Lobbying Congress with Appropriated Funds: Restrictions on Federal Agencies and Officials

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Summary

Congress, under its authority to direct and control the use and expenditure of the funds that it appropriates from the U.S. Treasury, has enacted several specific and express limitations on the expenditure of federal appropriations. Some of these restrictions and prohibitions apply specifically to using federal appropriations for what is generally called "lobbying" of the Congress (or in some cases other government officials).

Although these restrictions exist in both federal statutory laws as well as in yearly appropriations riders, because of their precise language and the exceptions to the limitations, and because of recognized countervailing public interests and the necessities of efficient governmental functioning, such restrictions are interpreted in a narrow fashion. The restrictions on the use of federal funds to lobby the Congress have, for example, been consistently interpreted to allow *direct* communications from federal officers or employees to Congress with respect to legislation or appropriations in order to facilitate an open dialogue between the agencies, departments, and officials in the various branches of government with regard to the public business and public policy options.

What may generally be prohibited by these various appropriations restrictions, however, are what are known as "grass roots" lobbying campaigns—where federal appropriations are used by an agency or federal officer to specifically urge the public to write or communicate with Congress to favor or oppose legislation. Although "grass roots" lobbying efforts may come within the appropriations restrictions, such limitations have generally been applied only to efforts which involve an *explicit* and clear request to contact a Member of Congress on pending legislation. General statements of support, promotion, or arguments in favor of or defending an Administration's or agency's policies, positions, and programs have generally been found to be a legitimate expenditure of federal funds and not a prohibited "grass roots" lobbying campaign (when not involving an express or clear solicitation or urging of the public to communicate with Congress on pending legislation).

Similarly, an agency may engage in informational activities directed at the public or Congress when there is a reasonable connection with the official duties of the agency, and such activity would not be an unauthorized "publicity and propaganda campaign" when it does not involve excessive "puffing" or self-aggrandizement of an agency's importance; covert or secret communications to the public where the government as the source of the material is hidden; or purely partisan political messages unconnected to an agency's official functions.

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Congress has the authority, under what is called its "power of the purse," to regulate and direct the uses to which any funds appropriated from the U.S. Treasury may be put.[1] Under this authority to regulate and direct the use and expenditure of federal appropriations, Congress has enacted specific prohibitions, both in federal statutory law and in yearly appropriations riders, on the use of federal funds by federal agencies and employees to "lobby" the Congress or to engage in "publicity or propaganda" campaigns directed at legislation pending before Congress.

Although such restrictions exist, because of exceptions in the statutory prohibition, and in recognition of competing public interests, necessities, and the realities of governmental functioning, such appropriations restrictions have been consistently interpreted to allow agencies and departments in the different branches of the government to speak and communicate with each other, thus allowing *direct* communications from federal agencies and employees to Congress regarding legislation and appropriations. Rather than applying to direct communications to Congress, the prohibitions have been interpreted to bar "grass roots" types of lobbying campaigns with federal funds—where agencies expressly appeal to the public to write or contact a Member of Congress to influence a Member on an issue. Even though the restrictions have applied to such "grass roots" lobbying campaigns, the propriety of agencies and the Administration to use public funds to promote, to argue for, and to advocate for its policies and programs has been recognized as a legitimate use of federal funds and not necessarily a violation of the "lobbying" or the "publicity or propaganda" restrictions.

Statutory Restriction: 18 U.S.C. § 1913

The principal statutory prohibition on "lobbying" with appropriated funds is currently set out in the federal criminal code at 18 U.S.C. § 1913. That law, as amended in 2002, now prohibits the use of federal appropriations to pay for any "personal services, advertisement, telegram, telephone, letter, printed or written matter ... intended or designed to influence" Members of Congress, or state or local governmental units, on policies, legislation or appropriations.[2] Originally adopted in 1919, the law had applied initially only to officers and employees of the federal government,[3] and then only to lobbying the Congress. The 2002 amendments, while eliminating the criminal penalties and substituting civil penalties (of the so-called "Byrd Amendment"),[4] broadened the substantive prohibition to apparently cover the use of federal appropriations by any recipient, and not merely by federal employees, while also extending the substantive prohibitions beyond merely lobbying the Congress to a prohibition on the use of federal appropriations to lobby or influence all levels of governmental authority.[5]

Although the language of the law appears to encompass a broad prohibition on the use of federal funds to influence Members of Congress or other government officials, the statutory language expressly exempts from the prohibition the activities of officers and employees of the federal government "communicating to any such Member or official, at his request," or to Congress or such official "through the proper official channels, requests for any legislation, law, ratification,

[1] U.S. CONST, art. I, § 9, cl. 7; Cincinnati Soap Co. v. United States, 301 U.S. 308, 321-322 (1937).

[2] 18 U.S.C. § 1913, as amended by P.L. 107-273, § 205(a); 116 Stat. 1778, November 2, 2002.

[3] Section 6 of the Third Deficiency Appropriations Act, fiscal year 1919, 41 Stat. 68 (1919). As to its applicability only to federal employees, see Grassley v. Legal Services Corporation, 535 F. Supp. 818, 826 n.6 (S.D. Iowa 1982).

[4] Note 31 U.S.C. §1352(a), concerning prohibitions on contractors and grantees using federal monies for certain lobbying purposes, and applicable civil penalties at 31 U.S.C. § 1352(c).

[5] Note H.R. Rpt. No. 107-685, 107th Cong., 2d Sess. 177 (2002); S. Rpt. No. 107-96, 107th Cong., 1st Sess. 11 (2001).

policy or appropriations which they deem necessary for the efficient conduct of the public business.... " This provision of law has thus been consistently interpreted in the past by the Justice Department as permitting *direct* contacts and communications from federal executive officials and executive agencies to Members of Congress concerning pending or proposed federal legislation.[6] As explained by the Justice Department, "18 U.S.C. § 1913 'does not apply to direct communications between Department ... officials and Members of Congress and their staffs ... in support of Administration or Department positions.... '"[7] Earlier, in an informal opinion, the Assistant Attorney General discussed the right and obligation within our constitutional framework for the President and the executive agencies, and their officers and employees, to communicate directly with Members of Congress to express their views and the Administration's arguments and positions in favor of or opposition to proposed or pending legislation:

> Personal contacts with members of Congress by executive officers are both sanctioned and required by Article II, section 3 of the Constitution.... The power to recommend measures to Congress would appear clearly to comprehend and include the power to urge arguments on individual Members of Congress in support of such measures.[8]

Even when fairly overt and obvious advocacy activities by Administration officials are directed at the public, such that they are clearly not "direct communications" with Congress and so might arguably be considered in a very general sense a public "lobbying" or "publicity" campaign for particular legislation or programs favored by the Administration, there may not be violations of the restrictions. Interpretations of § 1913 (and similar appropriations prohibitions) recognize that members of the Administration and other executive branch officers and employees are not prohibited from all official public expressions of support or opposition, or expressions for the need for certain legislation or governmental programs. There is, therefore, in the first instance, an apparently accepted distinction between prohibited grass roots "lobbying" with federal funds regarding legislation, as opposed to permissible public "advocacy" for certain Administration programs, favored legislation, or policy.[9] As noted by one congressional commentator concerning an Administration's public expressions of opinions on policy: "Certainly, any Administration should be expected to use all legal means at its disposal to encourage acceptance of its programs."[10] In 1981, the Office of Legal Counsel of the Department of Justice explained in broad terms the proper, contemplated relationship and interchange between the executive branch and Congress as well as between the executive branch and the public concerning legislation:

> The Constitution contemplates that there will be an active interchange between Congress, the Executive Branch, and the public concerning matters of legislative interest. For that reason alone, this Department has traditionally declined to read the criminal statute and

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[6] 5 Op. O.L.C. 180, 185 (1981); 13 Op. O.L.C. 300 (1989); Office of Legal Counsel, Department of Justice, *Guidelines on 18 U.S.C. §1913* (April 14, 1995).

[7] 29 Op. O.L.C. 179 (2005), quoting 13 Op. O.L.C. 300, 301 (1989).

[8] Opinion of Assistant Attorney General Henry Miller (1962), printed at 108 CONG. REC. 8449-8451 (May 15, 1962).

[9] There is no First Amendment "neutrality" requirement for the government in public policy issues akin to the neutrality required in the Establishment Clause. See Buckley v. Valeo, 424 U.S. 1, 92-93 (1976). As noted by a federal court: "What is condemned by the free speech guarantee of the First Amendment is not advocacy by the government, but rather conduct which limits similar rights guaranteed to individual members of society." Arrington v. Taylor, 380 F. Supp. 1348, 1364 (D.N.C. 1974), citing Joyner v. Whiting, 477 F.2d 456, 461 (4th Cir. 1973). As to executive branch expenditures of federal funds, the Government Accountability Office (GAO) has concluded: "[T]he courts have indicated that it is not illegal for government agencies to spend money to advocate their positions, even on controversial issues." U.S. Government Accountability Office [GAO], Office of General Counsel, *Principles of Federal Appropriations Law*, Volume I, at p. 4-197 (Third ed. 2004).

[10] Ancher Nelson. *Lobbying by the Administration*, in WE PROPOSE: A MODERN CONGRESS, at 145.

> the general rider as requiring federal officers and employees to use their own funds and their own time to frame necessary communications to Congress and the public. We have taken the view that the criminal statute and the general rider impose no such requirement. They permit a wide range of contact between the Executive and the Congress and the Executive and the public in the normal and necessary conduct of legislative business.[11]

Similarly, in a 1989 opinion, the Office of Legal Counsel of the Department of Justice asserted that general public expressions concerning legislation or other public policy issues by the President or other executive branch officials are allowed under the statute, as the law was not intended to prohibit the President or executive officials "from engaging in a general open dialogue with the public on the Administration's programs and policies."[12]

The types of conduct that would, in theory, violate the statutory restriction would thus not involve mere exposition, or even advocacy or promotion of policy positions, preferred legislation, or appropriations or regulations that are favored by the Administration or an agency of the government, but rather conduct that involved certain "grass roots" lobbying campaigns—that is, substantial letter-writing or other types of significant propaganda campaigns funded with appropriated monies that are directed at the general public and that specifically urge or exhort the public or individuals to write or contact their congressman on an issue before Congress.[13] This discussion is framed in the context of "theoretical" violations of § 1913 because it appears that no one has ever actually been prosecuted or even indicted under the law since its enactment nearly one hundred years ago.[14] The Department of Justice, Office of Legal Counsel, has noted that prohibited "grass roots" lobbying campaigns with federal appropriations would involve those where the public is expressly asked to contact Members of Congress:

> The essence of a "grass roots" campaign is the use of "telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of Congress."[15]

The Department of Justice has consistently interpreted the restrictions of 18 U.S.C. § 1913 very narrowly and has explained, for example, that it (1) would not enforce the prohibition against the "lobbying activities of executive branch officials whose positions typically and historically entail an active effort to secure public support for the Administration's legislative program ... [including] presidential aides, appointees, and their delegees.... ";[16] (2) would not consider the statutory prohibition applicable to "public speeches" or public writings of federal executive branch officials, but rather only to private writings or communications to members of the public "expressly asking recipients to contact Members of Congress";[17] and (3) would not consider

[11] 5 Op. O.L.C. 180, 185 (1981).

[12] 13 Op. O.L.C. *supra* at 304.

[13] Note legislative history of § 1913, at 58 CONG. REC. 404, May 29, 1919; and discussion in 2 Op. O.L.C. 30 (1978); 5 Op. O.L.C. 180 (1981); 13 Op. O.L.C. 300 (1989); Office of Legal Counsel, Department of Justice, *Guidelines on 18 U.S.C. § 1913* (April 14, 1995). The exemption for communications through "proper official channels" applies expressly only to officers and employees of the federal government, and thus it is not apparent that the permissibility of lobbying campaigns in the form of "direct communications" to lawmakers and policymakers would also extend to persons other than federal employees who use federal appropriations for such communications.

[14] GAO, *Principles of Federal Appropriations Law*, at p. 4-195; also O.L.C., *Guidelines on 18 U.S.C. §1913*, at 1.

[15] 29 Op. O.L.C. 179 (2005), citing Office of Legal Counsel, *Guidelines on 18 U.S.C. §1913* at 2 (April 14, 1995).

[16] 13 Op. O.L.C., *supra* at 302-303.

[17] 13 Op. O.L.C. *supra* at 304: "Nor do we believe the statute should be construed to prohibit public speeches and writings designed to generate support for the Administration's policies and legislative proposals." See also O.L.C. *Guidelines* of April 14, 1995, *supra* at 2, confirming that the prohibition applied only to "substantial 'grass roots' (continued...)

enforcement except for what the Department of Justice considered as "gross" solicitations of public support, or "significant" or "large scale" expenditures of public funds in these types of prohibited "grass roots" lobbying efforts.[18]

Appropriations Restrictions

"Grass Roots" Lobbying and "Pending Legislation"

In addition to the permanent statutory provision at 18 U.S.C. § 1913, there is often included in departmental appropriations bills various riders in the form of general restrictions on the use of such funds appropriated in that act for "publicity or propaganda" purposes directed at "legislation pending before Congress." Similarly, there is usually included in a general appropriations bill a limitation applicable to *all* federal funds ("appropriated in this or any other Act") regarding the use of such funds for "publicity or propaganda" material "designed to support or defeat legislation pending before the Congress." The more recent general appropriations prohibitions on "publicity or propaganda" campaigns directed at "pending legislation," that is, "lobbying" Congress with federal funds, usually state as follows:

> No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.[19]

As express congressional limitations on appropriations, and thus also on the disbursement authority of the executive branch departments,[20] these provisions of appropriations law have been interpreted and applied by the Government Accountability Office (GAO, formerly the General Accounting Office).[21] Interpreting these types of "publicity or propaganda" restrictions with respect to so-called "lobbying" activities by federal agencies, GAO has explained:

(...continued)

lobbying campaigns of telegrams, letters and other private forms of communication expressly asking recipients to contact Members of Congress, in support or opposition to legislation."

[18] The *de minimis* threshold amount of $50,000 for a prohibited grass roots lobbying campaign suggested in the 1989 Barr memorandum to Attorney General Thornburgh (13 Op. O.L.C., *supra* at 304), has been cited and reiterated by the Department of Justice in guidelines issued to General Counsels (Office of Legal Counsel, Department of Justice, *Guidelines on 18 U.S.C. §1913*, p. 2, April 14, 1995).

[19] P.L. 113-235, "Consolidated and Further Continuing Appropriations Act, 2015," Division E – "Financial Services and General Government Appropriations Act, 2015," Section 715, 128 Stat. 2382-2383 (December 16, 2014); P.L. 113-76, "Consolidated Appropriations Act, 2014," Division E – "Financial Services and General Government Appropriations Act, 2014," Section 715, 128 Stat. 234 (January 17, 2014); P.L. 113-6, "Consolidated and Further Continuing Appropriations Act, 2013," Division F – "Further Continuing Appropriations Act, 2013," Section 1101(a)(2), 127 Stat. 412 (March 26, 2013), continuing appropriations and conditions provided in P.L. 112-74, "Consolidated Appropriations Act, 2012," Division C – "Financial Services and General Government Appropriations Act, 2012," including Section 716, 125 Stat. 933 (Dec. 23, 2011).

[20] U.S. CONST., art. I, § 9, cl. 7; Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). The purpose of this constitutional provision "is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not to the individual favor of Government agents.... " Office of Personnel Management v. Richmond, 496 U.S. 414, 428 (1990).

[21] Note general investigative, reporting, and audit authority regarding agency expenditures and disbursements, and (continued...)

> In interpreting "publicity and propaganda" provisions ... we have consistently recognized that any agency has a legitimate interest in communicating with the public and with legislators regarding its policies. ... An interpretation of [the anti-lobbying restriction] which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy, a result we do not believe was intended.
>
> We believe, therefore, that Congress did not intend ... to preclude all expression by agency officials of views on pending legislation. Rather, the prohibition of [the anti-lobbying restriction], in our view, applies primarily to expenditures involving direct appeals addressed to the public suggesting that they contact their elected representatives and indicate their support of or opposition to pending legislation, *i.e.*, appeals to members of the public for them in turn to urge their representatives to vote in a particular manner.[22]

This appropriation rider is thus interpreted in a somewhat similar manner as the permanent statutory law with respect to lobbying by federal agencies and employees and would not generally apply to *direct* communications from or between government officers in the executive and legislative branches of the government, but rather to certain communications to the public that expressly urge or exhort members of the public to contact Congress on a legislative matter. When communications are made to the public concerning public policy matters, even if such communications give arguments for or against specific legislation, programs, or policy, GAO found no violation of the general publicity or propaganda "anti-lobbying" rider when the material was "essentially expository in nature" and did not urge or suggest anyone contact their representative in the legislature.[23] In one example concerning Department of Transportation expenditures for displays, pamphlets, and informational material at the time Congress was considering requiring passive restraint systems (airbags) for cars, GAO noted that: "Considering the timing and location of the displays, one would have to be pretty stupid not to see this as an obvious lobbying ploy, that did not make it illegal since there was no evidence that Transportation urged members of the public to contact their elected representatives."[24]

Even if one could argue that an agency communication to the public had the *subjective* intent—or even if not intended had the probable result—to influence or spur the public to write or call their Member of Congress, GAO has resisted finding a violation of the appropriations provision without an express, clear, or *explicit* call to "write your congressman" or to "let Washington know how you feel" about an issue before Congress:

> GAO has articulated a bright-line rule in determining whether an agency's communication violates these prohibitions, that is, evidence that the agency made a clear, explicit appeal to the public to contact Members of Congress in support of the agency's position on legislation pending before Congress. B-304715, April 27, 2005. The rule

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government accounts, 31 U.S.C. §§ 712, 719, 3523, 3526, 3529.

[22] 56 Comp. Gen. 889, 890 (1977); Decisions of the Comptroller General, B-128938, July 12, 1976, at 5; B-164497(5), August 10, 1977, at 3; B-173648, September 21, 1973, at 3. See also 63 Comp. Gen. 626-627 (1984), similar language concerning federal judges.

[23] GAO, *Principles of Federal Appropriations Law*, *supra* at 4-205 to 4-206; see also Comptroller General Decisions B-270875, July 5, 1996; B-21639, January 22, 1985; B-212252, July 15, 1983; B-178648, December 27, 1973; B-139458, January 26, 1972.

[24] *Principles of Federal Appropriations Law*, *supra* at 4-211, citing Comptroller General Decision B-139052, April 29, 1980.

> balances the activity that the prohibitions are intended to address with an agency's responsibility to communicate with the American people on policy and priorities.[25]

Since this appropriations limitation is expressly worded to apply to "legislation pending before the Congress," it has been found not to prohibit a communication to the public that urges the public to contact Members of Congress when such contacts were not about pending legislation (but rather were about agency regulations),[26] and not to apply to urging the public to participate in communications "addressed to the President solely" (and not to Members of Congress).[27]

"Publicity or Propaganda" Prohibitions

In addition to the appropriations restriction concerning legislation "pending before Congress," there have been adopted over the years a few different varieties of "publicity and propaganda" riders in the various appropriations legislation for a particular federal entity, and thus the appropriations language for a specific department, agency, or governmental program should also be examined.[28]

There is now also a *general* restriction on the use of any federal funds for "publicity and propaganda not authorized by Congress," which may apply to different activities than those covered by the "legislation pending before Congress" provisions.[29] In a similar manner as the "legislation pending" restriction, however, GAO has noted that, under the general "publicity or propaganda" restriction, agencies that have an authorized general informational function may communicate with the public on the programs and policies under their purview and may advocate, promote, or argue for a particular public policy or program without a violation of the restriction. Even without an express statutory directive to disseminate information or to inform the public, GAO has recognized that "agencies have a general responsibility, even in the absence of specific direction, to inform the public of the agency's policies."[30] GAO has noted that "public officials ... may expound to the public the policies of those agencies and of the administration of which they are members, and may likewise offer rebuttal to attacks on these policies."[31]

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[25] GAO, B-319075, *Department of Health and Human Services – Use of Appropriated Funds for "HealthReform.gov" Web site and "State Your Support" Web page*, at 6, April 23, 2010.

[26] GAO, Decision, B-322882, *Consumer Product Safety Commission – Prohibitions on Grassroots Lobbying and Publicity and Propaganda*, at 3-5, November 8, 2012.

[27] GAO, B-319075, *supra* at 6.

[28] Some departmental appropriations riders prohibit the use of appropriations to pay for a propaganda campaign that "in any way tends to promote public support or opposition" to legislation, and that thus might, as noted by GAO, "cover particularly egregious examples of lobbying even though the material or activity stops short of explicitly soliciting a member of the public to contact his or her Member of Congress in support or opposition of pending legislation." *Principles of Federal Appropriations Law, supra* at 4-216, citing 59 Comp. Gen. 115 (1979); B-284226.2, August 17, 2000, and Interior Department appropriations in P.L. 108-7, Div. F, § 302, 117 Stat. 270 (2003).

[29] P.L. 113-235, "Consolidated and Further Continuing Appropriations Act, 2015," Division E – "Financial Services and General Government Appropriations Act, 2015," Section 718, 128 Stat. 2383 (December 16, 2014); P.L. 113-76, "Consolidated Appropriations Act, 2014," Division E – "Financial Services and General Government Appropriations Act, 2014," Section 718, 128 Stat. 234 (January 17, 2014); P.L. 113-6, "Consolidated and Further Continuing Appropriations Act, 2013," Division F – "Further Continuing Appropriations Act, 2013," Section 1101(a)(2), 127 Stat. 412 (March 26, 2013), continuing appropriations and conditions provided in P.L. 112-74, "Consolidated Appropriations Act, 2012," Division C – "Financial Services and General Government Appropriations Act, 2012," including Section 719, 125 Stat. 933-934 (Dec. 23, 2011): "No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by Congress."

[30] GAO, B-319075, at 4, citing B-302504, March 10, 2004, and B-130961, October 26, 1972.

[31] GAO, B-302504, *Medicare Prescription Drug, Improvement, Modernization Act of 2003 – Use of Appropriated*
(continued...)

Furthermore, "[t]o the extent ... that policy of an agency or Administration is embodied in pending legislation, discussion by officials of that policy may well necessarily refer to such legislation and be either in support of or against it."[32]

GAO has found, on the other hand, that there are certain types of general publicity or information campaigns funded by federal appropriations that may violate these general propaganda and publicity restrictions, for example, in using federal appropriations for:

(1) *Self-aggrandizement or "puffery."* GAO has found that "self-aggrandizement" is "publicity of a nature tending to emphasize the importance of the agency or activity in question,"[33]although it has permitted a department to explain the effects that proposed budget reductions would have upon the programs of the department in various communities across the country.[34]

(2) *Covert propaganda campaigns*. These have included agency-produced editorials, videos, reports, advocacy, and argument on public policy and programs that are "misleading as to their origin," including informational pieces produced by the government but presented as positions of "persons not associated with the Government":

> Our decisions have defined covert propaganda as materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency. See B-229257, June 10, 1988; B-229069, 66 Comp. Gen. 707 (1987). A critical element of covert propaganda is the concealment of the agency's role in sponsoring such material. [35]

GAO has found video news releases from an agency to be prohibited "covert propaganda" when the videos themselves did not clearly identify the government as the sponsor or producer of the material in a way that viewers could make that identification. GAO noted in that decision:

> In our case law, findings of propaganda are predicated upon the fact that the target audience could not ascertain the information source. For example, we found government-prepared editorials to be covert propaganda; although the newspapers who would have printed the suggested editorials should have been aware of the source, the reading public would not have been aware of the source.[36]

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Funds for Flyer and Print and Television Advertisements, at 13 (March 10, 2004), citing B-212069, October 6, 1983, and B-284226.2, August 17, 2000. Note also GAO, B-301022, *Application of Anti-Lobbying Laws to the Office of National Drug Control Policy's Open Letter to State Level Prosecutors*, at 3, March 10, 2004.

[32] GAO, B-302504, March 10, 2004, *supra* at 13.

[33] GAO, B-302504, March 10, 2004, *supra* at 7, citing B-212069, October 6, 1983, and 31 Comp. Gen. 311 (1952).

[34] GAO B-284226.2, August 17, 2000.

[35] GAO, B-301022, March 10, 2004, *supra* at 4.

[36] B-302710, May 19, 2004, *Department of Health and Human Services, Centers for Medicare & Medicaid Services – Video News Releases*, at 11, citing to B-223098, October 10, 1986, and B-229069, September 30, 1987. It should be noted that the Office of Management and Budget and the Office of Legal Counsel, Department of Justice, in memoranda in March of 2005 during President George W. Bush's Administration, informed agencies of the executive branch that they need not conform to the legal opinions of the Government Accountability Office concerning the expenditure of federal funds by agencies for covert or secret propaganda activities, in that the agencies "are not bound by GAO's legal advice." O.L.C., Department of Justice, "Memorandum for the General Counsels of the Executive Branch," March 1, 2005. O.L.C. contended that covert or otherwise undisclosed federal funding of videos providing "information" and opinions on public policy issues are not necessarily prohibited covert propaganda.

(3) *Activities that are purely partisan or political*. For an activity to violate the riders under this standard as "purely partisan," it would have to be found to have been "designed to aid a political party or candidates."[37] Agencies, as noted above, generally have the authority to disseminate *information* to the public and to "defend and explain its policies," and thus GAO has noted that it is "sometimes difficult to differentiate an agency's" legitimate dissemination of information from activities that are for "purely political" reasons.[38] While certain "information" and arguments forwarded by an agency may comport with the positions or policies of one political party or candidate over another's, GAO has generally deferred to the agency's justification for the expenditure of funds when the motives for such activity are not otherwise clear:

> A standard we apply to resolve this struggle is that the use of appropriated funds is improper only if the activity is "completely devoid of any connection with official functions." B-147578, November 8, 1962. We do not raise any objection to the use of appropriated funds if an agency can reasonably justify the activity as within its official duties.[39]

The Government Accountability Office has also indicated that under this standard an agency publication might properly include what might be considered to be materials that are in a "political context" or that contain "some partisan content," by providing only arguments that support the Administration's position on a bill or a public policy matter. GAO found that certain publications and videos by the Forest Service, for example, although presenting only one side of the argument on more aggressive clearing or thinning of national forest lands, were not "purely partisan":

> Indeed, these materials discuss the possible positive results without discussing the negative impact that such policy could have on the environment or wildlife habitat. ...
>
> The fact that the materials do not present both the negative and positive consequences, however, does not render them purely partisan in violation of the publicity and propaganda prohibition. On the contrary, our recent cases have recognized that restricting all materials that arguably have or are perceived as having some partisan content would hinder the legitimate exercise of the agencies' authority to inform the public of its policies, and to rebut attacks upon its policies.[40]

While GAO has found in this manner and has allowed the agencies significant latitude as to the content and "balance" of their public communications based on the scope of the agency's official duties and statutory authorization, GAO has not ruled out the possibility that a government-produced document may be so "palpably erroneous," or so one-sided as to be "misleading or inaccurate," that it might also constitute propaganda.[41]

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[37] B-302992, September 10, 2004, *Forest Service – Sierra Nevada Forest Plan Amendment Brochure and Video Materials*, at 8; B-147578, November 8, 1962.

[38] B-302992, *supra* at 8.

[39] B-302992, *supra* at 9.

[40] B-302992, *supra* at 10.

[41] B-302992, *supra* at 8, n.10. See also *Principles of Federal Appropriations Law, supra* at 4-218 to 4-219, and U.S. General Accounting Office, EMD-76-12, "Evaluation of the Publication and Distribution of 'Shedding Light on Facts About Nuclear Energy,'" September 30, 1976.

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