

A FISH OUT OF WATER: WHY THE GAO’S APPROACH TO FINDING AGENCY PROPAGANDA IS INADEQUATE IN THE SOCIAL MEDIA AGE

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INTRODUCTION

Unfiltered by the press, President Roosevelt spoke to Americans as if having an intimate conversation in their homes during his fireside chats.¹ It was the first time a president used the new cutting-edge medium of radio in such a way, and it was effective, reaching millions of Americans at once.² President Kennedy similarly pioneered the use of television to control his image and bypass conventional media, speaking practically face-to-face³ with tens of millions of his constituents.⁴ Understanding and embracing modern media technology is still a hallmark of presidencies.⁵ Although President Trump makes unprecedented use of Twitter,⁶ President Obama was the first president of the social media age,⁷ integrating digital technology into his administration⁸ to reach the 69% of Americans using those platforms.⁹

Hours into Obama's presidency, he launched a website to circumvent established news media outlets and update the public about

¹ H.W. Brands, *How Presidents Manipulate the Media and the Public*, WASH. POST (Jan. 8, 2016), https://www.washingtonpost.com/opinions/how-presidents-manipulate-the-media-and-the-public/2016/01/08/4a97f610-780d-11e5-a958-d889faf561dc_story.html?utm_term=.0ce16c809572 [<https://perma.cc/P6SC-4X9X>].

² *Id.*

³ See DIANA C. MUTZ, *IN-YOUR-FACE POLITICS: THE CONSEQUENCES OF UNCIVIL MEDIA* 1 (2015) (“[My mother] turned her head away from [President George W. Bush on] the television in disgust. ‘Aach!’ she exclaimed, ‘I can’t bear to have that man in my face. It makes me sick to my stomach!’”).

⁴ Steven Levingston, *Masters of Their Medium: JFK on TV, Trump on Twitter*, WASH. POST (May 18, 2017), https://www.washingtonpost.com/lifestyle/magazine/jfk-on-tv-trump-on-twitter-and-the-shaping-of-two-presidential-legacies/2017/05/15/08c60ed8-1eed-11e7-be2a-3a1fb24d4671_story.html?utm_term=.5d6cb0722c42 [<https://perma.cc/7MYX-AN6X>].

⁵ See Tamara Keith, *Commander-In-Tweet: Trump’s Social Media Use and Presidential Media Avoidance*, NPR (Nov. 18, 2016, 3:46 PM), <https://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance> (noting that while President Trump is using Twitter in ways no President has before, only the “method” is new, not the “long tradition of presidents going around the so-called filter of the press. . . . ‘In that sense, what Donald Trump is doing with social media is not new’”).

⁶ See *id.*; Levingston, *supra* note 4.

⁷ Juliet Eilperin, *Here’s How the First President of the Social Media Age Has Chosen to Connect with Americans*, WASH. POST (May 26, 2015), https://www.washingtonpost.com/news/politics/wp/2015/05/26/heres-how-the-first-president-of-the-social-media-age-has-chosen-to-connect-with-americans/?utm_term=.a645949d63cb [<https://perma.cc/CT89-AXLR>]; see also Kevin Freking, *Obama Makes His Mark as First ‘Social Media’ President*, SEATTLE TIMES (Jan. 6, 2017, 9:09 AM), <https://www.seattletimes.com/nation-world/nation-politics/obama-makes-his-mark-as-first-social-media-president>.

⁸ See Victoria Chang & Jennifer Aaker, *Obama and the Power of Social Media and Technology*, EUROPEAN BUS. REV. (2010), <https://people.stanford.edu/jaaker/sites/default/files/tebrmay-june-obama.pdf> [<https://perma.cc/D5J2-RV8D>] (even before his election, President Obama’s team treated digital technology not as an extension of older media forms, but as having its own abilities and reach).

⁹ *Social Media Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media> [<https://perma.cc/9NY3-QHKY>] (when Obama took office in 2009, 36% of American adults used social media, which jumped to 50% by 2011 and increased during his presidency to 69% by the time he left office in 2017).

the administration directly from his team.¹⁰ By the end of his presidency, the President could be found on Facebook, Twitter, Instagram, YouTube, Snapchat, and Medium.¹¹ His newly created Office of Digital Strategy managed these platforms with more staff than his Office of the Press Secretary.¹² However, his goal to transform how the White House communicated with the public did not end with personal accounts.¹³ President Obama directed the entire executive branch to adopt social media practices with his Open Government Initiative.¹⁴ It aimed to improve transparency and public participation in rulemaking processes by providing more information to the public online.¹⁵ Today, every agency has at least tried using social media, but most are well-versed in navigating these platforms.¹⁶

While an increased use of social media has its advantages,¹⁷ this record push to bring agencies online also increased the risk of violating restrictions placed on agencies when communicating with the public.¹⁸ The Environmental Protection Agency (EPA) recently discovered how

¹⁰ Nathan Murphy, *Context, Not Content: Medium-Based Press Clause Restrictions on Government Speech in the Internet Age*, 2009 DENV. U. SPORTS & ENT. L.J. 26 (2009) (noting change.gov was “intended to be the public’s central source for news and announcements” about Obama’s administration).

¹¹ See Freking, *supra* note 7; see also Kori Schulman, *The Obama Administration Digital Transition: Moving Forward*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 17, 2017, 6:08 PM), <https://obamawhitehouse.archives.gov/blog/2017/01/17/obama-administration-digital-transition-moving-forward> [<https://perma.cc/D5JJ-VW7C>].

¹² See BRUCE MIROFF, PRESIDENTS ON POLITICAL GROUND: LEADERS IN ACTION AND WHAT THEY FACE 12 (2016).

¹³ See Eilperin, *supra* note 7.

¹⁴ *Open Government Initiative*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/open> [<https://perma.cc/NEJ6-Q5LV>] (last visited Sept. 9, 2018).

¹⁵ Carolyn J. Lukensmeyer et al., *Assessing Public Participation in an Open Government Era: A Review of Federal Agency Plans*, IBM CTR. FOR BUS. OF GOV’T (2011), <http://www.govexec.com/pdfs/082211jm1.pdf> [<https://perma.cc/3A4F-LBLL>] (the four categories of the Open Government Initiative’s outcome are (1) online public participation; (2) face-to-face public participation; (3) formal public participation; and (4) creating a culture of open government).

¹⁶ *Id.* at 16. This trend impacted legislative and independent agencies as well. Independent agencies are part of the executive office but are “not subject to the direction of a departmental secretary, and often include[] characteristics that limit presidential and, to a lesser extent congressional, influence over agency decisionmaking and actions.” DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 19 (1st ed. 2012). In 2011, the Government Accountability Office found that twenty-three of twenty-four major agencies (featuring executive and independent agencies) are found on social media. U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-605, *Federal Agencies Need Policies and Procedures for Managing and Protecting Information They Access and Disseminate* (June 28, 2011), <https://www.gao.gov/assets/330/320244.pdf> [<https://perma.cc/CRB3-BL6Y>]. Legislative agencies, such as the Government Accountability Office and the Library of Congress, are also found on such websites. See *Stay Connected with GAO*, U.S. GAO, <https://www.gao.gov/feeds.html> [<https://perma.cc/EDV7-NRRQ>] (last visited Sept. 9, 2018); *Connect with the Library of Congress*, LIBR. OF CONGRESS, <https://www.loc.gov/connect> [<https://perma.cc/3VTF-H8CW>] (last visited Jan. 2, 2018).

¹⁷ See *infra* Section I.B.

¹⁸ See *infra* Section I.A.

thin that line is. The agency is a pioneer of social media use,¹⁹ but stirred up controversy with its 2014 campaign to inform citizens of its proposed Clean Water Rule.²⁰ The EPA used the more adventurous medium, Thunderclap, a platform that allows supporters of a message to broadcast that message at the same time, increasing awareness.²¹ The EPA shared the message “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family, and my community,”²² which was posted on supporters’ feeds and thus spread to *their* followers.²³ While this may not have turned the average user’s head,²⁴ the Government Accountability Office (GAO)²⁵ found that the EPA engaged in statutorily prohibited “propaganda” because nothing in the message itself indicated that the EPA wrote it.²⁶ The GAO reads the statutory bar on propaganda to apply only to *covert* propaganda, meaning that the recipient of the message cannot identify the agency and its source.²⁷ However, the EPA maintains that it did not violate any law because it posted the message on the agency’s account and took no steps to hide its identity.²⁸

While agency use of social media is no longer innovative, questions

¹⁹ See Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee’s White Space*, 32 J. LAND USE & ENVTL. L. 523, 528 (2017) (“EPA has also been innovative when it comes to publicizing its rules and programs via the Internet and social media.”); see also Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1205 (2016) (“[The] EPA has frequently leveraged visual media [on social media] to promote contemporary, high-profile rulemakings.”).

²⁰ The Clean Water Rule was enacted to clarify the scope of “waters of the United States” under the Clean Water Act, which determines how much federal jurisdiction there is over certain waters. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015); see *infra* Section II.A.

²¹ *About*, THUNDERCLAP, <https://www.thunderclap.it/about> [<https://web.archive.org/web/20180705094741/https://www.thunderclap.it/about>] (last visited July 5, 2018). Thunderclap.it is no longer an active website as of September 15, 2018. *Thunderclap, the Online Crowd Speaking Platform, is Shutting Down*, COMMAFUL (August 2018), <https://commaful.com/play/news/thunderclap-the-online-crowd-speaking-platform-i> [<https://perma.cc/E3R7-8QPR>].

²² U.S. Envtl. Prot. Agency, *I Choose Clean Water*, THUNDERCLAP, <https://www.thunderclap.it/projects/16052-i-choose-clean-water> [<https://web.archive.org/web/20180915103155/https://www.thunderclap.it/projects/16052-i-choose-clean-water>] (last visited Sept. 15, 2018) [hereinafter EPA’s Thunderclap Message].

²³ U.S. GOV’T ACCOUNTABILITY OFF., GAO B-326944, ENVIRONMENTAL PROTECTION AGENCY—APPLICATION OF PUBLICITY OR PROPAGANDA AND ANTI-LOBBYING PROVISIONS 12–13 (2015), <http://www.gao.gov/products/B-326944> [<https://perma.cc/B85Y-8VWU>] [hereinafter GAO 2015 EPA REPORT].

²⁴ See, e.g., Steve Benen, *EPA ‘Propaganda’ Isn’t Quite as Dramatic as Advertised*, MSNBC (Dec. 17, 2015, 10:40 AM), <http://www.msnbc.com/rachel-maddow-show/epa-propaganda-isnt-quite-dramatic-advertised> [<https://perma.cc/QR3C-2VVK>].

²⁵ GAO is an agency directed by Congress to investigate how other agencies spend taxpayer dollars. *About GAO*, U.S. GOV’T ACCOUNTABILITY OFF., <http://www.gao.gov/about/index.html> [<https://perma.cc/MPX4-9BMX>] (last visited Sept. 21, 2018).

²⁶ GAO 2015 EPA REPORT, *supra* note 23.

²⁷ *Id.* at 11–12.

²⁸ See Liz Purchia, *We Won’t Back Down from Our Mission*, EPA BLOG (Dec. 17, 2015), <https://blog.epa.gov/blog/2015/12/we-wont-back-down-from-our-mission> [<https://perma.cc/KUD3-8A5V>]; see also *infra* Section II.B.2.

remain about when those activities go too far. This Note proceeds in three parts. Part I observes statutory limitations on propaganda and the GAO's interpretation of them. This Part explores why agencies use social media and analyzes past GAO opinions. Part II discusses the EPA's Thunderclap campaign, evaluating both the GAO and the EPA's arguments about whether the alleged EPA violation is warranted. This Part also notes how agencies have used social media after the GAO's finding of the EPA's violation.

Part III offers a judgment on which agency is correct, concluding that the EPA violated propaganda restrictions under current interpretations.²⁹ However, the EPA's contentions expose the inadequacy of the GAO's approach to social media.³⁰ What works with television or print media does not effectively balance the need to prevent propaganda activity with the valid interests of agencies to engage with the public through digital technologies.³¹ Lastly, this Part advises the GAO or Congress to define propaganda and proposes a definition. This Note argues that the GAO's current practice is insufficient to ascertain whether a communication is propaganda because of its lack of attention to the actual content of messages. As is, harmless messages may be targeted while misinformation spreads so long as its authorship is clear.

I. BACKGROUND

A. Congressional Limitations on Agency Outreach

Congress has long been concerned with agency communication with the public.³² Doing so allows control over agency conduct, priorities, and messages ensuring consistency with Congress's goals.³³

²⁹ See *infra* Part I for an analysis of the GAO's current interpretation of propaganda restrictions.

³⁰ See, e.g., Purchia, *supra* note 28 (noting that the GAO labeled what was a seemingly regular use of social media "propaganda" because of its current interpretations).

³¹ See, e.g., *id.*; Benen, *supra* note 24 (contrasting the EPA case with findings of propaganda on television to show that the former is trivial, implying that the GAO's current analyses have frivolous results when applied to social media).

³² See KEVIN R. KOSAR, CONG. RESEARCH SERV., R42406, CONGRESSIONAL OVERSIGHT OF AGENCY PUBLIC COMMUNICATIONS: IMPLICATIONS OF AGENCY NEW MEDIA USE (2012). One of the Trump administration's first acts in office was instructing federal agencies to stop all communication with the public. Juliet Eilperin & Brady Dennis, *Federal Agencies Ordered to Restrict Their Communications*, WASH. POST (Jan. 24, 2017), https://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.9367e8168a53 [<https://perma.cc/C4ZG-AQUF>].

³³ See Trudy Lieberman, *Today's Federal Agencies Are 'Highly Message-Controlled.'* *Here's What that Means for Health Reporting*, COLUM. JOURNALISM REV. (Nov. 10, 2015), https://www.cjr.org/the_second_opinion/health_reporting_obama_administration.php [<https://perma.cc/PG4X-QRGS>]; Todd David Peterson, *Protecting the Appropriations Power: Why*

For example, the Federal Anti-Lobbying Act prevents grassroots lobbying by a federal agency by prohibiting payment to influence any government official to vote a certain way on any law or policy.³⁴ Similarly, through a joint regulation implementing a congressional bar, multiple federal agencies prohibit themselves from paying a person to influence a member or employee of Congress.³⁵ Read broadly, this prohibition covers any action taken by agency employees directed towards Congress, as those employees are paid by an agency.³⁶ The Federal Antideficiency Act forbids any government officer or employee from permitting an expenditure not authorized by Congress or in excess of the amount appropriated by Congress for such spending.³⁷

Each year, Congress passes an appropriations statute and, in almost every year since 1951,³⁸ forbids any of the appropriated funds to be used for “publicity or propaganda.”³⁹ Notably, this provision does not define “publicity or propaganda.”⁴⁰ Indeed, Congress has not provided a definition since the phrase first appeared, when Congress voiced its unease about a campaign to promote a national healthcare plan.⁴¹ During the mid-to-late-1940s, politicians feared that the healthcare plan was socialist and that promotion of it constituted impermissible propaganda.⁴² They used the appropriations law language, which

Congress Should Care About Settlements at the Department of Justice, 2009 BYU L. REV. 327, 330 (2009).

³⁴ 18 U.S.C. § 1913 (2012).

³⁵ 40 C.F.R. § 34.100 (2017).

³⁶ See Tom Fox, *Using Social Media for Your Federal Agency*, WASH. POST (Mar. 18, 2015), https://www.washingtonpost.com/news/on-leadership/wp/2015/03/18/using-social-media-for-your-federal-agency/?utm_term=.d73c07bf6145 [<https://perma.cc/H9KU-MV6R>] (explaining that any social media work done by agencies “requires investing in staff time and budget”).

³⁷ 31 U.S.C. § 1341(a)(1)(A) (2015). This law can potentially expose an agency to liability if the agency uses funds to conduct propaganda activity and there were no appropriated funds to conduct propaganda activity.

³⁸ Memorandum from Steven G. Bradbury, U.S. Principal Deputy Assistant Attorney General to the General Counsels of the Executive Branch (Mar. 1, 2005), <https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-10.pdf> [<https://perma.cc/DMQ2-JMEX>] [hereinafter OLC response to VNRs].

³⁹ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 501, 131 Stat. 135, 219.

⁴⁰ *Id.*

⁴¹ See U.S. GOV'T ACCOUNTABILITY OFF., GAO B-302504, USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS 6 (2004), <http://www.gao.gov/assets/380/370969.pdf> [<https://perma.cc/RNV2-4ZL5>] [hereinafter USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-797SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: CHAPTER 3 3-278-79 (4th ed. 2017), <https://www.gao.gov/assets/690/687162.pdf> [<https://perma.cc/SR2V-7UQ4>] [hereinafter REDBOOK CHAPTER 3].

⁴² See MATTHEW C. PRICE, JUSTICE BETWEEN GENERATIONS: THE GROWING POWER OF THE ELDERLY IN AMERICA 37-38 (1997); Jodie Morse, Note, *Managing the News: The History and Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843, 853 (2006) (“[L]urking in the background were conservative political fears that the government was secretly building a Soviet-style propaganda machine, and that communists within the government were using agency P.R. ‘in furtherance of the Moscow party line’ to whip up support for ‘socialized medicine.’”) (internal citations omitted).

prohibited using funds for propaganda, to defeat the plan.⁴³ When questioned about a definition of propaganda, the Congressman who introduced the language simply responded: “We can well distinguish between what is propaganda and what is educational matter.”⁴⁴

Enforcement of this limitation falls to the GAO.⁴⁵ The GAO is an independent agency.⁴⁶ At Congress’s request, it investigates how agencies used their budgets for a specific activity.⁴⁷ The GAO must balance the need to carry out Congress’s will with an agency’s right to inform the public of its activities, which includes justifications and defenses of those activities.⁴⁸ The GAO interprets the term propaganda, and thus the scope of impermissible propaganda, as *covert* propaganda only.⁴⁹ Although the GAO has not provided a definition of “propaganda,” it does describe what it considers to be covert propaganda: messages whose authorship is unclear such that the agency’s role in broadcasting the message is not disclosed to the public.⁵⁰ The GAO’s determination of whether an agency material is propaganda does not focus on the content of the message, but on the clarity of the agency’s role in disseminating such material.⁵¹

⁴³ PRICE, *supra* note 42, at 38.

⁴⁴ USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 6.

⁴⁵ *Id.*

⁴⁶ *About GAO*, *supra* note 25.

⁴⁷ *Id.* Although the GAO issues opinions on all federal agencies, there is debate over whether its opinions are binding on executive agencies. The Department of Justice’s Office of Legal Counsel (OLC) holds that it has sole authority over executive agencies, although most GAO decisions are followed by executive agencies and the GAO and the OLC usually agree. See *infra* note 50 for examples of when the OLC and the GAO agree and differ on interpretation. *But see* Peterson, *supra* note 33, at 371–72 (noting an instance where the OLC and the GAO did not agree).

⁴⁸ U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-197–98 (3d ed. 2004), <https://www.gao.gov/assets/210/202437.pdf> [<https://perma.cc/F9LH-BJ7J>] [hereinafter REDBOOK CHAPTER 4] (“[C]ourts have indicated that it is not illegal for government agencies to spend money to advocate their positions, even on controversial issues.”) (citing *Joyner v. Whiting*, 477 F.2d 456, 461 (4th Cir. 1973); *Donaggio v. Arlington Cty., Virginia*, 880 F. Supp. 446, 454–56 (E.D. Va. 1995); *Arrington v. Taylor*, 380 F. Supp. 1348, 1364 (M.D. N.C. 1974)).

⁴⁹ See USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 6–8 (discussing the publicity prong of the phrase “publicity and propaganda” as well, and the GAO’s interpretation of that term and propaganda); Robert H. Wood, *Lining the Pockets of Publicists with Federal Funds: The Prohibition Against Use of Agency Appropriations for Publicity and Propaganda*, 7 LOY. J. PUB. INT. L. 133, 157 (2006) (“GAO limits its enforcement of the propaganda prohibition to situations where there is ‘covert propaganda.’”) (internal citation omitted).

⁵⁰ See REDBOOK CHAPTER 3, *supra* note 41, at 3–287; Wood, *supra* note 49, at 148–49. The OLC holds a similar interpretation: “covert attempts to mold opinion through the undisclosed use of third parties.” OLC response to VNRs, *supra* note 38, at 1 (internal quotation marks omitted).

⁵¹ The OLC puts emphasis on a message’s content, unlike the GAO, and does not believe covert propaganda applies to messages “where there is no advocacy of a particular viewpoint.” OLC response to VNRs, *supra* note 38, at 2.

B. Agency Use of Social Media

Since the White House live-streamed its annual Easter Egg Roll in 2002, government agencies have increasingly used social media to the point where it is commonplace today.⁵² Agencies are found across the social media spectrum, using any platform available to engage with the public.⁵³ The EPA alone runs a website, thirty-seven Twitter accounts, nine blogs, a YouTube channel, Pinterest, Instagram, Flickr accounts,⁵⁴ and more.⁵⁵ Similarly, the Department of Agriculture (USDA) has twenty-nine Twitter accounts,⁵⁶ and the Department of Education (DOE) has over fifteen Twitter accounts, ten Facebook pages, five YouTube channels, and multiple blogs and Storify accounts.⁵⁷ Thanks to the widespread belief that social media is the new public square, allowing for greater engagement with citizens, government agencies recognize that social media platforms offer a wide reach to new audiences and, whether successful or not,⁵⁸ dedicate a lot of time and money to cultivate a real presence online.⁵⁹

Agencies conduct social media campaigns for different reasons, from raising awareness of an issue to requesting feedback.⁶⁰ For

⁵² Michael Herz, *We Are All Publicists Now*, REG. REV. (May 3, 2016), <https://www.theregreview.org/2016/05/03/herz-we-are-all-publicists-now> [<https://perma.cc/C68G-N3BR>] (noting that agency use of social media is “no longer even moderately notable” today).

⁵³ *Id.*

⁵⁴ Energy & Env'tl. Policy, *EPA Social Media Machine Put on Hold*, INDEPENDENCE INST. (Jan. 25, 2017), <https://i2i.org/epa-social-media-machine-put-on-hold> [<https://perma.cc/39SF-HUHY>].

⁵⁵ *List of Social Media Platforms that EPA Uses*, U.S. EPA, <https://www.epa.gov/web-policies-and-procedures/list-social-media-platforms-epa-uses> [<https://perma.cc/XP3P-EFEK>] (last updated July 9, 2018) (listing numerous Facebook accounts, wikis, RSS Feeds, Thunderclap, and a Challenge.gov page).

⁵⁶ Larry O'Connor, *The Government's Social Media Propaganda Machine*, WKLY. STANDARD (Jan. 26, 2017, 1:05 PM), <http://www.weeklystandard.com/the-governments-social-media-propaganda-machine/article/2006501> [<https://perma.cc/8DDS-LB2J>].

⁵⁷ *Social Media*, U.S. DEP'T OF EDUC., <https://ed.gov/about/overview/focus/social-media.html?src=ft> [<https://perma.cc/EJ2H-P8JF>] (last modified Mar. 2, 2018).

⁵⁸ See Patricia Santiago, *Resetting Expectations for New Media*, REG. REV. (Apr. 21, 2014), <https://www.theregreview.org/2014/04/21/21-santiago-new-media-expectations> [<https://perma.cc/SP5T-4EQW>] (“[R]ecent open government efforts fail to increase public participation substantially, since they provide crude information rather than a nuanced analysis of facts and policy problems. . . . [E]xisting obstacles to citizen participation simply become ‘digitized,’ rather than eliminated. . . . [T]he level of information consumed, and number of opinions generated through social media, may not be an accurate reflection of the public’s readiness and willingness to participate thoughtfully in official policymaking processes.”). *Contra* Porter & Watts, *supra* note 19, at 1187 (“Because visuals are easy to create and to digest in today’s social media culture, visual rulemaking empowers a broader range of stakeholders—not merely those privileged regulatory insiders who are well-equipped to navigate dense text.”).

⁵⁹ See Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017); Herz, *supra* note 52 (“For all the theorizing about social media as a dialogic network, fostering feedback and engagement by customers and citizens . . .”).

⁶⁰ See Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 353–54 (2013) (listing several agencies’ stated social media policies and

example, in 2016, the Department of Labor began a campaign to raise the minimum wage.⁶¹ The campaign included a web page dedicated to the issue, videos on YouTube, and a Twitter hashtag “#RaiseTheWage.”⁶² Similarly, the USDA’s Forest Service recently revived the World War II-era mascot “Smokey Bear” to inform the public about wildfires.⁶³ Using Facebook, Instagram, and Twitter accounts, the USDA created a “softer image” of Smokey Bear for the modern audience.⁶⁴ On these outlets, the USDA featured Smokey Bear on artwork with phrases such as, “Make it Your Goal to Extinguish Hot Coals.”⁶⁵ Although a lighthearted campaign, an estimated 6.7 million acres of forests are destroyed by fire yearly,⁶⁶ with nine out of ten wildfires started by people.⁶⁷ Using social media, the USDA is able to inform a modern audience of serious issues.⁶⁸

With agencies increasingly using social media to communicate, there is much to monitor.⁶⁹ As this Note discusses in Part III, treating social media messages in the same manner as those issued through traditional media can negatively restrict agencies and prevent any valuable outcomes of using social media from ever coming to fruition.⁷⁰ The GAO is consequently tasked with navigating a complicated but important social media landscape, and has responded by making reports on the challenges of using such platforms.⁷¹

goals).

⁶¹ Eric Scheiner, *Labor Dept. Releases New Video for Raising Minimum Wage*, CNS NEWS (Sept. 6, 2016, 2:36 PM), <https://www.cnsnews.com/news/article/eric-scheiner/labor-dept-promoting-raising-minimum-wage> [<https://perma.cc/N53Y-DU3Z>].

⁶² See *id.*; John Maxwell Hamilton & Kevin Kosar, *How the American Government is Trying to Control What You Think*, WASH. POST (Sept. 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/09/24/the-new-propaganda-how-the-american-government-is-trying-to-control-what-you-think/?utm_term=.8b8972ee8d97 [<https://perma.cc/SK9E-L9DU>].

⁶³ Meg James, *Smokey Bear, Nearly 70, Gets A Millennial Makeover*, L.A. TIMES (May 13, 2014, 5:00 AM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-smokey-bear-campaign-20140513-story.html> [<https://perma.cc/6SH4-P5MY>].

⁶⁴ *Id.*

⁶⁵ Kyle O’Brien, *Smokey Bear Turns 73 and Introduces New Anti-Wildfire Campaign*, DRUM (Aug. 9, 2017, 4:26 PM), <http://www.thedrum.com/news/2017/08/09/smokey-bear-turns-73-and-introduces-new-anti-wildfire-campaign> [<https://perma.cc/GX4F-66DF>].

⁶⁶ James, *supra* note 63.

⁶⁷ O’Brien, *supra* note 65.

⁶⁸ *Id.*

⁶⁹ Alice Lipowicz, *Nearly All Major Federal Agencies Use Social Media, GAO Says*, FCW (July 22, 2010), <https://fcw.com/articles/2010/07/22/nearly-all-major-federal-agencies-now-using-social-media-gao-says.aspx> [<https://perma.cc/85PM-BQZF>].

⁷⁰ Porter & Watts, *supra* note 19, at 1277–78 (explaining that valuable outcomes include increased transparency, a “more dialogic means” of communicating with the public, and improved “public awareness of rulemakings”).

⁷¹ *Appropriations Law Decisions*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/legal/appropriations-law-decisions/search> [<https://perma.cc/JR3V-E859>] (last visited Sept. 22, 2018). Aside from specific agency violations of propaganda prohibitions, the GAO has been concerned with potential privacy and security violations. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-605, FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS AND DISSEMINATE (2011), <https://www.gao.gov/>

C. GAO Rulings on Covert Propaganda

Congress has prohibited certain agency communications through its appropriations laws, but it has not set up a robust scheme of enforcement.⁷² Rather, because the anti-propaganda provision is an appropriations measure, enforcement lies entirely with the GAO.⁷³ Individual members of Congress ask the GAO to conduct investigations into specific agency actions.⁷⁴ The purpose of the investigation is to determine whether or not the agency used appropriated funds for prohibited purposes.⁷⁵ Thus, a finding of propaganda activity is a conclusion that the agency spent taxpayer dollars unlawfully.⁷⁶ However, the significance of a GAO finding is not that legal conclusion, but the political consequences. If the GAO labels an agency campaign as propaganda, members of Congress—particularly those who are not from the president’s party—use that conclusion to promote opposition towards that campaign.⁷⁷ This Section analyzes some of the GAO’s reports on agency activity to ascertain what covert propaganda means in practice and what the GAO considers when making a judgment.

assets/330/320244.pdf [https://perma.cc/P434-K7ED]; *Information Management: Challenges in Federal Agencies’ Use of Web 2.0 Technologies*, Hearing Before the H. Subcomm. on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, 111th Cong. (2010), <http://www.gao.gov/new.items/d10872t.pdf> [https://perma.cc/4VFJ-VE2F] (statement of Gregory C. Wilshusen, Director of Information Security Issues) (GAO-10-872T). It is thus only those specific agency findings that reveal what precautions the GAO believes agencies should take before posting on any medium.

⁷² Congress does not provide for a private right of action. *See, e.g.*, Consolidated And Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat 2130 (2014); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat 5 (2014).

⁷³ *See About GAO*, *supra* note 25; *see also* 31 U.S.C. § 712 (2012); *About GAO Reports*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/about/products/about-gao-reports.html> [https://perma.cc/976P-RVHB] (last visited Sept. 22, 2018).

⁷⁴ *See* KEVIN R. KOSAR, CONG. RESEARCH SERV., RL32750, PUBLIC RELATIONS AND PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES 5 (2005), <https://fas.org/sgp/crs/misc/RL32750.pdf> [https://perma.cc/Z8TQ-A8WG].

⁷⁵ *About GAO*, *supra* note 25.

⁷⁶ *Id.* There are no penalties for agencies that violate the “publicity or propaganda” clause, unless the GAO rules that an agency also violated the Antideficiency Act. The GAO often finds a violation of both laws, as they are related. *See, e.g.*, GAO 2015 EPA REPORT, *supra* note 23, at 26 (“Because EPA obligated and expended appropriated funds in violation of specific prohibitions, we also conclude that EPA violated the Antideficiency Act . . . as the agency’s appropriations were not available for these prohibited purposes.”). For a discussion of why Antideficiency Act penalties are also deficient, *see infra* notes 201–03.

⁷⁷ *See Herz*, *supra* note 52 (“The only legal penalty for violating the appropriations rider is for the offending agency to return funds to the treasury. The greater consequence, of course, is the public and political relations harm from being labeled a distributor of ‘covert propaganda’ . . . As a result, the prohibition on agency publicity or propaganda is used primarily to arm agency critics with ammunition for anti-agency publicity and propaganda.”); *see also infra* notes 166–69.

1. Finding No Violation

The GAO typically defers to agency justifications for its spending.⁷⁸ For instance, early in the Obama administration, during an intense public debate over what ultimately became the Affordable Care Act, the Department of Health and Human Services (HHS) posted electronic form letters on its website for the public to sign, which contained declarations such as, “[w]e strongly support your commitment to comprehensive health reform.”⁷⁹ The HHS maintained that its only purpose was to poll public opinion.⁸⁰ Because the letters were posted directly on the agency website, the GAO found that the HHS clearly identified itself, and therefore the letters were not covert propaganda.⁸¹ The GAO stressed that it generally defers to agency discretion on how they inform the public.⁸² Unless the justifications for such activities are obviously flawed and unreasonable, the GAO will not intervene.⁸³

In 2009, the Department of Defense (DOD) established a retired military officers outreach program, consisting of regular meetings with retired officers about the war on terrorism and paid travel to various military locations.⁸⁴ The DOD created the program because it knew those officers were involved in public outreach and would spread a DOD-positive message.⁸⁵ The GAO admitted that the DOD was clearly trying to influence public opinion of its war policies through the officers, but determined that this type of subject matter did not violate propaganda prohibitions.⁸⁶ Regardless of the goal, because the DOD did not hide its identity when providing the officers with information or travel, its actions did not amount to covert propaganda.⁸⁷ Any promotions made by the officers after those meetings were not paid for

⁷⁸ See REDBOOK CHAPTER 4, *supra* note 48, at 4-198 (“[T]he agency gets the benefit of any legitimate doubt.”).

⁷⁹ U.S. GOV’T ACCOUNTABILITY OFF., GAO B-319075, DEPARTMENT OF HEALTH AND HUMAN SERVICES—USE OF APPROPRIATED FUNDS FOR “HEALTHREFORM.GOV” WEB SITE AND “STATE YOUR SUPPORT” WEB PAGE 2-3 (2010), <https://www.gao.gov/assets/390/388676.pdf> [<https://perma.cc/VUG8-36QZ>].

⁸⁰ *Id.* at 4.

⁸¹ *Id.* at 8.

⁸² *Id.* at 5.

⁸³ USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 7.

⁸⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO B-316443, DEPARTMENT OF DEFENSE—RETIRED MILITARY OFFICERS AS MEDIA ANALYSTS 4-5 (2009), <https://www.gao.gov/assets/390/386306.pdf> [<https://perma.cc/XLK2-SQQ7>].

⁸⁵ *Id.*

⁸⁶ *Id.* at 2, 8 (“[A]ctivities such as meetings, conference calls, luncheons with agency leadership, and travel do not implicate the publicity or propaganda prohibition where those activities are reasonably related to the agency’s duty to inform the public of agency actions, programs, and policies, or justify and rebut attacks upon its policies.”) (internal citation omitted).

⁸⁷ *Id.* at 2.

by the DOD, and therefore would not fall under any appropriations statute.⁸⁸

The most recent GAO finding that agency communication was lawful involved Twitter.⁸⁹ Although a Twitter hashtag campaign may seem susceptible to the spread of false information because any user can use an agency's hashtag in their own message,⁹⁰ the GAO held that the EPA's hashtag campaign did not amount to covert propaganda.⁹¹ Along with ruling on the EPA's Thunderclap campaign in 2015,⁹² the GAO considered whether the agency's #DitchtheMyth campaign, designed to combat against a #DitchtheRule campaign expressing opposition to the EPA's proposed rulemaking change,⁹³ violated the covert propaganda prohibition.⁹⁴ On its website, the EPA posted prewritten tweets for users to share on their own accounts, containing the hashtag #DitchtheMyth.⁹⁵ The GAO ultimately concluded that the EPA activity was permissible because, while the campaign allowed users to post messages written by the EPA from their accounts, all graphics the EPA posted had the agency logo and prewritten tweets included the EPA's Twitter handle at the end.⁹⁶ These inclusions indicated to the EPA's intended audience that the EPA was the source of any information publicized.⁹⁷ As always, the GAO was solely concerned with whether the message was covert, not with whether its content constituted propaganda. The GAO found that so long as any tweet written by an agency can be identified as such—by being posted from an official account or including the agency's Twitter username in the message—starting a hashtag campaign is permissible.⁹⁸

2. Finding Violations

The GAO's decision on the EPA's #DitchtheMyth and

⁸⁸ *Id.* at 9–10.

⁸⁹ GAO 2015 EPA REPORT, *supra* note 23.

⁹⁰ On Twitter, a hashtag is created by using the # symbol before a word or phrase, generating a tag that categorizes the message with others using the same hashtag. *How to Use Hashtags*, TWITTER: HELP CTR., <https://support.twitter.com/articles/49309> [<https://perma.cc/S9C3-9R4C>] (last visited Sept. 22, 2018). The message will then appear when a user clicks on or searches for that hashtag. While one user starts a hashtag, any user can write it in their own tweets. *Id.*

⁹¹ GAO 2015 EPA REPORT, *supra* note 23, at 15.

⁹² *See infra* Section II.B.

⁹³ To oppose the EPA's Clean Water Rule, the American Farm Bureau started a #DitchtheRule campaign. *See* Eric Lipton & Coral Davenport, *Critics Hear E.P.A.'s Voice in 'Public Comments'*, N.Y. TIMES (May 18, 2015), <https://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html>; *see also infra* Section II.A.

⁹⁴ GAO 2015 EPA REPORT, *supra* note 23, at 11.

⁹⁵ *Id.* at 5–6.

⁹⁶ *Id.* at 15.

⁹⁷ *Id.*

⁹⁸ *Id.*

Thunderclap campaigns was the first time it considered whether social media activity violated appropriations law.⁹⁹ It is helpful to begin with GAO findings of a violation on older media, because the GAO's considerations remain the same for new platforms.¹⁰⁰ In 1986, the GAO investigated the Small Business Administration's (SBA) preparation of suggested editorials for distribution in newspapers.¹⁰¹ The editorials were letters to government officials offering support from a third-person perspective for the Reagan administration's effort to move the SBA to the Commerce Department.¹⁰² The GAO found that the agency did not simply disseminate information, which is a legitimate activity.¹⁰³ When published, the editorials appeared as if the views it promoted were those of the newspaper, not of the agency itself.¹⁰⁴ The agency's authorship was concealed so the public would not know that the SBA used its money to push that support.¹⁰⁵ The GAO found the editorials to be propaganda because they were deceptive as to their authorship.¹⁰⁶ The GAO interpreted Congress's prohibition on propaganda to be only a prohibition on misleading the role of the agency in its messages.¹⁰⁷ An agency may still promote its ideas, garner support, and advocate a perspective without violating propaganda restrictions, so long as its role in dissemination is unambiguous.¹⁰⁸

In 2004, the HHS hired a public relations firm to release video news releases (VNRs), or prepackaged news reports,¹⁰⁹ on television about new laws designed to improve Medicare coverage.¹¹⁰ They included a script for a broadcaster's news anchor to read when announcing the VNR that read as if the anchor were introducing a real news segment and did not identify that it was pre-made by the HHS.¹¹¹

⁹⁹ Shannon O'Neil, *Thunderstruck: The Government Accountability Office's Recent Ruling on Agency Social Media Use*, 17 N.C.J.L. & TECH. 293, 324 (2016).

¹⁰⁰ GAO 2015 EPA REPORT, *supra* note 23, at 11–12.

¹⁰¹ U.S. GEN. ACCOUNTING OFF., GAO B-223098, B-223098.2, LETTER TO HON. LOWELL WEICKER, JR., CHAIRMAN, COMM. SMALL BUS. U.S. SEN. (1986), <http://www.gao.gov/products/475182#mt=e-report> [<https://perma.cc/LGN7-KHQG>].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (finding “[t]he editorials, prepared by SBA for publication as the ostensible editorial position of the recipient newspapers are misleading as to their origin”).

¹⁰⁵ REDBOOK CHAPTER 3, *supra* note 41, at 3-287 (“[O]ne may have considered them to be ‘propaganda’ in the common sense of the word. This, however, was not enough to violate the law.”).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS 134 (2006) (“[P]repackaged programming segments . . . designed to look like news footage. . . . VNRs [can be] completely produced segments with actors playing the role of reporters.”).

¹¹⁰ U.S. GEN. ACCOUNTING OFF., GAO B-302710, DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES—VIDEO NEWS RELEASES 5–6, 8 (2004), <http://www.gao.gov/decisions/appro/302710.pdf> [<https://perma.cc/KXK6-3JQS>].

¹¹¹ *Id.* at 6.

With a fake news anchor reporting, the VNRs contained only facts about the new law but did not indicate that the videos were produced by the government.¹¹²

While the HHS maintained, and the GAO recognized, that using VNRs is standard practice for government entities and the news sector, the GAO took issue because the videos were misleading as to their source, which meant they constituted covert propaganda.¹¹³ While the news station itself may have known the agency paid to create the VNRs, the HHS's target audience—the public—would believe the information came from a neutral source and not the government.¹¹⁴ The HHS's overall mission and message may have been innocent, but concealing itself as the source of the videos pushed the message into unauthorized territory.¹¹⁵ Conversely, the Department of Justice's Office of Legal Counsel disagreed with the GAO in this case, finding that, because the VNRs did not advocate for a particular viewpoint or opinion and instead were purely informational, they did not constitute covert propaganda simply because the HHS's role in their production was not revealed.¹¹⁶

The GAO continues to focus on clarity of source rather than on content of messages, as evinced by its 2005 investigation of the DOE's No Child Left Behind Act advertisements.¹¹⁷ The DOE retained Armstrong Williams, founder of a public relations firm, to regularly comment on the Act during television and radio broadcasts in order to educate minorities about the new law.¹¹⁸ Williams commented on the Act over one hundred times without disclosing his relationship with the DOE,¹¹⁹ and his contract did not require that he disclose to any audience that he was being paid for his statements.¹²⁰ Therefore, the DOE concealed its role, making it appear as if an independent source advocated for the agency's position, when all the while such sponsorship was in exchange for public funds.¹²¹ The GAO found that the DOE's

¹¹² *Id.* at 6–7.

¹¹³ *Id.* at 9–10.

¹¹⁴ *Id.* at 12–13.

¹¹⁵ See *id.* at 13–14 (“While we agree that the story packages may not be characterized as editorials, explicit advocacy is not necessary to find a violation of the prohibition.”) (internal citation omitted).

¹¹⁶ OLC response to VNRs, *supra* note 38.

¹¹⁷ U.S. GOV'T ACCOUNTABILITY OFF., GAO B-305368, DEPARTMENT OF EDUCATION—CONTRACT TO OBTAIN SERVICES OF ARMSTRONG WILLIAMS (2005), <https://www.gao.gov/assets/380/375344.pdf> [<https://perma.cc/TC6A-3VL8>].

¹¹⁸ *Id.* at 2–3 (the DOE required Williams to advertise on his radio and television show during Black History month and on Martin Luther King, Jr.'s birthday, to “utilize his long term working relationship with America's Black Forum . . . [to] address the No Child Left Behind Act”) (internal quotation marks omitted).

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.* at 6 (the DOE did not “ensure that Mr. Williams [would disclose] to his audiences his relationship with the Department”).

¹²¹ *Id.* at 7.

conduct constituted covert propaganda.¹²² Notably, the GAO asked the DOE for a transcript of Williams' activities not to analyze the content of the messages, but to see whether or not he made relevant disclosures.¹²³

Just four years later, the HHS faced a situation almost identical to the DOE's No Child Left Behind Act incident when it contracted with an economist to promote a health care plan.¹²⁴ The economist did not disclose his financial relationship with the HHS in his editorials.¹²⁵ The GAO did not rule on this, but would likely have been as concerned, as it was with the DOE, that the HHS did not ensure that this paid representative reveal to the public his connection to the agency.¹²⁶ The GAO would probably consider the economist's communications to be covert propaganda.¹²⁷

These cases show that, in finding an agency action constitutes covert propaganda, the GAO strictly considers whether audiences would realize a message was broadcasted by an agency. While the GAO defers to agency judgment, it applies a test to determine whether a communication was covert—whether it is clear an agency was the author of its message—and does not look to what was in the communication itself. In the 2009 DOD case, the GAO found that the subject of the agency's messages to retired military officers was not a concern for a finding of propaganda, despite the agency's goal of using those officers to garner support for itself.¹²⁸ Conversely, the GAO found that the HHS's VNRs constituted covert propaganda even though the HHS was in an analogous position to the news station as the DOD was to the retired officers.¹²⁹ The two are distinguishable in that the HHS's intended audience was the viewers watching the news.¹³⁰ The DOD shared messages about itself with no guarantee that the officers would spread those messages.¹³¹ Like the DOD case however, the GAO did not look at the content of the HHS message to establish whether it was propaganda.¹³² There were no inquiries into whether the

¹²² *Id.* at 6–7.

¹²³ *Id.* at 10.

¹²⁴ STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 111TH CONG., ANALYSIS OF THE FIRST YEAR OF THE OBAMA ADMINISTRATION: PUBLIC RELATIONS AND PROPAGANDA INITIATIVES 16–17 (Comm. Print 2010), https://oversight.house.gov/wp-content/uploads/2012/02/8-16-2010_Propaganda_Report.pdf [<https://perma.cc/G5Z3-R32V>].

¹²⁵ *Id.*

¹²⁶ *Id.* at 17.

¹²⁷ *Id.* at 18. For a brief discussion on the effectiveness—or lack thereof—of the GAO's rulings and punishments, see *infra* Part III.

¹²⁸ U.S. GOV'T ACCOUNTABILITY OFF., DEPARTMENT OF DEFENSE—RETIRED MILITARY OFFICERS AS MEDIA ANALYSTS, *supra* note 84, at 2–8.

¹²⁹ U.S. GEN. ACCOUNTING OFF., DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES—VIDEO NEWS RELEASES, *supra* note 110, at 9–10.

¹³⁰ *Id.* at 10–13.

¹³¹ U.S. GOV'T ACCOUNTABILITY OFF., DEPARTMENT OF DEFENSE—RETIRED MILITARY OFFICERS AS MEDIA ANALYSTS, *supra* note 84, at 9–10.

¹³² See generally U.S. GEN. ACCOUNTING OFF., DEPARTMENT OF HEALTH AND HUMAN

communications were advocacy, or whether any facts asserted were accurate.¹³³ Similarly, the GAO did not analyze what the EPA's #DitchtheMyth tweets *said*, asking only whether they were properly credited to the agency.¹³⁴ A covert propaganda investigation determines whether an agency disclosed itself as the source of a communication to its intended audience.¹³⁵

Although not investigated by the GAO, Congress's Committee on Oversight and Government Reform reported on the Obama administration's first year in office, detailing instances that likely would have violated the GAO's covert propaganda restriction.¹³⁶ One in particular dealt with blogging websites.¹³⁷ The Office of Public Affairs¹³⁸ hired Tracy Russo to serve as its New Media Specialist.¹³⁹ Congress's report claims¹⁴⁰ that Russo deliberately searched for online editorials criticizing the administration and anonymously posted comments countering any negative arguments.¹⁴¹ This type of persuasion of the public would not raise covert propaganda concerns had Russo's employee relationship with the Office of Public Affairs been disclosed in her comments.¹⁴² But because the posts were anonymous, the GAO would find that the Office of Public Affairs violated the propaganda prohibition.¹⁴³ The GAO's covert propaganda test remained the same

SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES—VIDEO NEWS RELEASES, *supra* note 110.

¹³³ *Id.*

¹³⁴ See *supra* text accompanying note 98.

¹³⁵ See REDBOOK CHAPTER 3, *supra* note 41, at 3-287.

¹³⁶ STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 111TH CONG., ANALYSIS OF THE FIRST YEAR OF THE OBAMA ADMINISTRATION: PUBLIC RELATIONS AND PROPAGANDA INITIATIVES, *supra* note 124, at 2, 8.

¹³⁷ *Id.* at 12.

¹³⁸ An agency within the Department of Justice (DOJ). *Id.*

¹³⁹ *Id.* This role required her to serve as the author of the DOJ's official blog. *Id.* Russo "specialized in department-wide digital strategy and led the agency's open government policy and technology initiatives." RUSSO STRATEGIES, LLC, <http://www.russostrategies.com> [<https://perma.cc/W7XL-BXEK>] (last visited Sept. 22, 2018). The new role stemmed directly from the Obama administration's push for agencies to garner a larger presence online. See Chad Catacchio, *New Government Position: New Media Director*, NEXT WEB (Apr. 22, 2010), <https://thenextweb.com/us/2010/04/22/government-position-media-director> [<https://perma.cc/H8W2-DC79>].

¹⁴⁰ The DOJ denied these claims, saying "its policy is not to comment on blogs or other online media anonymously." Jonathan Strong, *Report: Administration PR for Health Care Bill Was 'Propaganda'*, HEARTLAND INST. (May 31, 2016), <https://www.heartland.org/news-opinion/news/report-administration-pr-for-health-care-bill-was-propaganda?source=policybot> [<https://perma.cc/C557-S46U>].

¹⁴¹ STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 111TH CONG., ANALYSIS OF THE FIRST YEAR OF THE OBAMA ADMINISTRATION: PUBLIC RELATIONS AND PROPAGANDA INITIATIVES, *supra* note 124, 12-13.

¹⁴² *Id.* at 13 ("In cases where GAO has ruled that the means by which an agency publicized information was illegal, the source of the information was not disclosed.")

¹⁴³ It is not necessarily problematic that the agency was trying to "shape online debate," as demonstrated in previous GAO holdings such as the 2009 DOD case; the anonymous nature of Russo's posts is typically what the GAO does not tolerate when ruling on what constitutes

since entering the social media realm, as exemplified by its ruling on #DitchtheMyth,¹⁴⁴ but that test may have unintended effects as agencies struggle to apply old rules to a new medium.¹⁴⁵

II. ANALYSIS

A. Events Leading Up to the EPA's Thunderclap Campaign

The Clean Water Act (CWA) aims to protect water quality and reduce pollution.¹⁴⁶ It does so primarily by limiting discharges of pollutants into “navigable waters,” which are defined broadly as “waters of the United States” (WOTUS).¹⁴⁷ But the CWA does not define that phrase, and the protections and impact of the Act depend on what is considered WOTUS.¹⁴⁸ Pollution of a water body that is not a WOTUS is not a violation of the CWA, and a narrower meaning limits EPA jurisdiction while a broader one expands it.¹⁴⁹ The Supreme Court sought to clarify the term in 2006 in *Rapanos v. United States*,¹⁵⁰ focusing on whether wetlands were covered.¹⁵¹ However, the case resulted in a 4-1-4 split decision, leading to more debate.¹⁵² Justice Scalia, writing for the plurality, advocated for a restrictive definition of WOTUS, holding that the phrase includes only waters adjacent to a navigable waterway.¹⁵³ Justice Kennedy's concurring opinion was broader, and mushier, defining WOTUS as any body of water that has a “significant nexus” to a traditional navigable waterway.¹⁵⁴ The remaining four Justices argued that the EPA can regulate much more: any body of water, including non-navigable ones, that is hydrologically connected to navigable waters.¹⁵⁵

covert propaganda. *Id.*

¹⁴⁴ And further exemplified by its ruling on the EPA's Thunderclap campaign, discussed *infra* Part II.

¹⁴⁵ See *infra* Section III.B–C.

¹⁴⁶ 33 U.S.C. § 1251 (2012).

¹⁴⁷ 33 U.S.C. § 1362 (2012).

¹⁴⁸ See STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44585, EVOLUTION OF THE MEANING OF “WATERS OF THE UNITED STATES” IN THE CLEAN WATER ACT 1–4 (2016), <https://fas.org/sgp/crs/misc/R44585.pdf> [<https://perma.cc/4KF7-UDT5>].

¹⁴⁹ *Id.*

¹⁵⁰ 547 U.S. 715 (2006).

¹⁵¹ Wetlands are bodies seemingly isolated from traditionally protected navigable waters. *Id.* at 728–31.

¹⁵² See Thomas P. Redick & Christopher Brooks, *Wars and Endangered Species: Where Will Farmers Find Their Legal High Ground?*, 31 NAT. RESOURCES & ENV'T 20, 20–21 (2016).

¹⁵³ *Rapanos*, 547 U.S. at 742 (plurality opinion) (“[O]nly those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ . . . are ‘adjacent to’ such waters and covered by the Act.”).

¹⁵⁴ *Id.* at 759 (Kennedy, J., concurring).

¹⁵⁵ *Id.* at 787–88 (Stevens, J., dissenting).

Rapanos created a confusing situation, and circuit splits across the nation, and the EPA was left to choose which of the three Supreme Court Justices' opinions to follow.¹⁵⁶ Under the Obama administration, the EPA undertook this task and made some headway in 2011 with proposed guidance using Justice Kennedy's significant nexus test.¹⁵⁷ The EPA, with the Army Corps of Engineers, formally proposed its Clean Water Rule in 2014.¹⁵⁸ By the time the comment period ended in November of 2014, the agency had received over one million comments, 87% of which were in support.¹⁵⁹ In 2015, the EPA published a final rule, essentially codifying Justice Kennedy's significant nexus test.¹⁶⁰ Before finalizing the rule, however, it undertook a social media campaign to promote and inform citizens of the Clean Water Rule, as well as to counter online opposition.¹⁶¹ While the EPA was still accepting comments to the Rule, the American Farm Bureau started a Twitter hashtag¹⁶² encouraging the public to #DitchtheRule because it believed the EPA was expanding its jurisdiction beyond its constitutional reach.¹⁶³ Over 230 members of Congress supported the Farm Bureau's efforts.¹⁶⁴ The EPA sought to respond to the Bureau's "facts"¹⁶⁵ and advocate its belief that the Clean Water Rule would prevent water pollution while bypassing traditional media.¹⁶⁶ In addition to its #DitchtheMyth Twitter campaign, the EPA took to Facebook, YouTube,

¹⁵⁶ See Redick & Brooks, *supra* note 152, at 20–21 (explaining that the First, Third, and Eighth Circuits followed Justice Scalia or Justice Kennedy's test; the Seventh, Ninth, and Eleventh Circuits followed only Justice Kennedy's test).

¹⁵⁷ *Clean Water Rule Timeline: 2001–2016*, U.S. HOUSE OF REPRESENTATIVES: DOCUMENT REPOSITORY 2, <http://docs.house.gov/meetings/II/II13/20160413/104791/HHRG-114-II13-Wstate-Goldman-CarterJ-20160413-SD003.pdf> [<https://web.archive.org/web/20170312060827/http://docs.house.gov/meetings/II/II13/20160413/104791/HHRG-114-II13-Wstate-Goldman-CarterJ-20160413-SD003.pdf>] (last visited Mar. 12, 2017).

¹⁵⁸ *Id.* at 3. The EPA conducted over one hundred meetings during this period and had an over two-hundred-day comment period. *Id.*

¹⁵⁹ *Id.* See also Natasha Geiling, *Experts Slam Trump Administration's Flawed Analysis for Repealing Water Pollution Rule*, THINKPROGRESS (July 28, 2017, 4:22 PM), <https://thinkprogress.org/clean-water-rule-economic-analysis-problems-3def20a591df> [<https://perma.cc/S59N-MMF9>] (noting that industry groups oppose the rule, while environmental groups, conservation groups, and "the public at large" are more supportive).

¹⁶⁰ Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015); *Clean Water Rule Timeline: 2001–2016*, *supra* note 157.

¹⁶¹ Eric Lipton & Michael D. Shear, *E.P.A. Broke Law with Social Media Push for Water Rule, Auditor Finds*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/us/politics/epa-broke-the-law-by-using-social-media-to-push-water-rule-auditor-finds.html>.

¹⁶² For a brief discussion, see *supra* Section I.C.1.

¹⁶³ See *American Farm Bureau Calls on EPA to Ditch the Waters of the U.S. Rule*, AM. FARM BUREAU FED'N (Nov. 13, 2014), <http://www.fb.org/newsroom/american-farm-bureau-calls-on-epa-to-ditch-the-waters-of-the-u.s.-rule> [<https://perma.cc/8E7N-978C>].

¹⁶⁴ Lipton & Davenport, *supra* note 93.

¹⁶⁵ See Porter & Watts, *supra* note 19, at 1241 (noting this campaign "high-light[s] how visuals may present matters as 'fact' when the reality is much more nuanced. . . . For example, the Farm Bureau asserted that the EPA's proposed rule would alter the regulatory landscape for agricultural farms, whereas EPA labeled that assertion a 'myth.'") (internal citation omitted).

¹⁶⁶ Lipton & Shear, *supra* note 161.

and the new (even for social media) platform Thunderclap.¹⁶⁷

B. *The EPA’s “I Choose Clean Water” Message*

Thunderclap considers itself a social media “flash mob” or, more practically, a massive scheduled social post.¹⁶⁸ A user can start a campaign by creating a Thunderclap message and asking others to “support” it or share it, which schedules the message to automatically post on the supporters’ other social media accounts at one time.¹⁶⁹ At that scheduled time, the message is displayed on every supporter’s social media account, spreading the campaign across multiple websites and reaching a larger audience than one would by posting the message on, for example, Twitter alone.¹⁷⁰ The EPA acknowledges that a primary reason for using Thunderclap is reaching that secondary audience: the supporters’ social media followers.¹⁷¹

Titled “I Choose Clean Water,” the EPA’s Thunderclap campaign message to be posted on supporters’ social media feeds read: “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family, and my community.”¹⁷² It ended with a URL, the EPA’s “message link” that Thunderclap requires users include with a message, to direct supporters to an outside site where they can learn more about the campaign.¹⁷³ The link led to the EPA’s official web page on the Clean Water Rule.¹⁷⁴ The message had 982 supporters and reached an audience of over 1.8 million people.¹⁷⁵

1. The GAO’s Response

Republican Senator Jim Inhofe, later aided by two other Republican senators, asked the GAO to investigate the EPA’s Thunderclap campaign.¹⁷⁶ Concerned with how the secondary,

¹⁶⁷ *Id.*

¹⁶⁸ *What is Thunderclap?*, THUNDERCLAP: HELP CTR., <https://help.thunderclap.it/hc/en-us/articles/235482008-What-is-Thunderclap> [<https://perma.cc/7HKK-WMTG>] (last updated Mar. 25, 2018).

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *List of Social Media Platforms that EPA Uses*, *supra* note 55.

¹⁷² EPA’s Thunderclap Message, *supra* note 22. The message also included a link at the end: <http://thndr.it/1sLh51M>. *Id.*

¹⁷³ Thunderclap Support, *An Important Note About Your Message Link*, THUNDERCLAP: HELP CTR., <https://help.thunderclap.it/hc/en-us/articles/235391947-An-important-note-about-your-message-link> (last visited Oct. 21, 2017).

¹⁷⁴ GAO 2015 EPA REPORT, *supra* note 23, at 4.

¹⁷⁵ EPA’s Thunderclap Message, *supra* note 22.

¹⁷⁶ *See* Press Release, U.S. Senate Comm. on Env’t & Pub. Works, Inhofe Statement on EPA Illegal Propaganda, Lobbying (Dec. 14, 2015), <https://www.epw.senate.gov/public/index.cfm/>

anticipated audience would know of the agency's authorship, the GAO found that the campaign constituted covert propaganda.¹⁷⁷ The GAO noted that the campaign's page clearly indicated that the EPA was its creator,¹⁷⁸ but found that the message itself did not indicate that the EPA wrote it.¹⁷⁹ This is a problem because once the message was posted on the supporters' accounts, the secondary audience viewing the message from those accounts would not be able to tell that the EPA originally wrote the message.¹⁸⁰ Comparing this situation with the HHS's VNRs, the GAO emphasized that it is not enough for an agency to divulge its authorship to the *conduit* of messages if it is concealed from the target audience.¹⁸¹ The HHS's notification to news stations was not enough because its intended audience, the public, would not know of the HHS's role.¹⁸² Similarly, the EPA's disclosure of its identity to the supporters of its campaign was not enough because its intended audience, the secondary users, would not know of the EPA's role.¹⁸³

The GAO also found that the first-person point of view of the message furthered concealment of the EPA's authorship, stating that the agency purposefully made it appear as if it were not the writer.¹⁸⁴ It would appear as if a supporter wrote the message herself once it was shared on her account, without any ascription to counter that assumption.¹⁸⁵ The GAO found the message retained no identifying information once shared,¹⁸⁶ violating the statutory restrictions on using funds for propaganda purposes.¹⁸⁷ The GAO asked the EPA to determine the exact amount it cost the agency to conduct the Thunderclap campaign, and to repay that amount to the Treasury.¹⁸⁸ White House officials were silent as to whether they agreed that the EPA conducted propaganda activity.¹⁸⁹

2015/12/inhofe-statement-on-epa-illegal-propaganda-lobbying [https://perma.cc/RBC2-MCZQ].

¹⁷⁷ GAO 2015 EPA REPORT, *supra* note 23, at 12.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ *Id.* at 12.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 13.

¹⁸² U.S. GEN. ACCOUNTING OFF., DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES—VIDEO NEWS RELEASES 9–10 (2004), <http://www.gao.gov/decisions/appro/302710.pdf> [https://perma.cc/KXX6-3JQS].

¹⁸³ GAO 2015 EPA REPORT, *supra* note 23, at 13.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 14 (noting that even the link to the EPA's website did not indicate the agency was the source).

¹⁸⁷ *Id.* at 13.

¹⁸⁸ *Id.* at 26.

¹⁸⁹ Lipton & Shear, *supra* note 161.

2. The EPA's Defense

The EPA disagrees with the GAO's outcome.¹⁹⁰ The agency reaffirmed that in this age, social media is one of the most effective tools to share information and be transparent with the public.¹⁹¹ The campaign aimed to get citizens engaged with the rulemaking process, which is a normal use of the platform.¹⁹² The EPA claims that it made no effort to hide its ownership of the Thunderclap because the agency published the message on its own, clearly labeled account and linked to its official website.¹⁹³ The EPA thinks it important that users chose to support the message, but focusing solely on the Thunderclap's supporters avoids a major issue the GAO had with the campaign.¹⁹⁴ For instance, the EPA makes no mention of the message's point of view, nor of the fact that the EPA was actually targeting the secondary audience.¹⁹⁵ The GAO believes that the message's supporters were merely a conduit to the agency's intended audience, making the EPA's defense of how it appeared to the initial supporters (rather than the defense of how it appeared to the secondary audience) largely irrelevant.¹⁹⁶

The EPA later rejected the claim that the campaign supporters were only conduits of the Thunderclap message, emphasizing again that the supporters had the freedom to choose whether to put the message on their accounts, and even had the opportunity to edit the message.¹⁹⁷ The EPA likens this situation to the GAO's ruling on the DOD's retired military officer outreach, where the DOD did not pay the officers but knew they would spread a pro-DOD policy message to the public.¹⁹⁸ The EPA argues that, like the DOD, it had no control over the message that the Thunderclap supporters would actually post.¹⁹⁹

Regardless of whether the EPA engaged in illegal activity, the

¹⁹⁰ Purchia, *supra* note 28.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* Both of those are inherent to Thunderclap campaigns. The site understands that its appeal is that messages will be shared from supporters' accounts, reaching a large audience. To craft the perfect message, Thunderclap recommends that users "[c]onsider writing [their] message in the first person (e.g. 'Join *me* in honoring veterans this month!)" because the message will appear on others' accounts and so "should feel a bit more natural." Thunderclap Support, *Crafting the Perfect Thunderclap Message*, THUNDERCLAP: HELP CTR., <https://help.thunderclap.it/hc/en-us/articles/235486948-Crafting-the-perfect-Thunderclap-message> (last visited Jan. 5, 2018).

¹⁹⁶ See *supra* notes 174–83 and accompanying text.

¹⁹⁷ Letter from Gina McCarthy, EPA Administrator, to The Honorable Eugene Dodaro, Comptroller General, U.S. Gov't Accountability Off., 1–2 (Sept. 15, 2016), https://www.epa.gov/sites/production/files/2016-11/documents/epa_reply_to_gao_social_media_op_9-15-16_0.pdf [<https://perma.cc/CX3W-VBEL>].

¹⁹⁸ *Id.* at 2.

¹⁹⁹ *Id.*

GAO's penalty is not the most effective deterrent to stop agencies from undergoing propagandist campaigns in the future. The GAO's authority to penalize the agency is limited to requiring that the EPA determine how much money was spent on the Thunderclap campaign.²⁰⁰ However, while many find the GAO to be largely ineffective in its solutions,²⁰¹ the political effects of the GAO's finding are a greater consequence for the EPA.²⁰² The GAO's ruling played into Republican and conservatives' opposition to the rule, and to the EPA itself, providing challengers with the ammunition they sought to discredit the agency and its plan.²⁰³

C. Recent Agency Social Media Use

After the GAO's 2015 report on the EPA, the House passed the Regulatory Integrity Act, which requires the reporting of every agency communication about a rule and prohibits agencies from promoting a rule on social media.²⁰⁴ Agencies would not be allowed to advocate for a rule; they could only use social media to inform citizens of the content or status of a rule.²⁰⁵ This Act would prohibit more than covert propaganda as defined by GAO; for example, it would seem to prohibit even the EPA's #DitchtheMyth campaign.²⁰⁶ Members of Congress are

²⁰⁰ This "penalty" is from a violation of the Antideficiency Act. GAO 2015 EPA REPORT, *supra* note 23, at 26.

²⁰¹ Under the Antideficiency Act, the agency head must report all findings of violations to the president and Congress. OFFICE OF MGMT. & BUDGET, OMB CIRCULAR NO. A-11, SECTION 145—REQUIREMENTS FOR REPORTING ANTIDEFICIENCY ACT VIOLATIONS 1 (2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11_current_year/s145.pdf [<https://perma.cc/2HEL-ZGYH>]. Responsible parties can be fined up to \$5,000 or be imprisoned for up to two years. *Id.* at 2. They may also be subject to administrative discipline such as a written reprimand, suspension without pay, or removal from office. *Id.* at 1–2.

²⁰² *See, e.g.*, Murphy, *supra* note 10, at 34 (“[The GAO’s] role is only advisory, so its opinions have no precedential weight or legal enforceability. The most it can do is refer matters to Congress for additional investigation.”) (internal citations omitted); Porter & Watts, *supra* note 19, at 1277 (“[B]ecause digital media is both instantaneous and inexpensive, post-hoc findings of violation may have only a limited effect.”); Herz, *supra* note 52 (“[T]he prohibition on agency publicity or propaganda is used primarily to arm agency critics with ammunition for anti-agency publicity and propaganda.”); Lipton & Shear, *supra* note 161 (“G.A.O.’s findings are unlikely to lead to civil or criminal penalties”).

²⁰³ Herz, *supra* note 52 (“[C]overt propaganda is exactly what the Chamber, and other EPA opponents, expect from the agency.”); *see also* Lipton & Shear, *supra* note 161 (“G.A.O.’s findings . . . offer Republicans a cudgel for this week’s showdown.”). Senator Inhofe responded to the alleged violation: “G.A.O.’s finding confirms what I have long suspected, that E.P.A. will go to extreme lengths and even violate the law to promote its activist environmental agenda.” *Id.* The U.S. Chamber of Commerce expressed that “covert propaganda’ is something you’d expect from a foreign spy agency not from EPA.” Herz, *supra* note 52.

²⁰⁴ Regulatory Integrity Act of 2017, H.R. 1004, 115th Cong. (2017); *see* Lydia Wheeler, *Regulatory Reform Bill Advances in House*, HILL (Sept. 13, 2016, 5:05 PM), <http://thehill.com/regulation/legislation/295744-regulatory-reform-bill-advances-in-house> [<https://perma.cc/D5K4-PTDS>].

²⁰⁵ *Id.*

²⁰⁶ Daniel E. Walters, *Ditch the Flawed Legislative Proposal to Police Agency*

concerned that agencies use social media to sway public opinion, rather than sincerely invite criticism and feedback about rules.²⁰⁷ While some find the Act to be overly burdensome,²⁰⁸ the possibility of its passage, along with the GAO's finding of propaganda, may be contributing to a chilling effect on agencies, which are not using social media as casually as they once were to inform the public about rulemakings.²⁰⁹ For example, in 2016, the EPA only tweeted once about a public comment period, while the Department of the Interior's and Bureau of Land Management's Twitters featured *zero* posts about public comment periods.²¹⁰

In a role reversal of the Thunderclap incident, Democratic members of Congress asked the GAO to review whether the EPA under the Trump administration²¹¹ violated the propaganda prohibition.²¹²

Communications, REG. REV. (May 10, 2017), <https://www.theregreview.org/2017/05/10/walters-proposal-agency-communications> [<https://perma.cc/G3TY-CRDF>].

²⁰⁷ Wheeler, *supra* note 204.

²⁰⁸ *Id.*

²⁰⁹ Social media use from 2017 and beyond is affected by the Trump administration's instruction to some federal agencies to cease social media communication. Eilperin & Dennis, *supra* note 32. The EPA, USDA, and Department of Interior specifically implemented policies limiting what messages can be posted. *Id.* No social media posts went out on EPA accounts for some time, aside from a few tweets by the Office of Water. *Id.* USDA communications were closely screened and approved before posted, which was possibly the case at other agencies. *Id.* Some agencies, like the DOJ and Department of Labor, were not affected. *Id.* However, others advised employees not to post on social media until further guidance from the administration was received, reducing engagement on those platforms. See Andrew Restuccia et al., *Information Lockdown Hits Trump's Federal Agencies*, POLITICO (Jan. 24, 2017, 3:03 PM), <https://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122> [<https://perma.cc/US9J-T7HE>]. Lesser social media use to promote regulations may also be explained by Republican administration principles that generally favor deregulation. See JEFF MADRICK, THE CASE FOR BIG GOVERNMENT 1-3 (2009); Binyamin Appelbaum & Jim Tankersley, *The Trump Effect: Business, Anticipating Less Regulation, Loosens Purse Strings*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/us/politics/trump-businesses-regulation-economic-growth.html>.

²¹⁰ While this correlation may be a coincidence, some are making a connection between the recent events mentioned here and the lack of social media use by agencies. Aaron M. Johnson, 'Covert Propaganda' in Federal Rulemaking, HILL (Nov. 9, 2016, 1:35 PM), <http://thehill.com/blogs/congress-blog/economy-budget/305245-covert-propaganda-in-federal-rulemaking> [<https://perma.cc/CJ2Q-653V>].

²¹¹ Democrats have largely opposed EPA action since the change in administration from President Obama to President Trump, who is a Republican. See, e.g., Timothy Cama & Devin Henry, *Overnight Energy: EPA Begins Repeal of Obama Power Plant Rule*, HILL (Oct. 10, 2017, 5:31 PM), <http://thehill.com/policy/energy-environment/overnights/354797-overnight-energy-pruitt-kicks-off-clean-power-plan> [<https://perma.cc/4D5R-P2VF>]; Alex Guillén, *Democrats: GOP Will 'Rue the Day' It Pushed Pruitt Vote for EPA*, POLITICO (Feb. 17, 2017, 11:16 AM), <https://www.politico.com/story/2017/02/scott-pruitt-democrats-emails-oil-gas-235140> [<https://perma.cc/E8LV-ED6R>]; Suzy Khimm, *Democrats: Trump EPA Nominee Michael Dourson Is Toxic Chemical Swamp Creature*, NBC NEWS (Oct. 3, 2017, 6:15 PM), <https://www.nbcnews.com/politics/congress/democrats-trump-nominee-toxic-chemical-swamp-creature-n807281> [<https://perma.cc/8BVR-3ERT>].

²¹² Press Release, House Comm. on Transp. & Infrastructure, Top Committee Democrats Request GAO Inquiry into EPA's Misuse of Taxpayer Dollars to Undermine Clean Water Rule (Oct. 12, 2017), <https://democrats-oversight.house.gov/news/press-releases/top-committee->

EPA Administrator Scott Pruitt appeared in a promotional video produced by the National Cattlemen's Beef Association to oppose the 2015 Clean Water Rule.²¹³ He spoke about why he is against the Rule, and urged farmers to provide comments on the proposed repeal of it.²¹⁴ The video directs viewers to BeefUSA.org to file comments, which has the title "Take Action Now—Tell EPA to Kill WOTUS."²¹⁵ In the video, Pruitt also said that the Clean Water Rule defined WOTUS as including puddles, dry creek beds, and ephemeral drainage ditches, but the Rule specifically excludes puddles, dry creek beds without beds, and ephemeral ditches that only flow after precipitation.²¹⁶ The GAO will investigate the situation,²¹⁷ but will likely not look at whether those assertions were misleading or false.²¹⁸

III. PROPOSAL

A. *The EPA Violated the Law*

Under the GAO's interpretation of annual appropriation bills, the EPA's Thunderclap campaign was propaganda.²¹⁹ Using the GAO's test of considering attribution of a message only, the GAO is correct that the campaign's first-person point of view makes it covert propaganda.²²⁰ Unlike providing plain facts, the EPA encouraged users to share a subjective message: "I support EPA's efforts."²²¹ Because of its perspective, the EPA knew that once the message appeared on users' profiles, it would appear as if the user wrote it themselves.²²² The EPA is removed from the post, regardless of the fact that the agency posted it on its account.²²³ Although the EPA insists that its target audience was only the supporters, the EPA used Thunderclap specifically to target the supporters' followers and reach a larger audience; the agency's list of social media platforms that it utilizes explains that the EPA uses

democrats-request-gao-inquiry-into-epa-s-misuse-of-taxpayer [https://perma.cc/H3EH-9E6B].

²¹³ BeltwayBeef, *EPA Administrator Scott Pruitt Urges Ranchers to File WOTUS Comments*, YOUTUBE (Aug. 16, 2017), <https://www.youtube.com/watch?v=vTVd54WYhDQ>.

²¹⁴ Timothy Cama, *GAO to Review Whether EPA Violated Anti-Propaganda Law*, HILL (Nov. 6, 2017, 4:10 PM), <http://thehill.com/policy/energy-environment/359000-gao-to-probe-whether-epa-violated-anti-propaganda-law> [https://perma.cc/S74A-QRD6].

²¹⁵ Ariel Wittenberg, *Pruitt Stars in Industry Video Promoting WOTUS Repeal*, E&E NEWS (Aug. 21, 2017), <https://www.eenews.net/stories/1060058985> [https://perma.cc/FQ67-5HRH].

²¹⁶ *Id.*

²¹⁷ Cama, *supra* note 214.

²¹⁸ *See infra* Section II.C.

²¹⁹ *See* REDBOOK CHAPTER 3, *supra* note 41, at 3-287 for GAO's current test to find covert propaganda.

²²⁰ GAO 2015 EPA REPORT, *supra* note 23, at 13.

²²¹ *Id.* at 4.

²²² *Id.* at 13 ("EPA deliberately disassociates itself as the writer.").

²²³ *Id.* at 14.

Thunderclap to have supporters promote agency messages to their social media followers.²²⁴ The perspective of the message thus makes the campaign amount to what the GAO considers covert propaganda.

What further distinguishes the Thunderclap campaign from other social media efforts is that it lacked identifying information within the content of the message.²²⁵ Thunderclap is a unique platform because, unlike a retweet²²⁶ on Twitter or a share²²⁷ on Facebook, the EPA's authorship would not be reposted on supporters' social media feeds when the message posted on their accounts.²²⁸ The only feature in the Thunderclap message that could be an ascription is the link concluding it, directing the public to the EPA's official website.²²⁹ Neither the GAO nor the EPA focused on this part of the message.²³⁰ For the EPA's #DitchtheMyth campaign, the agency added its campaign hashtag and Twitter username at the end of pre-written tweets to indicate that it was the source of the messages.²³¹ In contrast, a link to the EPA's official site does not as effectively disclose the message's origin. A follow-up link to explain the EPA's Clean Water Rule is not a clear ascription because people typically add links to their messages for their audiences to get further information about a topic.²³² Intended innocently or not, the EPA's Thunderclap hid the agency's identity to its intended audience, making the message covert and violating the GAO's interpretation of propaganda.²³³ However, actions that would satisfy the GAO may not be feasible.²³⁴ If part of the GAO's goal is to protect an agency's right to inform and engage the public, it must reconsider what covert propaganda means on the Internet.²³⁵

²²⁴ *List of Social Media Platforms that EPA Uses*, *supra* note 55 (“It’s a way that you can help us get the word out about events, special alerts, tips or other special messages.”).

²²⁵ GAO 2015 EPA REPORT, *supra* note 23, at 15.

²²⁶ Daniel Nations, *What is a Retweet on Twitter?*, LIFEWIRE, <https://www.lifewire.com/what-is-a-retweet-on-twitter-3486593> [<https://perma.cc/QAL3-8TXA>] (last updated Nov. 7, 2017) (after retweeting someone’s tweet, “[t]hat user’s tweet will then be automatically embedded in your profile”).

²²⁷ Beth Gasser, *The Difference Between Facebook Likes and Shares*, VIVID IMAGE, <https://vimm.com/like-vs-share-facebook> [<https://perma.cc/Z485-U86U>] (last visited Sept. 22, 2018).

²²⁸ GAO 2015 EPA REPORT, *supra* note 23, at 14.

²²⁹ *Id.* at 4.

²³⁰ *See id.* at 12–15 (the GAO only briefly noted that “the link to the website for the proposed rule did not identify EPA as the creator of the message”); Letter from Gina McCarthy, *supra* note 197, at 1–2; Purchia, *supra* note 28.

²³¹ GAO 2015 EPA REPORT, *supra* note 23, at 15.

²³² *See, e.g.*, Courtney Seiter, *A Scientific Guide to Writing Great Tweets: How to Get More Clicks, Retweets and Reach*, BUFFER: SOC. BLOG, <https://blog.bufferapp.com/writing-great-tweets-scientific-guide> [<https://perma.cc/QG9U-GVC5>] (last updated Mar. 18, 2016).

²³³ *See* GAO 2015 EPA REPORT, *supra* note 23, at 11–15.

²³⁴ *See infra* Section III.B.

²³⁵ *See* REDBOOK CHAPTER 3, *supra* note 41, at 3–281.

B. *The GAO Needs to Consider the Nature of Social Media*

The message that the GAO sent agencies is clear: an agency openly posting on its own account is not always enough; it must also include in the text or image of messages themselves a credit to the agency.²³⁶ The GAO compared its social media investigations to its decisions on agency activity through older media, trying to mold these violations into traditional ones and ignoring the characteristics and exceptional reach specific to new platforms.²³⁷ But what may have constituted covertness over television does not necessarily do the same on social media. Covertness may not be an effective standard to hold messages to in order to prevent propaganda.

For example, Thunderclap does not allow Twitter usernames in messages and encourages messages in the first person.²³⁸ In many ways, the EPA's use of Thunderclap was a typical and natural application of the tool.²³⁹ In fact, DigitalGov²⁴⁰ directs agencies to use Thunderclap for issue or topic support,²⁴¹ and the White House itself followed these norms when it made a Thunderclap campaign in 2013 with a message in the first-person point of view.²⁴² Further, Thunderclap has a 140-character limit on messages;²⁴³ similarly stringent length limits are typical of social media.²⁴⁴ Shorter, clean messages are valued on social media, and an ascription or link after a message can take up significant space.²⁴⁵ On social media, agencies try to publicize a complex message in little space and cannot always fit an attribution that undoubtedly credits

²³⁶ See Porter & Watts, *supra* note 19, at 1273.

²³⁷ GAO 2015 EPA REPORT, *supra* note 23, at 12–14.

²³⁸ Thunderclap Support, *Crafting the Perfect Thunderclap Message*, *supra* note 195.

²³⁹ See, e.g., Porter & Watts, *supra* note 19, at 1277–78; see also *infra* note 247.

²⁴⁰ The “destination” in government for agencies to learn how to “create effective digital services.” *About*, DIGITALGOV, <https://digital.gov/about> [<https://perma.cc/99VR-NTVR>] (last updated Aug. 13, 2018).

²⁴¹ Alison Lemon, *Case Studies in Thunderclap*, DIGITALGOV (June 25, 2014), <https://www.digitalgov.gov/2014/06/25/case-studies-in-thunderclap> [<https://perma.cc/562Q-7UA8>].

²⁴² It read: “I support common-sense steps to reduce gun violence. #NowIsTheTime to act. Share this if you agree: <http://thndr.it/ZCv5wX>.” The White House, *Now Is the Time to Act*, THUNDERCLAP (Apr. 17, 2013, 2:00 PM), <https://www.thunderclap.it/projects/1839-nowisthetime-to-act> [<https://web.archive.org/web/20170308123003/https://www.thunderclap.it/projects/1839-nowisthetime-to-act>].

²⁴³ Ian Parker, *Craft Your Message*, THUNDERCLAP, <https://help.thunderclap.it/hc/en-us/articles/235481128-Craft-your-message> (last visited Aug. 12, 2018). At the time of the EPA's Thunderclap post, Thunderclap had a 117-character limit on messages. See Zach Noble, *EPA Broke the Law with Social Media Push, Says GAO*, FCW (Dec. 15, 2015), <https://fcw.com/articles/2015/12/15/epa-social-media-propaganda-noble.aspx> [<https://perma.cc/HH3T-HATA>].

²⁴⁴ *Character Limits for Each Social Network*, BUFFER, <https://faq.buffer.com/article/491-what-is-the-character-limit-for-each-social-network-when-posting-from-buffer> [<https://perma.cc/82GV-UAPS>] (last updated July 17, 2018).

²⁴⁵ See *Social Media Tips*, COMM. CONSORTIUM MEDIA CTR., <http://ccmc.org/tips/social-media-tips> [<https://perma.cc/86PU-VA6T>] (last visited Sept. 22, 2018).

a message to them.²⁴⁶ Some believe the GAO went too far in finding that the EPA's Thunderclap message was a violation, arguing that there was enough accreditation in the agency's post and that the GAO's concerns are trivial compared to other violations of the propaganda prohibition.²⁴⁷

Normally, an agency can avoid violating the GAO's disclosure requirement because messages are usually posted from the agency's official account.²⁴⁸ If users share an agency's message, the medium will show that the agency is the author.²⁴⁹ On television, it may be easy for a paid government employee to appear on screen and hide their relationship to an agency, acting as if they are a nonpartisan citizen.²⁵⁰ Online, sites try to build such verification into their design, so an employee posting from an agency's official account can have her message shared without obscuring her identity.²⁵¹ The trouble occurs in situations where agencies create prewritten messages or use platforms such as Thunderclap—where the audience is the first to share the agency's message.²⁵² However, as discussed, the traditional idea of covertness may not mean as much online as it does in older media.

²⁴⁶ See *id.*; Thunderclap Support, *Crafting the Perfect Thunderclap Message*, *supra* note 195.

²⁴⁷ Those who agree with this think that a finding of propaganda implies more wrongdoing than the EPA committed, especially considering the EPA did not use social media in a devious way. See Benen, *supra* note 24 (“[T]he allegations here are pretty thin. The EPA created a social-media message, it disseminated that message, and it made no effort whatsoever to hide its authorship of the message. . . . [W]hen the Bush/Cheney team used taxpayer money to pay pundits to publicly praise the administration’s agenda, that was a real controversy. This EPA story, however, is something else entirely, and it seems quite trivial by comparison.”); see also Kevin Drum, *The EPA’s “Covert Propaganda” Campaign Explained*, MOTHER JONES (Dec. 15, 2015, 3:29 PM), <http://www.motherjones.com/kevin-drum/2015/12/epas-covert-propaganda-campaign-explained> [<https://perma.cc/UZD2-MSHM>] (“I have a hard time getting too exercised by this [finding of covert propaganda] . . . [K]eep [the actual facts] in mind when you start hearing dark stories about how the EPA engaged in lobbying and propaganda.”). The EPA’s message link may also contribute to the feeling of credibility, as Thunderclap users are supposed to insert a link that leads to the user’s website, which is shortened to a “thndr.it” URL. See Thunderclap Support, *An Important Note About Your Message Link*, *supra* note 173 (the link “should point to a site where your supporters (and their networks) can learn more or take action to support your efforts.”); Jesse Bacon, *You Can Make a Thunderclap! But Should You?*, POWERTHRU CONSULTING (May 6, 2013), <http://powerthruconsulting.com/blog/you-can-make-a-thunderclap-but-should-you> [<https://perma.cc/8HB6-AHTD>] (“The purpose of Thunderclap’s flood of messages is to get people to go to a particular link.”). The EPA linked to its official website. GAO 2015 EPA REPORT, *supra* note 23, at 4.

²⁴⁸ See GAO 2015 EPA REPORT, *supra* note 23, at 14.

²⁴⁹ *Id.* at 15.

²⁵⁰ See VNR incidents, *supra* Section I.C.2.

²⁵¹ See Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 923–24 (2010) (“Third-party platforms build identity verification into their design for sites used by government actors. For instance, a government actor’s Twitter account explicitly notes that the governmental author of the micro blogging site had been ‘verified,’ providing links to the government party’s official website Although third-party platforms like Twitter and Facebook do not necessarily check to see whether those setting up the accounts actually hail from government, they at least signal to the public that those creating the sites hold themselves out as government speakers.”).

²⁵² See GAO 2015 EPA REPORT, *supra* note 23.

Therefore, the GAO should consider online norms when determining whether activity is propaganda. Because covertness alone is problematic in determining whether a communication is propaganda, the “congressional watchdog”²⁵³ must return to the statutory text and focus on what propaganda actually is.

C. *The GAO or Congress Needs to Define Propaganda*

When Congress first enacted prohibitions on agency “propaganda,” it was worried about the indoctrination of socialism.²⁵⁴ Some members of Congress successfully prevented the implementation of a national healthcare plan, calling the campaign to promote it propaganda and adding the term to its annual appropriations bill.²⁵⁵ While knowing which messages were paid for by the government would be an important interest to identifying propaganda, the healthcare plan in this instance was clearly proposed by the government.²⁵⁶ It was fear of socialists *within* the government and their manipulation of the public that spurred the addition to the appropriations bill.²⁵⁷ Not all propaganda is covert.²⁵⁸

An important question then remains: even if the EPA’s Thunderclap message was covert, was it propaganda? Neither the GAO nor Congress defines propaganda.²⁵⁹ Under the GAO’s longstanding approach, whether an agency is engaged in covert propaganda turns solely on whether it is apparent to the public that the agency is the source of the message; the GAO ignores the content of the message.²⁶⁰ While the transparency of whether the government paid for a message is vital for accountability purposes, the content should be as much of a concern.²⁶¹

Americans increasingly rely on social media to get their news,²⁶² and studies show that getting information online fosters political

²⁵³ *About GAO*, *supra* note 25.

²⁵⁴ See PRICE, *supra* note 42, at 37–38; Morse, *supra* note 42, at 853.

²⁵⁵ PRICE, *supra* note 42, at 38.

²⁵⁶ *Id.* at 37–38.

²⁵⁷ See Morse, *supra* note 42.

²⁵⁸ See Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting*, 40 CAP. U.L. REV. 967, 967–70 (2012).

²⁵⁹ See *supra* Section I.A.

²⁶⁰ See KOSAR, *supra* note 74, at 7; *supra* Section I.C.

²⁶¹ See KOSAR, *supra* note 74, at 7.

²⁶² Angela Moon, *Two-Thirds of American Adults Get News from Social Media: Survey*, REUTERS (Sept. 8, 2017, 2:03 PM), <https://www.reuters.com/article/us-usa-internet-socialmedia/two-thirds-of-american-adults-get-news-from-social-media-survey-idUSKCN1BJ2A8> [<https://perma.cc/9MQ3-5UXW>] (“About 67 percent of American adults somewhat rely on social media platforms such as Facebook Inc, Twitter Inc and Snapchat for news . . . compared with 62 percent in 2016.”).

engagement.²⁶³ Digital technology may allow the manipulation of voters more easily than other media,²⁶⁴ and a message delivered by the government affects how the public perceives it, and thus affects its persuasiveness.²⁶⁵ In addition, Internet media amplifies messages faster and to a larger degree than other traditional media, making for very persuasive platforms.²⁶⁶ These are not inherently dangerous realities, but can make the public more susceptible to government propaganda.²⁶⁷ However, propaganda is not always associated with a negative connotation,²⁶⁸ and any definition of it for the GAO's purposes must navigate around this idea. Merriam-Webster's definition of propaganda is "the spreading of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person."²⁶⁹ That definition covers a broad range of activity, even the legal dissemination of messages today.²⁷⁰

²⁶³ Kevin Curry, *More and More People Get Their News Via Social Media. Is that Good or Bad?*, WASH. POST (Sept. 30, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/30/more-and-more-people-get-their-news-via-social-media-is-that-good-or-bad/?utm_term=.2d6a0c04236b [<https://perma.cc/4THM-Y9N3>].

²⁶⁴ See *id.* ("[W]e tend to read and quickly digest ideas and views from individuals whom we already consider 'friends' or 'followers,' mixing them with those from the news media.").

²⁶⁵ Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 594 (2008) ("[W]here the government seems an expert, objective, or otherwise trustworthy source, its endorsement gives the ideas it trumpets . . . more acceptance than they would otherwise enjoy."). See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1017-18 (1995) ("Call this the Orwell effect: when people see that the government or some relatively powerful group is attempting to manipulate social meaning, they react strongly to resist any such manipulation. . . . What the Orwell effect will mean is that government will have an incentive to minimize the extent to which its messages seeking change seem to be messages from it, by tying its messages to independent authorities (for example, doctors) or authority (science)."). The government as a source can have positive or negative effects on a message's perceived credibility, depending on readers' attitudes towards the government itself. *Id.* at 595; see also Jeffery J. Mondak, *Source Cues and Policy Approval: The Cognitive Dynamics of Public Support for the Reagan Agenda*, 37 AM. J. POL. SCI. 186, 188-90 (1993) (discussing how individuals evaluate political messages depending on education, need, attentiveness, knowledge of specific issues, external factors like public opinion, and more). For example, most Americans report that they do not trust the government, though this is impacted by which political party is in power. *Public Trust in Government: 1958-2017*, PEW RESEARCH CTR. (Dec. 14, 2017), <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017> [<https://perma.cc/M35R-XYLF>].

²⁶⁶ See Murphy, *supra* note 10, at 52; see also William D. Araiza, *Captive Audiences, Children and the Internet*, 41 BRANDEIS L.J. 397, 407-08 (2003) (noting how ingrained the Internet is in our lives and applying the "captive audience theory" to the medium).

²⁶⁷ See *infra* notes 282-83 and accompanying text.

²⁶⁸ See Ariel Victoria Lieberman, *Terrorism, the Internet, and Propaganda: A Deadly Combination*, 9 J. NAT'L SECURITY L. & POL'Y 95, 98 (2017). Propaganda has been used by the ancient Greeks, pharaohs of Egypt, and religious leaders to advocate certain ideas. *Id.*

²⁶⁹ *Propaganda*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/propaganda> [<https://perma.cc/VWG6-3HPS>] (last visited Sept. 22, 2018). Black's Law Dictionary defines propaganda similarly: "[t]he systematic dissemination of doctrine, rumor, or selected information to promote or injure a particular doctrine, view, or cause." *Propaganda*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁷⁰ See KOSAR, *supra* note 74, at 8-9 ("[This type of definition] captures any coordinated activity aimed at persuading others of the wisdom and veracity of one's ideas and positions,

Although the GAO maintains that it does not know of a satisfactory definition of propaganda that excludes permissible agency communication due to the lack of direction by Congress,²⁷¹ either it or Congress needs to attempt to define it. Government propaganda does not indoctrinate Americans, especially on the Internet, where citizens can voice criticism and speak back to the government.²⁷² But it can still be dangerous. Propaganda deceives people by appealing to emotions, relying on stereotypes, making false claims, contorting facts, and more.²⁷³ It is particularly operational in a polarized environment, which increasingly describes our nation, and can threaten democracy by distorting reality.²⁷⁴ This vulnerability is why the GAO should consider the content of an agency's message.²⁷⁵ For example, while the GAO

something that is part and parcel of politics and governance.”). For example, under such a definition, “the Department of Transportation’s media campaigns to discourage drunken driving and nearly every campaign for public office might constitute ‘propaganda.’” Kevin R. Kosar, *Is Government Propaganda Legal? Well . . .*, HISTORY NEWS NETWORK (Jan. 22, 2007), <https://historynewsnetwork.org/article/20418> [<https://perma.cc/635C-M4DN>]. Adding an element of manipulation or persuasion to that definition still does not adequately exclude agencies’ duty to promote its actions and rules. For example, see *Propaganda and Public Relations, Government*, ENCYCLOPEDIA.COM: OXFORD COMPANION TO AM. MILITARY HIST., <http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/propaganda-and-public-relations-government> [<https://perma.cc/7C9W-AFDG>] (last visited Sept. 22, 2018), for a definition of propaganda from a military perspective that still does not provide a working definition of propaganda for the GAO to use: “Propaganda is a deliberate attempt to persuade people to think and then behave in a manner desired by the source.”

²⁷¹ USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 6–7 (noting its difficulty in trying to distinguish “permissible informational activity” from propaganda, as even legislative history reveals no definition of the latter). The GAO gives agencies “wide discretion in their information activities,” to “reflect societal values in favor of a robust exchange of information between the government and the public it serves.” *Id.* at 7.

²⁷² See, e.g., Herz, *supra* note 52 (noting an example where the Transportation Security Administration (TSA) published informational YouTube videos that were outshined by anti-TSA videos).

²⁷³ See MAGEDAH SHABO, *TECHNIQUES OF PROPAGANDA & PERSUASION* (2008); Michiko Kakutani, *How Propaganda Works’ Is a Timely Reminder for a Post-Truth Age*, N.Y. TIMES (Dec. 26, 2016), <https://www.nytimes.com/2016/12/26/books/how-propaganda-works-is-a-timely-reminder-for-a-post-truth-age.html>; Johnnie Manzaria & Jonathon Bruck, *Media’s Use of Propaganda to Persuade People’s Attitude, Beliefs and Behaviors*, STAN. U.: ETHICS DEV. GLOBAL ENV’T, https://web.stanford.edu/class/e297c/war_peace/media/hpropaganda.html [<https://perma.cc/7V2G-837U>] (last visited Sept. 22, 2018) (studying the different ways propaganda is employed, such as through stereotypes, simplistic portrayals of events, and contortions of fact by framing).

²⁷⁴ Kakutani, *supra* note 273.

²⁷⁵ Agency silence can be just as propagandistic as positive communication. For example, the EPA withdrew scientific information on climate change from its website and current head Scott Pruitt continues to deny evidence of climate change, despite overwhelming agreement by scientists that it exists. See Walters, *supra* note 206 (“It is not hard to imagine . . . the agency’s conspicuous silence, failure to correct misinformation, or active concealment of data reveal the Administration’s position and shape the public dialogue in the same ways that a social media campaign might.”); see also John Nichols, *For Scott Pruitt’s EPA, Climate-Change Denial is Mission Critical*, NATION (Aug. 30, 2017), <https://www.thenation.com/article/for-scott-pruitts-epa-climate-change-denial-is-mission-critical> [<https://perma.cc/PVV3-4SFH>]. However, the GAO will likely not investigate agency inaction, even with a broad definition of propaganda.

found that the EPA's #DitchtheMyth campaign was not propaganda, the public remains unaware of whether the agency's purported facts are actually true.²⁷⁶ Verifying information publicized by an agency, especially when that information is used to counter opposition and raise support for a pending rule, would satisfy a concern that is currently lacking in the GAO's reports.

This is not to say that the GAO should abandon its current test. The GAO should continue asking whether an agency's message is covert, but should also take into account the type of message being conveyed. The GAO believes that establishing a definition of propaganda is too problematic because of the impossibility of reconciling impermissible activity with an agency's right to inform the public and defend its policies.²⁷⁷ But the GAO can create a definition by supplementing its current test with other factors. In addition to covertness, such other factors should include: (1) deceptiveness, which focuses on whether the content of a message is false or unusually exaggerated or misleading; and (2) emotivity, which focuses on whether an agency deliberately and egregiously plays on the public's emotions. Therefore, propaganda would be any agency communication that is covert, deceptive, and/or egregiously emotive. If the GAO treats these three as distinct, the agency will find propagandistic messages in every investigation. For example, while most agencies present certain views in favorable or unfavorable lights,²⁷⁸ the GAO does not have to label that language as unlawful, misleading propaganda. Instead, the GAO should balance all three factors in relation to each other, treating them as prongs to the greater propaganda phrase. It should consider the context and medium of a message to determine whether it implicates the propaganda prohibition.

If the EPA's Thunderclap campaign were analyzed under this test, the first-person perspective of the message would not weigh as heavily because of how Thunderclap is used. That the agency's intended audience would not know the EPA wrote the message is a concern,²⁷⁹ but would be placed in a larger context. The EPA used Thunderclap the way it was directed to, the way the website suggests, and the way most use the platform.²⁸⁰ The GAO would then need to determine whether encouraging citizens to tell their social media followers that they

²⁷⁶ See *supra* text accompanying note 98.

²⁷⁷ USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 6–7 (admitting the agency has “struggled over the years” to “give meaning to [the propaganda] prohibition”).

²⁷⁸ See Bejesky, *supra* note 258, at 967 (“Although it is natural for a government to frame issues of public concern . . . and persuade perceptions so that foreign policy ‘actions . . . appear legitimate in the eyes of others . . .’”); *Propaganda vs. Misinformation*, JOHNS HOPKINS SHERIDAN LIBR., <http://guides.library.jhu.edu/c.php?g=202581&p=1334961> (last updated June 25, 2018).

²⁷⁹ See *supra* Section III.A.

²⁸⁰ Discussed *supra* Section III.B.

support the EPA's proposed rule is propaganda. There are no facts in the message, but it does appeal to the public's emotions with simplistic ideas. Appealing to emotions alone cannot constitute propaganda because much of what the government does is sensitive and concerns health, family, and community. However, it is noteworthy that this message was posted in the midst of a proposed rulemaking, but, deceptively, does not indicate in the message itself that there is a rule at all.²⁸¹ The message contains no indication for readers to know that the EPA's efforts are for anything other than general goals of encouraging a safe environment.²⁸² It is true that the EPA validly promoted its goal and mission for supporters to share, while providing a link for users to get more information on the EPA's concrete plans.²⁸³ Still, because the EPA tried to sway the secondary audience's opinion with such an usually misleading message, the Thunderclap campaign would still count as propaganda under the approach I propose.²⁸⁴

That the GAO's report had the same outcome does not mean its current approach is effective for social media. There are instances in which the GAO analyzing a message's covertness alone would not correspond with one where it considered a broader view of propaganda. If the EPA was more specific in its Thunderclap about what its purpose was,²⁸⁵ the message would be propaganda under the GAO's current approach, but would not under a more flexible, multi-factored one. The latter approach understands that Thunderclap works differently than older media.²⁸⁶ This is crucial if the GAO does not want to discourage agency use of new platforms, which can reach modern audiences more effectively than ever before, by finding propaganda where most of the public would not.²⁸⁷ Additionally, if the EPA's #DitchtheMyth purported facts were untrue, the GAO's current approach would still not find propaganda, while the proposed definition would. This is

²⁸¹ See Herz, *supra* note 52. Only the message link at the end, sending users to its official webpage on the Clean Water Rule, would let the public know of this. GAO 2015 EPA REPORT, *supra* note 23, at 4.

²⁸² GAO 2015 EPA REPORT, *supra* note 23, at 4. It is also important to note that the EPA's message and subsequent defenses indicate that the agency holds the "mistaken view" that public comments should only show support, rather than provide the agency with additional information or criticism. Herz, *supra* note 52.

²⁸³ Purchia, *supra* note 28.

²⁸⁴ GAO 2015 EPA REPORT, *supra* note 23, at 14–15.

²⁸⁵ See *supra* notes 281–84 and accompanying text.

²⁸⁶ The EPA used Thunderclap publicly and under its own account, yet the GAO standard of covertness was not satisfied because it tried to fit the campaign with previous ones over traditional media. Just because use of Thunderclap may be too difficult to satisfy the GAO's test, however, does not mean agencies should never use social media. The benefits are substantial. See *supra* Section III.B; see also *infra* Section III.D.

²⁸⁷ This is in line with the GAO's concern that it should "reflect societal values in favor of a robust exchange of information between the government and the public it serves." USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 7.

because the definition takes into account how propaganda works beyond a message's unclear origin, to better protect the public against all types of propaganda.

D. Possible Objections

Because federal agencies must engage in some degree of covertness on social media, it may be submitted that the GAO should discourage agency use of those platforms entirely. However, sharing messages is an essential feature to communicating and spreading information online.²⁸⁸ Simply because covertness may be inherent to some social media does not mean that agencies should stop using social media altogether. The advantages of social media are significant, allowing the government to communicate easily, directly, and at little cost to a large number of Americans at any time in ways that are not possible using older media.²⁸⁹ The GAO should therefore permit normal uses of social media to promote agency activity and encourage public participation in politics and the rulemaking process.²⁹⁰

The GAO's primary concern in adopting a more comprehensive propaganda definition is that broadening it may make otherwise permissible government communications unlawful.²⁹¹ Yet the difficulty in drawing that line should not dissuade the GAO from doing so. Propaganda may not brainwash Americans,²⁹² but it does make citizens susceptible to manipulation.²⁹³ The GAO's instinct to adopt a narrow

²⁸⁸ See Murphy, *supra* note 10, at 51 ("Internet media is more durable than print or broadcast media, because its content can be easily and repeatedly accessed over a longer period of time. . . . For example, internet messages can be amplified by repeated forwarding, allowing recipients to become speakers in their own right.") (internal citations omitted); *Understanding Word-of-Mouth in the Digital Age*, I-SCOOP, <https://www.i-scoop.eu/understanding-word-of-mouth-social-media-age> [<https://perma.cc/BQ8P-4YLV>] (last visited Sept. 22, 2018) (finding traditional word-of-mouth communication still exists on social media).

²⁸⁹ Discussed *supra* Section I.B. As the EPA stated: "One of the most effective ways to share information is via the Internet and social media. Though backward-thinkers might prefer it, we won't operate as if we live in the Stone Age." Purchia, *supra* note 28. Thunderclap is especially effective to share a message "because aggregating the posts [on supporters' accounts] allows breaking through the 'noise' of general news." Luc Dudler, *6 Things You Should Know Before Using Thunderclap*, MEDIUM (Apr. 16, 2014), <https://medium.com/@lucdudler/6-things-you-should-know-before-using-thunderclap-bc0855efb4db> [<https://perma.cc/57PT-4Z7W>].

²⁹⁰ See Mark Drapeau, *Government 2.0: How Social Media Could Transform Gov PR*, MEDIASHIFT (Jan. 5, 2009), <http://mediashift.org/2009/01/government-20-how-social-media-could-transform-gov-pr005> [<https://perma.cc/EB63-UURV>]; USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 7.

²⁹¹ See KOSAR, *supra* note 74, at 7–8; USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 6–7. For example, any definition must allow agencies to persuade the public of its ideas. *Id.*

²⁹² Herz, *supra* note 52.

²⁹³ See Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 473–78 (2017); see also *supra* notes 273–78 and accompanying text. While Congress's fears of socialism were

interpretation of propaganda is reasonable, because making a broad definition may render most agency communication unlawful.²⁹⁴ However, this Note's proposed definition requires the agency to balance covertness with deceptiveness and emotivity, finding violations when an agency lies to the public or effectively does so with egregious manipulation. Therefore, an agency would not violate the law when persuading campers to avoid accidentally causing forest fires,²⁹⁵ but may when purporting to tell the public essentially false facts about a rule.²⁹⁶ The current GAO approach is both underinclusive and overinclusive—while many types of suspect agency propaganda are ignored, arguably harmless communications are classified as covert propaganda.²⁹⁷ The proposed definition expands the GAO's interpretation, but is still limited, and even reduces some classifications of covert propaganda.²⁹⁸ This proposed analysis may be more subjective than the GAO's approach, but it does not give the GAO so much discretion so as to preclude a consideration of special factors.

Broadening the definition of propaganda may also raise the concern that it unnecessarily expands the amount of communication open to GAO investigation, burdening the agency.²⁹⁹ However, because the GAO does not affirmatively look at agency messages, it would only increase the number of requests it receives from Congress, which should not result in encumbering the GAO with investigations.³⁰⁰ As to the idea that having the GAO verify the truthfulness of every agency statement would be too burdensome, the GAO would likely, at the very least, only require an agency's justification and sources for its statements; this is a practice the GAO currently employs to determine whether an agency violated propaganda prohibitions.³⁰¹ Doing this would still encourage

heightened because of the period, it included the propaganda prohibition because of those concerns and their potential effect on democracy. See PRICE, *supra* note 42, at 37–38; Morse, *supra* note 42, at 853.

²⁹⁴ See KOSAR, *supra* note 74, at 7–8.

²⁹⁵ *Id.* at 7.

²⁹⁶ See *supra* text accompanying notes 213–18 (describing EPA chief Pruitt's video objecting to the Clean Water Rule).

²⁹⁷ See discussion *supra* Section III.C (using the EPA's Thunderclap campaign as an example).

²⁹⁸ See, e.g., Section III.C.

²⁹⁹ KOSAR, *supra* note 32, at 4, 8 (noting the incredible increase of agency communication thanks to social media).

³⁰⁰ *About GAO*, *supra* note 25. Perhaps Congress members will try to obtain holdings that opponent agencies conducted propagandistic activity for trivial incidents more frequently, but Congress members are arguably already using the GAO to rule on insignificant incidents. See *supra* note 77 and notes 202–11 for why Congress members use GAO holdings for political gains, and *supra* note 222 for arguments that the EPA Thunderclap incident is unimportant.

³⁰¹ See USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS, *supra* note 41, at 7 (“We generally will defer to an agency’s justification for such activities, only ‘overrid[ing] administrative determinations and justification of propriety . . . where they are so palpably erroneous as to be unreasonable.”) (alteration in original) (internal citation omitted); see also *supra* notes 82–83 and accompanying text.

agencies to ensure that they can credibly support their messages, which would in turn better inform the public and help combat against common propagandistic practices.³⁰² Relatedly, it may be suggested that expanding the definition will have a chilling effect that this proposal seeks to prevent: agencies refraining from using social media for fear that any message will be labeled propaganda due to its misleading or emotive nature.³⁰³ However, the proposed definition would still allow misleading or emotive messages. Additionally, agencies will likely not stop communicating online,³⁰⁴ but may focus more on the truthfulness of their messages—which some believe is a good idea.³⁰⁵

This Note’s definition of propaganda adds a focus on content only. Agencies will be more concerned with *what* they are posting, on any platform, rather than with *where* they are posting, unlike the effect the GAO’s approach has.³⁰⁶ Agencies should feel free to use all social media platforms, but should be more diligent in the type of message they broadcast. This closes the large gap that the GAO’s approach leaves, allowing other propaganda activity to remain unaccounted for.

CONCLUSION

With modern technology advancing at such a fast pace, social media techniques should not be evaluated the same way that the GAO

³⁰² See Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act’s Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL’Y 1, 6 (2006) (discussing why Americans are distrustful of government propaganda); The U.N. Special Rapporteur on Freedom of Opinion & Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression & the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda*, COUNCIL OF EUROPE (Mar. 3, 2017), <https://www.coe.int/en/web/media-freedom/-/joint-declaration-on-freedom-of-expression-and-fake-news-disinformation-and-propaganda> [<https://perma.cc/LAQ7-J55M>] (“expressing concern” about the relationship between disinformation and propaganda).

³⁰³ See *supra* notes 209–13213 and accompanying text. See also KOSAR, *supra* note 74, at 8–9 (giving examples showing how the line between what is misleading and what is objective can be thin).

³⁰⁴ See JOHN MAXWELL HAMILTON & KEVIN R. KOSAR, GOVERNMENT INFORMATION AND PROPAGANDA: HOW TO DRAW A LINE? 9 (R Street Policy Study No. 73, Oct. 2016), <https://www.rstreet.org/wp-content/uploads/2016/11/73.pdf> [<https://perma.cc/LP5V-VRNZ>] (“The EPA’s sheer brazenness demonstrates that agencies can and will pursue their policy preferences, regardless of statutory curbs on public communications.”).

³⁰⁵ See Bejesky, *supra* note 258, at 969–70 (discussing perceptions of the Iraq War based on inaccurate information spread by the government); John Maxwell Hamilton & Kevin Kosar, *How the American Government is Trying to Control What You Think*, WASH. POST (Sept. 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/09/24/the-new-propaganda-how-the-american-government-is-trying-to-control-what-you-think/?utm_term=.67e4ab41bf55 [<https://perma.cc/Z2BB-R7QG>] (“[R]eform would be even more helpful if it required agencies to cite and share the sources for their ‘facts.’”).

³⁰⁶ Hamilton & Kosar, *supra* note 305.

looks at those on older media forms.³⁰⁷ Covertness in the GAO's long-established sense of the word may be unavoidable at times, but the answer is not to effectively restrict agency use of social media altogether.³⁰⁸ Rather, the GAO needs to have a more adaptable approach that considers the type of medium a message is on and its norms.³⁰⁹ Further, either the GAO or Congress needs to define propaganda to allow an interpretation that covers the content of a message. This includes a focus on whether a message is deceptive or egregiously emotive.³¹⁰ What may not be covert propaganda may be substantively propaganda, and vice versa.³¹¹ To better protect our democracy, the GAO must revisit its interpretation to ensure that agencies are held accountable for such unlawful communication with the public.³¹²

³⁰⁷ The GAO compared the EPA social media incidents with those on older media, such as newspapers. GAO 2015 EPA REPORT, *supra* note 23, at 12.

³⁰⁸ See discussion *supra* Sections III.C–D.

³⁰⁹ See discussion *supra* Section III.C.

³¹⁰ This is in addition to considering whether a message is covert. See discussion *supra* Section III.C.

³¹¹ See discussion *supra* Section III.C (comparing the EPA's Thunderclap campaign and #DitchtheMyth campaign under the proposed interpretation of propaganda).

³¹² See *supra* notes 254–60 and accompanying text.