlier, the EPA has some two dozen Twitter accounts. It uses a social media tool called Thunderclap, which spreads messages so widely that one agency communications official called it a “virtual flash mob.”

A second impediment to regulating government information flows is the absence of meaningful guidelines. Congressional appropriations bills regularly forbid agencies from spending funds for “publicity or propaganda purposes.” But these terms are vague and fail to differentiate information from advocacy. What other government communications restrictions do exist tend to be equally ineffective and seldom enforced.

CONGRESSIONAL LIMITS ON AGENCY COMMUNICATIONS

Congress did not sit pat when the executive branch began to expand its public-communications apparatus during the Progressive Era. Members immediately saw a threat to representative government. If bureaucracies began to shape public opinion, governing hierarchies would be inverted and the executive would rule. Executive communications also interposed the bureaucracies between legislators and the public. As Mordecai Lee put it during the R Street roundtable:

In the old days, the average citizen had contact with the federal government through their member of Congress. With the exception of the Post Office, individual citizens weren’t touched by the

federal government. They had their mail carrier, but that was it. Otherwise they were touched by their member of Congress. [When] they wanted information they wrote a letter to their congressman.

Legislators were further aghast at the prospect of agencies using sales pitches to inflate the public’s demand for government services. It was this latter concern that compelled Rep. Gillett to introduce his 1913 bill to bar the use of appropriated money “for the compensation of any publicity experts unless specifically appropriated for that purpose.” When House Agriculture Committee Chairman Asbury Lever, D-S.C., asked Gillett for his rationale, he clarified that he saw no harm in agencies employing editors to write agency reports on their activities in “more popular language.” What offended Gillett was agencies spending public funds to “extol” their work. Gillett’s amendment was accepted, and remains law to this day.²³

A few years after the Gillett prohibition, Congress passed the Anti-Lobbying Act of 1919. The measure, which remains in-force in slightly amended form, states:

No part of any money appropriated by this or any other Act shall, in the absence of express authorization by Congress, be used 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 to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation.²⁴

The goal of the statute, sometimes called the grassroots lobbying law, was to keep executive agencies from interjecting themselves between the public and Congress. Notably, however, the law does not forbid agencies from speaking directly with Congress about policy or funding.²⁵ Each year, agencies submit to Congress budget justifications that request particular levels of funding and changes to law. Agencies also employ congressional liaisons, who answer requests from Congress and transmit reports and information. Most agencies – even the highly secretive Central Intelligence Agency – are legally obligated to report these activities to the public.²⁶

23. 5 U.S.C. § 3107.

24. 18 U.S.C. § 1913.

25. Public Citizen, “Restrictions on Government Entities Lobbying the Federal Government,” accessed Oct. 16, 2016. <https://www.citizen.org/documents/Govt-Lobbying-Govt.pdf>

26. See <https://www.cia.gov/library/reports>.

22. Cass R. Sunstein, “Government Control of Information,” *California Law Review*, Vol. 74, Issue 3, Article 10, May 1986. <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2010&context=californialawreview>

Since the 1950s, Congress has utilized a third policy to curb agency communications. Most – but not all – annual funding bills prohibit agencies from spending funds “for publicity or propaganda purposes within the United States not heretofore authorized by Congress.”

For the most part, these legal curbs were intended to maintain congressional primacy in our constitutional system. Congress is the first branch, and it alone has authority to create agencies, specify what they can do and appropriate money to them. The late Rep. Clarence Brown, R-Ohio, expressed this concern in a 1950 hearing, asking a witness whether “the demand for new government services should spring from the people or ... from those [bureaucrats] who desire to render service for the people?” Brown elucidated the need for Congress to curb agency public relations:

So the real issue was whether bureaucracy was more potent than the representatives of the people, whether they could compel the Congress, through pressure and propaganda, to appropriate unnecessary funds, or whether the representatives of the people themselves should judge as to how the public’s money was to be spent.²⁷

There are several reasons why the laws have not been terribly effective.

To start, agencies can dodge the prohibition against hiring publicity experts by giving them different position titles, such as “public affairs specialist.”²⁸ Agencies also can assign communications duties to staffers whose jobs primarily involve other duties. The rise of social media and other new media technologies has made this kind of evasion more common.

It also may be difficult to delineate clearly what sorts of agency communications are appropriate rather than inappropriate, objective rather than biased, and educational and informative rather than deceptive? As Kevin Kosar has written:

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. 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.²⁹

It’s also the case that the laws themselves are not well-drafted. Most glaringly, not only does the law not define “publicity” or “propaganda,” but it doesn’t even hint at differences between the two or provide examples or evaluative criteria. These might include, for instance, declaring that communications should be balanced and written in a tone that does not extol the agency or its activities. There also are drafting imperfections and anachronisms, such as the fact that the 1919 anti-lobbying statute forbids the use of telegrams, but not the internet.³⁰

Finally, the communications prohibitions are seldom enforced, meaning that agencies have little incentive to heed them. No inspector-general or other official is charged with monitoring or policing agency communications for compliance with the law.

The Government Accountability Office will sometimes investigate specific allegations of abuse, but only when requested to do so by a congressional committee. GAO has produced a corpus of legal opinions that provide practical criteria to discern licit from illicit communications.³¹ Under GAO precedent, agency communications that are not clearly labeled as such are “covert propaganda” and against the law. Public communications that include a call to action (“contact your member and tell her to vote against H.R. 1”) and those that are “purely political or partisan” also are deemed illicit.

When agencies spend appropriated funds for purposes that violate the law, they can be forced to repay them. However, such instances are rare. The vagaries of the three agency-communications statutes have left the GAO, as it commented

27. As quoted in Mordecai Lee, “Congress vs. the Bureaucracy: Muzzling Agency Public Relations,” University of Oklahoma Press, pp. 13-14, 2011.

28. USAJobs.gov, the government’s hiring website, lists open positions in public relations, including “public affairs specialist.” See <https://www.usajobs.gov/Search/?keyword=public+affairs+specialist&Location=&AutoCompleteSelected=>

29. Kevin R. Kosar, “Public Relations and Propaganda: Restrictions on Executive Agency Activities,” Congressional Research Service, report RL32750, pp. 8-9. Feb. 8, 2005 <https://archive.org/details/PublicRelationsAndPropagandaRestrictionsOnExecutiveBranchActivities>

30. Lee, “Congress vs. the Bureaucracy,” pp. 90-91, 2011.

31. Government Accountability Office, “Principles of Federal Appropriations Law, 3rd edition,” Vol. 1, pp. 188-233, 2003. <http://www.gao.gov/special.pubs/d04261sp.pdf>

in one report, “reluctant to find a violation where the agency can provide a reasonable justification for its activities.”³² Indeed, the GAO’s interpretations of the reach of these laws has been narrow, with very few communications activities deemed to be illicit.³³

Congress occasionally writes laws that give agencies a broad mandate to undertake public relations. To take a hypothetical, should Congress direct the “Department of Safe Roads” to reduce highway accidents, the agency might choose to run television advertisements that discourage high-speed driving and drunken driving. The law might not explicitly direct or authorize the agency to run advertisements but, legally, doing so would pass muster. During the R Street roundtable, Maskell noted that, under GAO’s necessary expense doctrine, an agency does not “need direct authorization to disperse funds as long as it’s within the broad scope of the agency’s purpose.”³⁴

The DOJ has not once prosecuted a violation of the laws in the century they’ve been on the books. It has interpreted the statutes extremely narrowly, and held that it is not bound to the GAO’s interpretations of the law.³⁵ “Because GAO is part of the legislative branch, executive branch agencies are not bound by GAO’s legal advice,” Steven G. Bradbury of the White House Office of Legal Counsel wrote a decade ago.³⁶

CASE STUDY I: THE EPA CORRUPTS PUBLIC INPUT

One of the requirements of the Administrative Procedure Act is that, when executive agencies implement laws passed by Congress, they must ask for public comment on any proposed rules.³⁷ The point of taking public comment for a period of a month or longer is to collect information that can help the agency refine its proposed rule. When the agency issues its final rule, it includes discussion of and answers to the various comments it has received. Regulations have the effect of law and – since they are issued by agencies, not Congress – democratic accountability obliges unelected agencies to listen to the public.

32. *Id.*, p. 200.

33. *Id.*, pp. 188–233.

34. *Id.*, pp. 19–33.

35. Kevin R. Kosar, “The Law: The Executive Branch and Propaganda: The Limits of Legal Restrictions,” *Presidential Studies Quarterly*, Vol. 34, No. 5, pp. 794–795, December 2005.

36. Steven G. Bradbury, “Re: Whether Appropriations May Be Used for Informational Video News Releases,” Memorandum for the General Counsels of the Executive Branch, March 1, 2005; The Office of Management and Budget took a similar position, see: Joshua Bolten, “Use of Government Funds for Video News Releases,” Office of Management and Budget, M-05-10, March 11, 2005.

37. 5 U.S.C. § 551 et seq. On rulemaking, see Maeve P. Carey, “The Federal Rulemaking Process,” Congressional Research Service, report RL 32240, June 17, 2013. <https://archive.org/details/MaevePCareyTheFederalRulemakingProcess>

In 2015, the Environmental Protection Agency (EPA) corrupted the public-comment process by running a public campaign promoting its proposed Waters of the United States (WOTUS) rule.³⁸ In April 2014, the EPA proposed a rule that would expand the reach of the Clean Water Act’s restrictions and the EPA’s authority. Dairy farmers, home builders, timber companies, energy producers and dozens of organizations and companies expressed concern, as did 30 states.³⁹

Unbowed by the criticism, the EPA gamed the rulemaking process by working with supportive environmental groups to load the rulemaking record with positive public comments. The agency used the social-media software Thunderclap to get messages promoting the agency’s WOTUS rule republished to various social media (e.g., “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family and my community.”). The EPA unabashedly announced its WOTUS promotional campaign on its blog and solicited individuals and groups to help advocate for the rule and to submit public comments on it. Some months after the campaign began, EPA Administrator Gina McCarthy cited the surfeit of glowing comments on WOTUS as evidence that it was widely supported.⁴⁰

FIGURE 5: SURGEON-GENERAL RETWEET PROMOTING WOTUS



Source: Surgeon General Twitter account, @Surgeon_General

Sen. James Inhofe, R-Okla., chairman of the Senate Committee on Environment and Public Works, was offended by the publicity campaign and asked the GAO to render a legal opinion. The GAO found the EPA violated both the 1919 anti-lobbying act and the appropriations bill’s publicity or propaganda provision.⁴¹ By spending money for these purposes,

38. Environmental Protection Agency, “Definition of “Waters of the United States” Under the Clean Water Act,” 79 Federal Register 22188, April 21, 2014. <https://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf>. See also Kevin R. Kosar, “The EPA’s Illegal Propaganda,” *The Weekly Standard*, Dec. 15, 2015. <http://www.weeklystandard.com/the-epas-illegal-propaganda/article/2000238>

39. Jenny Hopkinson, “Obama’s Water War,” *Politico*, May 28, 2015. <http://www.politico.com/story/2015/05/epas-waterways-wetlands-rule-118319>

40. Eric Lipton and Coral Davenport, “Critics Hear E.P.A.’s Voice in ‘Public Comments,’” *The New York Times*, May 18, 2015. <http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html>

41. Government Accountability Office, “Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions,” B-326944, Dec. 14, 2015. <http://www.gao.gov/assets/680/674163.pdf>

which were not authorized by law, the EPA also violated the Antideficiency Act.⁴² For its part, the EPA denied wrongdoing, declaring through a spokeswoman: “We use social media tools just like all organizations to stay connected and inform people across the country about our activities.”⁴³

The WOTUS propaganda incident is noteworthy on a few counts. The EPA’s sheer brazenness demonstrates that agencies can and will pursue their policy preferences, regardless of statutory curbs on public communications. It also shows that agencies will not suffer real consequences for breaking the law. All the GAO could do was demand the EPA calculate exactly how much it spent on the campaign and report it publicly to Congress and the Office of Management and Budget (OMB). No fine was issued; no employees were fired. A couple of months after the GAO issued that demand, a clearly exasperated Inhofe found himself writing the OMB to ask why the EPA still had not complied.⁴⁴

The agency’s use of Thunderclap underscores a point elucidated in the second case study – the internet is a major new front in the struggle over agency public communications and propaganda.

CASE STUDY 2: SELLING OBAMACARE ONLINE

The White House Office of Digital Communications (WHODC), a 14-person office established shortly after President Barack Obama took office in 2009, advertises itself as a 21st century government public relations shop:

Every day the White House Office of Digital Strategy employs new digital tools and capabilities to help both the President and the public realize the opportunity his second inaugural address called “the obligation to shape the debates of our time.” From WhiteHouse.gov and the “We the People” petitions platform to White House social media presences on sites including Twitter and Facebook, the Office uses digital platforms to amplify the President’s message and engage with citizens around the country online.⁴⁵

This new office played a key role in selling the president’s health-care proposal. Obama had made health-care reform a centerpiece of his 2008 campaign,⁴⁶ but both congressional

and political opinion were (and remain) starkly divided on what became known as “Obamacare,” especially along party lines.⁴⁷

The WHODC produced myriad media and coordinated with such agencies as the Department of Health and Human Services to advocate that Congress make the president’s plan law. Blogs, online videos and social-media posts sold the Affordable Care Act. The administration’s communications ranged from data-heavy calculations about how many Americans would gain health-care coverage to individual testimonials by “regular” Americans who suffered from lack of insurance.⁴⁸ Pro-Obamacare webpages were built, such as Whitehouse.gov/healthreform, which billed itself as an “official” government site that “provides news and information about the Affordable Care Act.”

Short “explainer” webpages and documents offered “facts” about the president’s plan.⁴⁹ Twitter was used heavily to promote the ACA. About 10 percent of all White House tweets concerned health-care reform, according to preliminary analysis by Kathleen Searles and Margo Jolet of Louisiana State University.⁵⁰ Most of the tweets sampled in their study were propagandistic, meaning they made emotional appeals, called citizens or legislators to action and/or spoke in a dominant (“we’re right”) tone. These digital pro-ACA communications came in addition to older forms of public communications – press releases, transcripts of presidential speeches, press conferences on health care and the like.

The business of promoting Obamacare did not end when the president signed the law March 23, 2010. The administration encouraged participation in the exchanges through advertisements and outreach. A steady stream of administration media proclaimed the legislation’s benefits. The public was told the ACA was good for senior citizens, persons living in rural areas, African-Americans and lesbian, gay, bisexual and transgender individuals.⁵¹ White House Senior Advisor Valerie Jarrett and Sylvia Burwell, secretary of the Department of Health and Human Services, jointly authored

42. 31 U.S.C. § 1341(a)(1)(A).

43. Lipton and Davenport, 2015.

44. Sen. James Inhofe, “Letter to Shaun Donovan, Director of the Office of Management and Budget,” Feb. 26, 2016. <https://archive.org/details/JamesInhofeLetterToTheOfficeOfManagementAndBudgetReTheEPAViolationsOfTheLaw>

45. “Presidential Department Descriptions,” WhiteHouse.gov, accessed Sept. 14, 2016. <https://www.whitehouse.gov/participate/internships/departments#ODS>

46. Transcript, “The First Presidential Debate,” The New York Times, Sept. 26, 2008. <http://elections.nytimes.com/2008/president/debates/transcripts/first-presidential-debate.html>

47. Andrew Dugan and Frank Newport, “Politics are Biggest Factor in Views of Healthcare Law,” Gallup.com, April 1, 2014. <http://www.gallup.com/poll/168170/politics-biggest-factor-views-healthcare-law.aspx>

48. See generally: <https://search.whitehouse.gov/search?affiliate=wh&page=3&query=health+care+2010&utf8=%E2%9C%93>.

49. White House, “The President’s Proposal,” Feb. 22, 2010. <https://www.whitehouse.gov/sites/default/files/summary-presidents-proposal.pdf>

50. Kathleen Searles, Margo Jolet and Jonathan Nickens, “Weapons of Mass Communication: How the White House Used Twitter to Talk about Obamacare,” white paper, 2016.

51. See https://www.whitehouse.gov/sites/default/files/docs/the_aca_helps_seniors.pdf; https://www.whitehouse.gov/sites/default/files/docs/the_aca_helps_rural_america.pdf; <https://www.whitehouse.gov/blog/2015/01/22/why-affordable-care-act-matters-african-americans>; and https://www.whitehouse.gov/sites/default/files/docs/the_aca_helps_lgbt_americans.pdf.

FIGURE 6: SEBELIUS TWEET FOR OBAMACARE



SOURCE: Kathleen Sebelius Twitter account, @secsebelius

an opinion piece promoting the law on the website of Black Entertainment Television's website.⁵²

To date, the administration has faced no consequences for its aggressive public-relations efforts for the ACA. The reasons vary. Not least, the president's party controlled both chambers of Congress and committee chairmanships during the law's passage. The nature of the statute also likely played a part. For the law to work, it needed individuals to purchase health care, thus arguably providing justification for the practical need to talk up the benefits of participation. The law also authorized HHS grants to nonprofits to perform outreach. The restrictions on using appropriated funds do not apply to the substantial ACA outreach that was conducted by private-sector groups – most of them friendly to the administration. Nor have these restrictions ever been applied to presidents and only rarely to appointed administration officials. Accordingly, Obama and administration officials promoted the act through public speeches, through appearances on news and entertainment programs and through their social-media accounts.

The extensive executive-branch publicity campaigns for Obamacare underscore the antiquated state of public-communications laws, which make no mention of the internet, much less of social media. The policies were drawn up when

52. Valerie Jarrett and Sylvia M. Burwell, "Why the Affordable Care Act Matters to African-Americans," BET.com, Jan. 22, 2015. <http://www.bet.com/news/health/2015/01/22/commentary-why-the-affordable-care-act-matters-to-african-americans.html>

media were less fungible and far more difficult to deliver directly to the public. Press releases 30 years ago were produced on paper and either handed out to the press or sometimes sent via fax. The internet and social media enable agencies to deliver their messages directly and instantly to the public.

New media bedevil the old agency-communications statutes.⁵³ Does encouraging readers of a Facebook post celebrating Obamacare constitute grassroots lobbying or propaganda? Are cabinet secretaries acting as publicity agents when they devote substantial portions of their time to extolling the virtues of the ACA?

WHAT CAN BE DONE?

H.L. Mencken once wrote: "There is always a well-known solution to every human problem – neat, plausible and wrong."⁵⁴ So it is with the issue of government information. Providing information arguably is more valuable than any other government activity in a democracy. The goal, therefore, must be to regulate the flow, not to stop it. The R Street roundtable participants suggested a number of avenues to begin the process.

Definitions

We cannot regulate what we cannot define. We need to create meaningful definitions and categories for the various government-information programs. Of prime importance is a more expansive definition of "propaganda" than the one cobbled together by the GAO, which limits the designation to agency information not labeled as such or to purely self-aggrandizing public relations.

The roundtable participants endorsed Lee's model of defining government communications based on its purposes. In refining the model, it would be helpful to undertake detailed studies of the actual practices of individual agencies. Rapid technological change has remade every communications enterprise, from newsrooms to advertising agencies. Government is no exception. We simply do not have enough fresh information on what information the government provides, who provides it and for whom it is intended.

Each study could provide the basis for meaningful discussion. As Warren noted, these so-called "snowflake" studies would be useful to congressional committees, which focus on agencies within their jurisdiction: "If all of them paid a

53. Kevin R. Kosar, "Congressional Oversight Of Agency Public Communications Implications Of Agency New Media Use," Congressional Research Service, report R42406, March 14, 2012. <https://archive.org/details/CongressionalOversightOfAgencyPublicCommunicationsImplicationsOfAgencyNewMediaUse>

54. H.L. Mencken, "The Divine Afflatus," *New York Evening Mail*, Nov. 16, 1917.

little more attention to this, through an oversight hearing, that could be very revealing.”

One roundtable attendee suggested the GAO is especially well-positioned to create definitions and query agencies about how much they spend on activities that meet those specific criteria.

Data

One reason to want good definitions is to collect good data. As noted in the roundtable discussion, the breadth and volume of government information is not measured in any meaningful way. Useful categories of information would facilitate tabulations, although no mechanism would be perfect. As one participant commented: “Even if it’s flawed quantification, it’s better than none at all.”

One avenue to arrive at this data would be to require agencies to self-report how much they spend and how many people they employ who work on communications. These data would be less than perfect, but would represent a starting point. The data would become increasingly useful as they are collected over a number of years. Federal law stipulates items that need to be in the White House budget and OMB could ask for the data on an annual basis.⁵⁵ Another suggestion was a stand-alone law that required such reports.

Agencies and best practices

The federal civilian workforce must abide by the federal ethics code, which declares:

Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain.⁵⁶

These standards authorize agencies to issues rules that ensure the public does not question government’s impartiality or objectivity in administering programs. Yet, there are no governmentwide standards for proper public communications.⁵⁷

Agencies largely have been free to develop their own practices. Different agencies have different statutory obligations to communicate with the public, so some variation in practice is necessary. The now-defunct Office of National Drug Control Policy, for example, was charged with establishing a

“national youth anti-drug media campaign.”⁵⁸ Telling people what to do was its job. As Gisselle Bourns of the Administrative Conference of the United States (ACUS) noted during the R Street roundtable, the Consumer Product Safety Commission is legally obligated to notify the public about dangerous products.⁵⁹ The U.S. Postal Service, on the other hand, has no such mandate, nor does the Labor Department.

The diversity of agency missions does not preclude establishing governmentwide standards for appropriate public communications. Indeed, government communicators have advocated for such standards. The Federal Communicators Network, a group of government public affairs specialists, recently released a paper that calls for a federal communications policy framework.⁶⁰ Additionally, the National Association of Government Communicators, a private nonprofit association that represents public-information professionals at all levels of government, has its own code of ethics. It declares that members will:

Conduct themselves professionally, with truth, accuracy, fairness, responsibility, accountability to the public, and adherence to generally accepted standards of good taste.

Conduct their professional lives in accord with the public interest, in recognition in each of us is a steward of the public’s trust.

Convey the truth to their own agencies’ management, engaging in no practice that could corrupt the integrity of channels of communication or the processes of government.

Intentionally communicate no false or misleading information and will act promptly to correct false or misleading information or rumors.

Identify publicly the names and titles of individuals involved in making policy decisions, the details of the decision-making processes and how interested citizens can participate.⁶¹

Both the public and Congress should want government communicators to convey facts, not serve as advocates for their agencies. Communicators who are civil servants, rather

55. 31 U.S.C. § 1105.

56. 5 C.F.R. § 2635.101

57. Danielle Blumenthal, “Wikileaks & the Crisis of Government Communication,” *Government Executive*, Aug. 8, 2016. <http://www.govexec.com/excellence/promising-practices/2016/08/wikileaks-and-crisis-government-communication/130558/>

58. 21 U.S.C. § 1708.

59. 15 U.S.C. § 2051.

60. The Federal Communicators Network Professional Standards Working Group, “Advancing Federal Government Communications: The Case for Professional Standards of Practice,” August 2016. <http://www.slideshare.net/FCN-Presentations/fcn-white-paper-advancing-federal-government-communications-the-case-for-professional-standards-of-practice-by-the-fcn-professional-standards-working-group>

61. National Association of Government Communicators, “Code of Ethics,” accessed Sept. 20, 2016. <https://nagc.com/code-of-ethics/>

than political appointees, should steer clear of advocacy not clearly directed or warranted by statute. Political appointees similarly might maintain webpages and blogs that promote their preferred policies. But government websites, as a general rule, should hew to standards for objectivity and non-partisanship. Establishing statutory professional standards for communications practitioners and practices could help curb some propaganda and thereby restore congressional and public trust.

Rulemaking

ACUS, a federal agency established to improve government administration, has offered recommendations to improve the rulemaking process and the use of social media in soliciting public comment.⁶² ACUS' recommendations have thus far focused more on how agencies might improve the quality of the public comments they receive. It would be beneficial if ACUS could study how agencies conduct outreach to solicit comment and advise them on appropriate limits.

Legal

The ambiguities of the three government-communications statutes invite agencies to push their viewpoints on the public. The existing statutes should be revised to provide clearer guidance. The Taxpayer Transparency Act, for example, would require agencies to label all their communications to the public clearly.⁶³ Legal guidance is needed to delineate information (fact-based, balanced, neutral in tone, etc.) from propaganda (blatantly selective use of facts, lacking balance, emotive and persuasive tone, etc.). As demonstrated in Figures 7 and 8, Kathleen Searles and Mordecai Lee each have developed schema to categorize public communications; these rubrics could serve as resources to develop said guidance.⁶⁴

Agencies also should be required to include in their communications the sources for any facts they propound (e.g., "What research found hot dog vendors earn \$9 per-hour on average?").

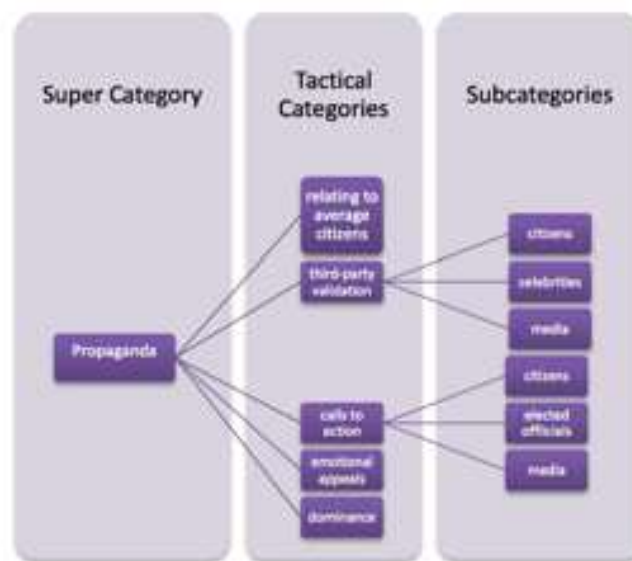
The hoary 1913 statute against hiring government publicity experts should be scrapped and replaced with a requirement that agencies use standard position titles for jobs that mostly involve generating public communications. This change both would be more honest and would better enable Congress to

62. ACUS Recommendation 2011-2 Rulemaking Comments. <https://www.acus.gov/sites/default/files/documents/Recommendation%202011-2%20%28Rulemaking%20Comments%29.pdf>. See also Recommendation 2013-5 Social Media in Rulemaking https://www.acus.gov/sites/default/files/documents/Social%20Media%20Rec_Final_12_9_13.pdf

63. H.R. 310, Taxpayer Transparency Act of 2015, 114th Congress. <https://www.congress.gov/bill/114th-congress/house-bill/310>

64. Lee, 2016; and Searles, 2016.

FIGURE 7: TACTICAL CATEGORIES OF PROPAGANDA



SOURCE: Kathleen Searles, Margo Jolet and Jonathan Nickens

FIGURE 8: PURPOSES OF GOVERNMENT PUBLIC RELATIONS

- I. Mandatory: Democratic purposes of government PR
 1. Media relations
 2. Public reporting
 - 3a. Responsiveness to the public (as citizens)
- II. Optional: Pragmatic purposes of government PR
 - 3b. Responsiveness to the public (as customers and clients)
 - (4-7. Public outreach:)
 4. Increasing the utilization of services and products
 5. Public service and public education campaigns
 6. Seeking voluntary public compliance with laws and regulations
 7. Using the public as the eyes and ears of an agency
- III. Dangerous, but powerful: Political purposes of government PR
 8. Increasing public support

SOURCE: Mordecai Lee

see who the government communicators are. It would not capture those who have some communications duties as part of other jobs, but the government could require that part-time communication positions be identified clearly.

A particularly promising reform would involve expanding the Information Quality Act.⁶⁵ Enacted in 2001, the statute requires that agencies have standards for information they

65. 44 U.S.C. § 3516.

disseminate publicly. It also requires that agencies establish processes to correct errant or misleading information after public complaint. The guidelines aimed high. They demanded that agencies' practices were "ensuring and maximizing the quality, objectivity, utility and integrity of information (including statistical information) disseminated." The statute applies only to a small slice of information but could be amended to apply to all government information.

As noted previously, prosecution – or any consequences at all – is exceedingly rare for agency misbehavior. The sole example in the past 20 years occurred in 2008, when *The New York Times* revealed the U.S. Defense Department provided special briefings to retired military officers who served as television news commentators. These "message force multipliers," as the DOD termed them, tended to speak favorably about U.S. military actions in the Middle East.⁶⁶ Congress added language to the defense bill directing the GAO to study the legality of DOD's actions. The Pentagon ultimately shuttered the program, abolished the unit that coordinated cultivation of retired military officers and reassigned the employees.

The Antideficiency Act, in theory, forbids agencies from spending funds for purposes not permitted by law – including illicit government communications. Violators may be prosecuted, but it's unclear if DOJ has ever convicted any agency personnel.⁶⁷ Agencies found in the wrong by the GAO suffer few significant consequences, according to recent GAO antideficiency reports.⁶⁸ Bolstering the law to make punishment more consistent and significant is an avenue worth further exploration. To cite one possible reform, a GAO determination that an agency had violated the Antideficiency Act could result in an equivalent portion of that agency's budget authority being cancelled immediately.

Establishing an Article I administrative court within the legislative branch, rather than relying solely on the DOJ, an executive branch agency, could result in more prosecutions. Additionally, rather than relying on the GAO or agency inspectors-general, Congress could crowdsource government-communications oversight by authorizing citizens to bring suits in these courts.

66. David Barstow, "Behind TV Analysts, Pentagon's Hidden Hand," *The New York Times*, April 20, 2008. <http://www.nytimes.com/2008/04/20/us/20generals.html>

67. Andrew Cohen, "The Odd Story of the Law That Dictates How Government Shutdowns Work," *The Atlantic*, Sept. 28, 2013. <http://www.theatlantic.com/politics/archive/2013/09/the-odd-story-of-the-law-that-dictates-how-government-shutdowns-work/280047/>

68. Government Accountability Office, "Government Antideficiency Act Reports." <http://www.gao.gov/legal/anti-deficiency-act/about>

Oversight

Having appropriate definitions, data and laws are necessary, but not sufficient, conditions to manage information. There also needs to be effective oversight.

As noted, the OMB and other executive-branch agencies have no incentive to report what they do, let alone monitor it, without statutory requirements do to so. During the R Street roundtable, Alissa Ardito of the Administrative Conference of the United States suggested inspectors-general might be the appropriate figures to conduct such oversight, noting: "They can be very effective inside agencies and they know what they're doing."

Tasking the DOJ with policing government information is unlikely to work well. The department has not prosecuted a single case under the anti-lobbying statute. An alternative would be to appoint a special council to monitor communications activities. These appointments could run for terms that stretch into new administrations.

It also was suggested the individual departments could not only establish their own rules, but also monitor them. Attorney and lobbyist Craig Holman mentioned this could operate much like ethics rules in the executive branch, where there is no overarching agency that monitors and enforces ethics for all agencies:

When you talk about the ethics rules, there's the Office of Government Ethics, but they just view themselves as an advisory agency. Instead, the actual decisions of what the ethics are is left up to 6,000 different ethics officers, spread throughout the executive branch.

There also are options outside the executive branch. Congress is the logical body to conduct such oversight, but no congressional committee has the express responsibility to monitor all federal communications. This might be corrected if budget submissions had clear statements on specific information programs that would be funded. Doing so could draw attention to the information activities of each agency. The GAO, which answers to Congress, also could be directed to monitor information issues during the course of its investigations.

In addition, House and Senate legal counsel could be tasked with bringing suits against executive agencies when it appears there have been violations. Mordecai Lee noted that Congress has considered making more high-level agency communicators subject to Senate confirmation. The rationale for such a change would be to offset the tendency and temptation to act expressly as advocates for the executive. Whether this would have any effect is unclear. Congress has never impeached a public affairs specialist or any other governmental public relations official for misconduct.

Finally, watchdog groups could be created similar to those that monitor government secrecy. These could be officially sanctioned or they can be established independently, with funding from foundations and individuals. Watchdog bodies could monitor government communications, perhaps publishing annual reports on trends in government communication and identifying blatant propaganda.

CONCLUSION

It is not realistic to think that government propaganda can be stopped, but more realistic goals are attainable. Congressional action is essential for this to happen. Clearer rules and oversight will help a good deal to reign in federal agencies. Equally important, the debate over such measures would alert the public and the press to the threats to democracy inherent in the third dimension of government information. We hope this white paper contributes to that result.

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