BATTLE OF THE ACRONYMS: THE DOJ AND THE GAO SQUARE OFF ON THE USE OF VNRS

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Through clever and constant application of propaganda, people can be made to see paradise as hell, and also the other way around, to consider the most wretched way of life as paradise. Adolph Hitler[1]

I. INTRODUCTION

Hypothetical: While sitting at home watching the evening news in your favorite armchair, you listen to your trusted local news anchor, who leads in to a video segment on the No Child Left Behind Act (hereinafter referred to as the NCLB): "Karen Ryan now has a report on how some students may be eligible for after-school free tutoring services." A news story fades in with a female narrator describing how Valerie Garland and her son are facing the possibility that he will have to repeat 11th grade due to poor grades. The woman describes in heart-wrenching terms how her son could do better in school if only he had the help he needs to succeed. The narrator explains that under certain circumstances the NCLB will provide tutoring at no cost to qualifying children. The Secretary of Education, Rod Paige, then appears on screen to explain that the tutoring program is having a positive impact on students. The segment concludes with the female narrator stating: "For Valerie and many other parents of children with poor grades, this is a program that gets an A Plus. In Washington, I'm Karen Ryan reporting."[2]

From all appearances, you think you have watched a news story by an unbiased reporter affiliated with a television station or network. In reality, you have just watched a taxpayer-funded commercial, with a paid public relations expert playing the reporter, extolling the virtues of the Bush Administration's education initiatives. This is the new face of political propaganda. It is also an illegal use of appropriations. At least, it is illegal now that Congress has definitively decided the issue after a two-year struggle between the Government Accountability Office (hereinafter referred to as the GAO) and the Department of Justice (hereinafter referred to as the DOJ) over the definition of *covert propaganda*.

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[1] ADOLPH HITLER, MEIN KAMPF 197 (14th ed. 1935).

[2] B-304228, Op. Comp. Gen., pp. 3-4 (Sept. 30, 2005).

The purpose of this article is to examine the use of the video news release (hereinafter referred to as the VNR) by the Bush Administration and the legal issues stemming from a debate between the GAO and the DOJ over the use of the VNR.

II. BACKGROUND

A VNR is a public relations tool used to promote products, services or celebrities, shape public perception, or advocate a position.[3] Typically, VNRs are produced by media outlets in the format of a news report intended to be broadcast during news and public affairs programs. They usually feature a professional actor playing a reporter who interviews "experts" or conducts man on the street interviews that are carefully edited to deliver the appropriate message.[4] The VNR may be accompanied by suggested scripts that television news anchors can use to introduce the story during the broadcast. [5]

The VNR is a less expensive alternative for commercial sponsors, as opposed to traditional broadcast advertising.[6] Instead of the high cost of commercial advertising production, the VNR is produced in the manner of a traditional news story, much the same way as a television news channel would produce its own stories.[7] VNR sponsors make the product very appealing to cash-strapped news organizations by eliminating the cost of production to produce material on a subject the news organization might otherwise have covered.[8] Essentially, the commercial sponsor makes the news segment for the news channel. Accordingly, the news media have increasingly used VNRs to fill in space in news broadcasts since the 1990s.[9]

The rising frequency in the use of VNRs has stirred debate among journalism scholars because of ethical concerns over the independence of the news media.[10] Using material on independent news broadcasts that was created by biased third parties would harm the public "perception that the news was derived from a neutral source."[11] Journalistic codes of ethics require journalists to resist outside influences, particularly advertisers and special interest groups, and to avoid using materials that might deceive the public as to source.[12]

According to the GAO, there are other reasons, besides low cost, that news stations use VNRs, including the ease with which they can be obtained.[13] Some VNR producers distribute the product

[3] Wikipedia.org, *Video News Release*, http://en.wikipedia.org/wiki/Video_news_release (last visited Oct. 5, 2006).

[4] *Id.*

[5] B-304272 Op. Comp. Gen. 1 (Feb. 17, 2005).

[6] B-302710 Op. Comp. Gen. 2-3 (May 19, 2004).

[7] *Id.* at 3.

[8] *Id.*

[9] *Id.* The GAO opinion noted several journalism articles, which stated that a poll of news directors showed that 78 percent admitted using edited VNRs at least once a week in their broadcasts, 100 percent of television stations polled in 1992 admitted their use, and 800 television stations in the United States admitted using VNRs in 2001. *Id.* at note 2.

[10] *Id.* at 3.

[11] *Id.* at 3 (citing Mark D. Harmon and Candace White, *How Television News Programs Use Video News Releases*, 27 PUB. REL. REV. 213 (June 22, 2001), and, Anne R. Owen and James A. Karrh, *Video News Releases: Effects on Viewer Recall and Attitudes*, 22 PUB. REL. REV. 369 (Winter 1996)).

[12] B-302710 Op. Comp. Gen. 5 (May 19, 2004) (citing the Society of Professional Journalists Code of Ethics, which states: "Deny favored treatment to advertisers and special interests and resist their pressure to influence news coverage." Also citing Code of Ethics and Professional Conduct, Radio-Television News Directors Association, which states: "vigorously resist undue influence from any outside forces, including advertisers, sources, story subjects, powerful individuals, and special interest groups." Further, journalists are required to "[c]learly disclose the origin of information and label all materials provided by outsiders.") *Id.* at notes 18-19.

[13] *Id.* at 4.

directly to stations. However, VNRs are primarily distributed through subscription services such as CNN Newsource, which also provide subscribers prepared news reports and advertising.[14] Because there are no industry standards for labeling VNRs, news stations indicate that they may mistake the VNR for an independent news story prepared by a legitimate journalist.[15]

The VNR package typically consists of essentially three parts: slate, B-roll and prepackaged news stories. The slate is a visual textual feed, which provides factual information about the VNR, such as a table of contents and the length of segments, to the news producer.[16] The B-roll contains audio-video segments, which the news producer can edit to either supplement the prepackaged news story, or to create their own news report.[17] Finally, they contain the prepackaged news stories (also called "story packages"), which are complete audio-video presentations meant to be broadcast either in part or in their entirety as news reports by the television station.[18]

VNRs have been in use by business interests such as Microsoft, Phillip Morris and pharmaceutical companies since the early 1980's.[19] According to the White House, the federal government has been using this technique since at least the early 1990's.[20] It has been reported that at least 20 federal agencies have distributed hundreds of VNRs in the last four years, many without any attribution to the government. [21]

The use of VNRs appears to have escalated in conjunction with an overall rise in public relations spending by the Bush Administration. According to a report by the Committee on Government Reform—Minority Office, federal spending on public relations rose dramatically after President Bush took office.[22] In the last year of the Clinton Administration, the government awarded $39 million in public relations contracts, with 20% of those contracts awarded on a non-competitive basis.[23] In contrast, government spending on public relations under President Bush rose from $37 million during his first year in office to over $88 million for the election year of 2004, with over 40% of public relations contracts awarded on a non-competitive basis.[24] At least $1.6 billion has been spent by the Bush Administration in public relations and media services in the last two and a half years.[25] The GAO identified 14 media contracts, worth a combined $1.2 million, that called for the development of VNRs. [26]

The concern over Bush Administration spending on media was sparked by the debacle that ensued from the revelation in early 2005 that the Department of Education paid a conservative black commentator, Armstrong Williams, to make positive comments regarding the NCLB on his television and radio shows.[27] This use of taxpayer dollars was considered by the GAO to be an

[14] *Id*.
[15] *Id.* at 5.
[16] B-303495 Op. Comp. Gen. 4, note 7 (January 4, 2005).
[17] *Id.* at note 9.
[18] *Id.* at 4.
[19] Wikipedia, the free encyclopedia, Video News Release, http://en.wikipedia.org/wiki/Video_news_release (last visited Oct. 5, 2006).
[20] Scott McClellan, White House Press Briefing (March 14, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050314-6.html (last visited Oct. 5, 2006).
[21] David Barstow and Robin Stein, *How the Government Makes News: Under Bush, a New Age of Prepackaged News*, NEW YORK TIMES, March 13, 2005, at Sect. 1, p. 1.
[22] U.S. House of Representatives, Committee on Government Reform—Minority Staff, 108th Cong., Report on Federal Public Relations Spending (Comm. Print 2005), p. 1.
[23] *Id.* at 4.
[24] *Id.* at 5. It is worth noting that in the last year of the Clinton administration, public relations spending actually dropped from $65 million for 1999 to $38.6 million for 2000. *Id.* at 4, note 10. Further, the top spending agency in 2000 was the United States Mint ($16 million), while the top spending agency under President Bush in 2004 was the Center for Medicare and Medicaid Services ($56 million) during a time when Medicare reform was a central campaign issue for the Bush re-election team. *Id.* at 5.
[25] Committee on Government Reform Minority Office, Fact Sheet 1-2 (February 13, 2006) (citing GAO 06-305 Report on Media Contracts).
[26] *Id*.
[27] Greg Toppo, *White House paid journalist to promote law; Ethics of No Child Left Behind deal questioned*, USA TODAY, January 7, 2005 at A1. A retraction was later printed on January 10, 2005, admitting that the headline was incorrect: it was the Department of Education who made the payment, not the White House.

illegal use of federal appropriations.[28] However, this decision was merely one round in a jurisdictional contest between two competing administrative agencies that had been simmering for some time.

III. THE OPPONENTS

A. THE GAO, A.K.A. "THE FIGHTING ACCOUNTANTS"

The Government Accountability Office (formerly the General Accounting Office[29]) is a federal congressional agency headed by the Comptroller General,[30] whose mission is to:

> investigate all matters related to the receipt, disbursement, and use of public money; [to] analyze expenditures of each executive agency the Comptroller General believes will help Congress decide whether public money has been used and expended economically and efficiently; . . . make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures.[31]

The accounting authority of the federal government was originally a function of the executive branch, within the Treasury Department.[32] The comptrollers of the treasury were abolished and their accounting functions were transferred to the General Accounting Office pursuant to the Budget and Accounting Act of 1921.[33] The Comptroller General was to serve as the "chief accounting officer" of the federal government.[34] Among the powers transferred to the new Comptroller General was "the issuance of legal decisions to agency officials concerning the availability and use of appropriated funds."[35] The GAO asserts that the published decisions of the Comptroller General constitute "a continuing evolution of a body of administrative law on federal fiscal matters dating back to the Nation's infancy."[36]

These decisions arise in several ways. First, the GAO can render "advance decisions" prior to a disbursement of funds when requested by agency heads, their general counsels or inspectors general.[37] Next, agency officers may request the GAO to review the settlement of their accounts.[38] Finally, the GAO may voluntarily render legal decisions or opinions on a discretionary basis.[39]

[28] For a discussion of the background of the publicity or propaganda prohibition, see Robert H. Wood, *Into the Pockets of Publicists: The Prohibition Against Use Of Agency Appropriations For Publicity and Propaganda*, 7 LOYOLA JOURNAL OF PUBLIC INTEREST LAW 102 (Spring 2006).
[29] The GAO Human Capital Reform Act of 2004, 31 U.S.C. § 702 (2004) changed the name of the agency to "better reflect the current mission of GAO . . . to ensure the executive branch's accountability to the American people." *GAO Human Capital Reform Act of 2004: Hearing on H.R. 2751 H. Comm. Gov't Reform Comm., Subcomm. on Civil Serv. and Agency Org.*, 108th Cong. 16-17 (2003) (Statement of David Walker, Comptroller General, General Accounting Office).
[30] 31 U.S.C. § 702 (2004).
[31] 31 U.S.C. § 712 (1), (3-4) (1982).
[32] U.S. Gov't. Accountability Office, Principles of Federal Appropriations Law, vol. 1, p. 37 (3d ed. 2004) [hereinafter Red Book].
[33] *Id*. at 39.
[34] *Id*. at 21.
[35] *Id*.
[36] *Id*. at 39.
[37] *Id*. at 40 (citing 31 U.S.C. § 3529 (2000)).
[38] Redbook at vol. 1, p. 40 (citing 31 U.S.C. §§ 3527 and 3528(b)(2000)).
[39] *Id*.

There is no mandated procedure for requesting a legal decision from the GAO-typically it is done via letter or e-mail.[40]

Although the GAO asserts that any decision regarding the settlement of accounts is "binding on the executive branch," it is admitted that the GAO has no power to enforce its decisions, and agency officials who disregard them are merely subject to reprimand by congressional committees.[41]

There are cases in which the GAO will refrain from issuing a legal decision, such as where the final determination of a matter by another agency is final and conclusive as a matter of law, or where an area is within the specific jurisdiction of another agency and the GAO's opinion is not "authoritative."[42] The GAO will not, for example, render a decision regarding criminal violations because those matters are reserved to the Justice Department and the court system.[43] However, as will be demonstrated, there exists considerable tension between the GAO and the Justice Department on the binding nature of Comptroller General decisions.

B. THE DOJ, OFFICE OF LEGAL COUNSEL, A.K.A. THE "PUGNACIOUS PROSECUTORS"

The Office of the Attorney General was created by the Judiciary Act of 1789 for the purpose of prosecuting suits in which the United States was a party, and to render legal advice to the President and the heads of executive departments.[44] With the increase of litigation involving the United States government following the Civil War, Congress created the DOJ in 1870 as an executive agency with the Attorney General as its head.[45] The DOJ was charged with handling all criminal prosecutions and civil suits involving the United States, as well as federal law enforcement.[46]

The Office of Legal Counsel (hereinafter referred to as the OLC) is a unit within the DOJ, headed by an Assistant Attorney General, whose responsibilities include drafting the legal opinions of the Attorney General, preparing and reviewing executive orders, and rendering legal advice to the agencies in the executive branch.[47] The OLC maintains that its legal decisions are binding on the agencies in the executive branch.[48] Moreover, the OLC maintains that its opinions supersede those of the GAO, as will be demonstrated below.

IV. THE BATTLE OVER "COVERT PROPAGANDA"

A. ROUND 1: THE GAO STRIKES FIRST AGAINST THE DEPARTMENT OF HEALTH AND HUMAN SERVICES VNR

In January 2004, a group of senators and congressmen wrote the GAO to request an investigation into the use of appropriated funds by the Department of Health and Human Services (hereinafter referred to as the Department of Health) to create flyers, and print and televise advertisements regarding the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.[49] The politicians were concerned that the media materials contained overtly political

[40] *Id.*
[41] *Id.*
[42] *Id.* at 42-43.
[43] *Id.*
[44] The Judiciary Act of 1789, ch. 20, sec. 35, 1 Stat. 73, 92-93 (1789).
[45] See, Department of Justice website, http://www.usdoj.gov/02organizations/ (citing An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870)) (last visited on Oct. 5, 2006).
[46] *Id.*
[47] 28 C.F.R. § 0.25 (July 1, 2006).
[48] Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000).
[49] B-302504 Op. Comp. Gen. 1 (March 10, 2004). Senator Frank Lautenberg requested the legal opinion and was joined by Senators Corzine, Kennedy and Kerry. Representatives Davis, Pallone, Rangel, Schakowsky and Stark wrote separately to request an audit. *Id.* at note 1. A GAO investigation is initiated by order of Congress or by request of a congressional committee with jurisdiction over revenue, appropriations, or expenditures. 31 U.S.C. § 712 (1, 4) (2000).

statements that violated the prohibition against the use of federal appropriations for unauthorized "publicity or propaganda purposes."[50] The GAO did not find the print publicity materials at issue to have violated appropriations law because the Department of Health had specific statutory authority to inform Medicare beneficiaries regarding changes to the program, and the materials were not so purely partisan[51] as to have violated the law. However, in the course of conducting that investigation, the GAO learned of the existence of VNRs prepared for the Department of Health's Centers for Medicare & Medicaid Services (hereinafter referred to as Medicare Services).[52] In a separate opinion, the GAO found that Medicare Services violated statutory prohibitions against the use of appropriations for publicity and propaganda because the VNRs failed to identify to the audience that the government was the source of the news reports.[53]

The three VNRs at issue contained slates, B-roll and story packages regarding Medicare benefits under the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (hereinafter referred to as Medicare Act 2003).[54] There were three story packages—two in English and one in Spanish. Medicare Services also provided stations with "suggested lead-in anchor scripts" for the story packages, such as: "the Federal Government is launching a new, nationwide campaign to educate 41 million people with Medicare about improvements to Medicare . . . . Karen Ryan explains."[55] The first story package focused on the new advertising campaign to tout Medicare changes, while the second and third story packages described the new prescription drug benefits resulting from Medicare Act 2003. The narrators were used to describe the substance of the advertising campaign and the prescription drug changes. All packages included footage of President Bush signing the bill into law, and the English language packages included clips of the Secretary of Health and Human Services, Tommy Thompson, making statements about the changes to Medicare. The Spanish language version used Alberto Garcia as the narrator and incorporated footage featuring Dr. Cristina Beato of Medicare Services.[56] Both English versions concluded with the standard news tag: "In Washington, I'm Karen Ryan reporting."[57]

The Department of Health had hired a large media firm, Ketchum, Inc., to assist its agencies with a "full range of social marketing activities to plan, develop, produce, and deliver consumer-based communication programs, strategies and materials."[58] In turn, Ketchum, Inc., hired a video production specialist, Home Front Communications, to create the VNRs. Although Home Front Communications wrote the scripts, Medicare Services and the Department of Health reviewed, edited and approved them.[59]

The VNRs were distributed to television stations by three ways: satellite, CNN Newsource, or mail.[60] Between January and February 2004, at least 40 stations in 33 different markets aired the materials. Some used edited portions, while others used the story packages in their entirety.[61]

[50] B-302504 Op. Comp. Gen. 1 (March 10, 2004).
[51] *Id.* at 3.
[52] B-302710 Op. Comp. Gen. 1 (May 19, 2004).
[53] *Id.* at 6.
[54] *Id.*
[55] *Id.* Karen Ryan is a public relations specialist and former TV news reporter who was hired to play the reporter in this VNR. *See*, Wikipedia.org, *Karen Ryan*, http://en.wikipedia.org/wiki/Karen_Ryan (last visited Oct. 5, 2006). She also appeared in other government funded VNRs such as the No Child Left Behind Act VNR, which was the focus of GAO report B-304228, and the Office of National Drug Control Policy VNR, which was the focus of GAO report B-303495.
[56] B-302710 Op. Comp. Gen. 5-7 (May 19, 2004).
[57] *Id.* at 7. The Spanish version ended with: "In Washington, I'm Alberto Garcia reporting." *Id.* at 8.
[58] *Id.*
[59] *Id.*
[60] Medicare Services sent news advisories to news stations by fax and email, alerting them of the availability of the VNR and providing satellite coordinates on how to download the materials. *Id.* at 8.

In reviewing the propriety of using VNRs by the government, the GAO noted that while their use may have been "standard practice in the news sector" as suggested by Medicare Services, the GAO analysis was based on appropriations law because the funds used to create the VNRs were provided pursuant to 2003 annual appropriations legislation.[62] The GAO analyzed the legality of the use of funds to create VNRs under the terms of that act that provided: "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by Congress."[63]

Accordingly, the first question in the GAO analysis was whether Medicare Services was granted statutory authority to use appropriations to even engage in publicity efforts. The GAO found that the Medicare Act 2003 arguably gave the Department of Health the requisite authority because the act authorized the Department of Health to inform Medicare beneficiaries regarding their benefits.[64] However, that did not end the analysis, because the appropriations act also prohibited the dissemination of unauthorized "propaganda."[65]

The GAO noted that they had previously construed the "publicity or propaganda" restriction contained in appropriations acts to prohibit use of funds for materials that are "self-aggrandizing, purely partisan in nature, or covert as to source."[66] The GAO viewed the VNRs produced by Medicare Services as possibly violating the covert propaganda prohibition because they were potentially misleading as to source.[67]

The position of Medicare Services was simply that the entire package of materials sent to the news stations, whether by mail or download, was clearly labeled as having been distributed by Department of Health and Medicare Services, and clearly stated that the package contained VNRs. Therefore, Medicare Services had no intent to distribute the materials covertly. Finally, Medicare Services argued that the method of packaging and distribution was "in keeping with traditional practices in the media industry."[68]

However, the GAO would not consider the VNRs as a whole package, but looked at the effect of each component. The B-roll and the slates did not violate the propaganda prohibition because they were not targeted at the television audience, but at the television news producers, who were well aware of the source. The story packages and lead-in scripts were another matter, because they had been prepared to be targeted directly at the audience. The viewing public would only see a news story purportedly prepared by Karen Ryan or Alberto Garcia, the mock-journalists, and nowhere in the story packages was a reference attributing the story to the Department of Health, Medicare Services or the federal government.[69]

To support its conclusion that the story packages constituted covert propaganda, the GAO referred to two of its earlier decisions that had found violations for traditional printed materials. In 1986, the Reagan Administration prepared editorials supporting its proposal to transfer the Small Business Administration to the Department of Commerce. These editorials were to be run in local papers as the position of the papers themselves without attribution to the federal government.[70] Although the newspapers would be aware of the source, the reading public would not. Without such attribution, the GAO considered them violative of the ban on unauthorized publicity or

[61] *Id.* at 9.
[62] *Id.* at 9-10. Medicare Services even used the "but Clinton did it, too" defense when they provided the GAO with two VNRs produced by Medicare Services under the Clinton administration in 1999. The two VNRs provided were very similar in structure and also used a purported journalist to narrate and conclude the VNR with "Lovell Brigham reporting." *Id.* at 8.
[63] *Id.* at 10 (citing The Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, Div. J, Tit. VI, § 626, 117 Stat. 11, 470 (2003)).
[64] B-302710 Op. Comp. Gen. 10, n. 25 (May 19, 2004) (citing MMA § 101(a)).
[65] B-302710 Op. Comp. Gen., 10 (May 19, 2004).
[66] *Id. Also see* Redbook, supra note 32, p. 4-188, *et seq.* (3d ed. 2004).
[67] B-302710 Op. Comp. Gen. 10 (May 19, 2004).
[68] *Id.*
[69] *Id.* at 12.
[70] *Id.* at 11 (citing B-223098 Op. Comp. Gen. (October 10, 1986)).

propaganda.[71] Reagan again fell afoul of the GAO in 1987, when the administration paid consultants to write op-ed articles in support of its Central American policies. This time, the Reagan State Department did not inform the newspapers of the source of the articles and the GAO found the use of funds for such purposes to be classic "propaganda . . . within the common meaning of the term."[72] The purpose of the articles was to covertly influence the public to support government policy and was considered violative of the statutory ban.[73]

Based on these precedents, the VNRs were considered by the GAO to also constitute covert propaganda because the American public would not be aware of the source, which was a longstanding requirement of such appropriations statutes in the view of the GAO. The opinion also noted that there was a clear "boundary between an agency making information available to the public and agencies creating news reports unbeknownst to the receiving audience."[74] In that vein, Medicare Services argued that the VNRs only contained strictly factual information and did not constitute advocacy, as had the Reagan editorials. The GAO did not find that argument persuasive and held that a finding of "explicit advocacy is not necessary to find a violation of the prohibition."[75] Rather, in the GAO's view, a violation is triggered regardless of the content, when the government is not identified as the source of the material.[76]

The penalty for this violation was rather mild. The GAO noted that the misuse of appropriated funds was a violation of the Antideficiency Act, which prohibited the use of funds in excess of budgetary allowances.[77] Because Medicare Services did not have budgetary authority to produce such materials, it was required to report the deficiency to Congress and the President.[78] The cost of the prohibited materials was $42,750.[79]

This correction of the executive branch by a legislative agency did not go unnoticed and it did not take long for the DOJ to come out swinging.

B. ROUND 2: THE EXECUTIVE BRANCH HITS BACK

In response to the GAO decision, the General Counsel for the Department of Health and Human Services requested a second opinion from a fellow executive agency, the DOJ.[80] The OLC wasted no time in concluding that the GAO decision was meritless and the use of appropriations to produce "informational" video news releases did not violate the statutory prohibition against propaganda.[81]

The main body of the OLC opinion began with a recitation of the importance of the VNR as a modern tool of media relations for the government, calling it the "television version of the press release."[82] The OLC noted that the use of the VNR was widespread because it provided a more

[71] B-302710 Op. Comp. Gen. 11 (May 19, 2004).
[72] B-302710 Op. Comp. Gen.11 (May 19, 2004), (citing B-229069 Op. Comp. Gen. (September 30, 1987)).
[73] B-302710 Op. Comp. Gen. 11 (May 19, 2004).
[74] *Id.* at 13.
[75] *Id.* at 14. The GAO did not actually agree that the VNRs were "strictly factual" in nature and observed that "the contents of the story packages consist of a favorable report on effects on Medicare beneficiaries, containing the same notable omissions and weaknesses as the flyer and advertisements that we reviewed in our March 2004 opinion." *Id.* at 14, note 34. Although the GAO had not found the printed Medicare Services material violative of the ban on publicity or propaganda, it was clearly a close call, in part due to the overtly partisan nature of the materials. *See* B-302504 Op. Comp. Gen. 13 (May 10, 2004).
[76] B-302710 Op. Comp. Gen.14 (May 19, 2004).
[77] *Id.* at 15 (citing 31 U.S.C. § 1341(a) (2000)).
[78] B-302710 Op. Comp. Gen. 15 (May 19, 2004) (citing 31 U.S.C. § 1351(2000)).
[79] B-302710 Op. Comp. Gen. 15, n. 37 (May 19, 2004).
[80] U.S. Department of Justice, Office of Legal Counsel, Memorandum Opinion, *Expenditure of Appropriated Funds for Informational Video News Releases* (July 30, 2004), http://www.usdoj.gov/olc/opfinal.htm (last visited Oct. 5, 2006) (hereinafter "OLC 1st Memo").
[81] OLC 1st Memo at 1.
[82] *Id.* at 2.

"convenient and cost-effective programming option for local news stations."[83] The use of the VNR by federal agencies was even characterized as "the rule rather than the exception."[84] To make this point even more effectively, the OLC listed several agencies that had used VNRs in the past and even pointed to their use by members of Congress, who were also subject to the same appropriations restrictions when using federal funds.[85] Of course, it was noted that the same type of VNRs at issue were used in the Clinton Administration.[86]

Next, the OLC turned to the requirements of the MMA, which specifically directed the Department of Health to "broadly disseminate information" regarding the new prescription drug coverage and other benefits. The Conference Report on the legislation confirmed that Department of Health and Medicare Services were to engage in a "public information campaign" about the new drug benefit.[87] The OLC opinion then reviewed the scripts of the Medicare Services VNRs and the statements of the Medicare Services to make the point that the VNRs only contained non-editorial factual information, without advocating any position of the administration on the changes in Medicare.[88] Accordingly, the OLC stated that it took it "as a given" [89] that the VNRs at issue were purely informational in character, based on the finding of the GAO that the violation was based solely on the lack of attribution to government sources. Because the VNRs were purely informational in character and Medicare Services was merely carrying out its statutory duty to disseminate Medicare changes, the VNRs did not violate the prohibition against propaganda.[90]

This OLC memorandum was the first attempt by the DOJ to analyze the publicity or propaganda language in appropriations statutes. Based on its interpretation of legislative history and the GAO's own body of decisions, the OLC concluded that the prohibition against "covert propaganda" only applied to "advocacy of a particular viewpoint" as opposed to legitimate informational activities.[91]

The OLC then reviewed the GAO posture on what kind of activity actually violated the publicity or propaganda prohibition. The OLC agreed with the GAO that publicity materials that were either self-aggrandizing or purely partisan in nature clearly violated the statutory ban because they were inappropriate propaganda with a distinct political purpose. Neither category was implicated with the Medicare Services VNRs.[92] However, the OLC took issue with the GAO's application of the third category, covert propaganda. The OLC admitted that the DOJ had also recognized the prohibited category of covert propaganda in the past, but interpreted the ban as being against "covert attempts to *mold opinion* through the undisclosed use of third parties."[93]

[83] *Id.* Much of the factual and legal support the OLC used in its response on the use of VNRs was taken directly from the GAO decision.

[84] *Id.*

[85] *Id.* The OLC noted that members of Congress received appropriations through the Legislative Branch Appropriations Act, 2004, Pub. L. No. 108-83, 117 Stat. 1007 (2003), which was subject to the same prohibition against use of funds for publicity or propaganda by virtue of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Tit. VI, § 624, 118 Stat. at 356 ("No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda . . . ."). *Id.* at 14, note 5. The OLC did not, however, note whether any Congresspersons had violated the publicity or propaganda prohibition.

[86] *Id.* at 3. The GAO had noted the same in its opinion, but had also observed that 31 USC § 3526(c) provided that government accounts were "settled by operation of law three years after the close of the fiscal year" and that the Clinton videos had not been brought to their attention during that time. *See* B-302710 Op. Comp. Gen. 13, note 30 (May 19, 2004).

[87] OLC 1st Memo at 3.

[88] OLC 1st Memo at 4-5.

[89] OLC 1st Memo at 5-7.

[90] *Id.* at 7.

[91] *Id.* Although relying on past GAO decisions as precedent for its analysis, the OLC was careful to preserve its independence by citing to Bowsher v. Synar, 478 U.S. 714 (1986), and observing that the GAO was part of the legislative branch, and the OLC was therefore not bound by its legal decisions. However, the OLC found the GAO opinions "helpful." *Id.* at 7-8.

[92] OLC 1st Memo at 8.

[93] *Id.* (citing *Legal Constraints on Lobbying Efforts in Support of Contra Aid and Ratification of the INF Treaty*, 12 Op. O.L.C. 30, 40 (1988) (emphasis added in OLC Memo)).

The OLC asserted that all previous GAO findings of covert propaganda regarded publications that were *both* covert ("misleading as to their origin") *and* propaganda (as that term is commonly understood).[94] In the OLC's view, the GAO erred by focusing solely on the covert nature of the VNRs without also requiring that the materials be propaganda, which was clearly the focus of the express statutory prohibition.[95]

The heart of the OLC's argument was that a cardinal rule of statutory construction requires that the plain meaning of legislative language be controlling.[96] One must look to the definition of propaganda to derive the plain meaning of the statutory intent. A review of Black's Law Dictionary, the Oxford English Dictionary, and Webster's revealed that propaganda was commonly understood to mean "a systematic effort at indoctrination to a particular viewpoint, as opposed to a mere promulgation of information."[97] Further, the OLC examined the legislative history of one of the first publicity or propaganda prohibitions in 1951 to support this argument[98] and quoted several statements from the Congressional Record to support the argument that the prohibition was against "(i) agency efforts to direct and control public thinking on various issues of public debate, particularly through political action; (ii) useless, excessive, or frivolous agency publications; and (iii) agency self-promotion, aggrandizement, or puffery."[99] The legislative history further supported the OLC's contention that the prohibition was not intended to restrain legitimate informational efforts by agencies in educating the public regarding government programs and activities.[100]

The OLC then analyzed a series of prior GAO decisions that had established a two part test for what constituted an executive agency's violation of the ban against unauthorized propaganda: the offending agency had both (1) concealed its role in producing the publicity materials, and (2) had published propaganda by advocating a particular position in the materials.[101] Therefore, the GAO's own body of decisions supported the OLC argument and the OLC could not agree with the latest pronouncement because it blurred the line between "legitimate governmental information [and] improper governmental advocacy."[102]

Finally, in a parting shot, the OLC again noted that members of Congress themselves used VNRs and were perfectly aware of their use by executive agencies.[103] But further, the OLC asserted that Congress had expressly approved certain VNRs that would now be considered covert propaganda.[104]

C. ROUND 3: THE GAO KEEPS SWINGING

Not to be deterred, the GAO reprimanded the executive branch with yet another opinion regarding the use of VNRs by the Office of National Drug Control Policy (hereinafter referred to

[94] OLC 1st Memo at 9.

[95] *Id.*

[96] *Id.* (citing Engine Mfrs. Ass'n. v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)).

[97] OLC 1st Memo at 9. The OLC even looked up dictionary definitions from the 1940's and 50's to argue that the definition of propaganda was the same then, when the first legislative restrictions were being passed, as it is now. *Id.*

[98] *Id.* (citing The Labor and Federal Security Appropriations Act, Pub. L. No. 82-134, 65 Stat. 209 (1951)). The legislative history for the current funding legislation was silent on the meaning of the language because this prohibition had been routinely included in appropriations acts since 1951 without further discussion. OLC 1st Memo at 16, note 9.

[99] *Id.* at 10.

[100] *Id.* at 10-11.

[101] *Id.* at 11.

[102] *Id.* at 12.

[103] *Id.* at 13.

[104] *Id.* However, the OLC did not attempt to explain how these Congressional VNRs might have violated the covert propaganda prohibition. One can only assume that the VNRs to which the OLC refers did not give proper attribution to a governmental source.

as the Office of Drug Policy).[105] This latest opinion from the GAO was a response to an inquiry by Representative Waxman, the ranking minority member on the House Committee on Government Reform.[106] In accordance with the Drug-Free Media Campaign Act of 1998,[107] the Office of Drug Policy had created eight VNRs, seven of which contained story packages that were similar to the Medicare Services VNRs, except the narrators did not appear on screen. However, the narrators identified themselves as "reporting" on Office of Drug Policy activities, press conferences and the anti-drug campaign.[108] Further, the story packages were accompanied by suggested lead-in scripts for news anchors that included remarks such as "Mike Morris has the story" or "Mike Morris has more."[109] Similar to the Medicare Services media product, the VNR packages were clearly identified as having been produced and distributed by the federal agency, but the story packages themselves did not give any attribution to the government.[110]

The Office of Drug Policy's first line of defense was that the whole VNR package provided to the broadcaster was labeled and, therefore, not deceptive as to origin.[111] The GAO gave this argument little consideration by pointing out that neither the story packages nor the suggested anchor remarks identified the government as the source of the material. Therefore, the audience was unaware of the true source of the material.[112] Further, the GAO observed that this was not a case where a broadcaster removed the disclosure.[113] The Office of Drug Policy also made the now-familiar argument that VNRs were justifiable because they were a popular tool in the arsenal employed by the media industry. However, the GAO observed that their analysis of appropriations law was not governed by the practices of the public relations market.[114]

The more novel argument offered by the Office of Drug Policy was that the agency had statutory authorization to engage in a "news media outreach" pursuant to a provision of the Drug-Free Media Campaign Act of 1998 and it therefore had specific authority from Congress to use VNRs and prepackaged news stories.[115] Because the appropriations act prohibition was only against publicity or propaganda "not heretofore authorized by Congress," the prohibition did not apply.[116] Taking a page from the OLC opinion, the GAO searched the dictionary for a definition of "news media outreach" because the term was not defined in the Drug-Free Media Campaign Act. After having no success in finding a dictionary definition of "outreach" that would justify the dissemination of unattributed story packages, the GAO concluded that nothing in the Drug-Free Media Campaign Act authorized the Office of Drug Policy to act covertly in the dissemination of information.[117] The Office of Drug Policy, therefore, was required to comply with the provisions of both statutes and accomplish the media campaign without the use of covert propaganda.[118]

[105] B-303495 Op. Comp. Gen. (January 4, 2005).
[106] *Id.* at 1. Waxman and the House Committee on Government Reform played a pivotal role in the fight over use of appropriations for VNRs. *See supra* note 22.
[107] Pub. L. No. 105-277, div. D, title I, subtitle A, 112 Stat. 2681-752 (Oct. 21, 1998) required the Office of Drug Policy to conduct a "National Youth Anti-Drug Media Campaign" to reduce and prevent youth drug abuse in the United States. *See* 21 U.S.C. § 1801 (a) (2000).
[108] B-303495 Op. Comp. Gen. 4 (January 4, 2005). Karen Ryan was again involved as one of the narrators, along with Mike Morris and a third narrator who was later identified by Office of Drug Policy as Jerry Corsini. Ryan was identified as a former journalist and the other two as "independent voice-over specialists." *Id.* at 4, note 11. The GAO also observed that none of the narrators were affiliated with a news organization at the time of production or distribution. *Id.* at 4.
[109] *Id.* at 4.
[110] *Id.* at 5.
[111] *Id.*
[112] *Id.*
[113] *Id.* at note 13.
[114] *Id.* at 6.
[115] *Id.* at 9 (citing 21 U.S.C. § 1801(a) (2000)).
[116] B-303495 Op. Comp. Gen. 9 (January 4, 2005).
[117] *Id.* at 11-12.
[118] *Id.* at 13.

Importantly, the GAO reasserted its view that the key to the covert propaganda violation was the creation by the agency of materials that "were misleading as to their origin."[119] Further, the GAO used their recent Medicare Services decision as the precedent for finding a violation of the Antideficiency Act by the Office of Drug Policy, and did not even refer to the recent opinion by the OLC.

Shortly after this opinion was released, the battle really began to heat up.

D. ROUND 4: A FREE FOR ALL

On January 7, 2005, a story broke in USA Today alleging that the White House had paid a nationally-syndicated conservative black commentator, Armstrong Williams, to make favorable remarks on his television show about the Bush administration and the NCLB.[120] This lead to an embarrassing amount of negative attention in the media, as well as from primarily Democratic members of Congress, regarding the use of the media to deliver pro-administration messages.[121] By early February, two pieces of legislation had been proposed that would solidify the GAO's position on the issue of covert propaganda.

House Resolution 373 was proposed on January 26, 2005, by Representative DeLauro, who was joined by Representatives Waxman, Miller, McDermott and Slaughter.[122] This act was "[t]o require notification to Congress of certain contracts, and to amend title 31, United States Code, to prohibit the unauthorized expenditure of funds for publicity or propaganda purposes."[123] In the Findings and Purpose section of the bill it was noted, *inter alia*, that the GAO had found that federal agencies had used appropriations to fund covert propaganda that was "misleading as to source."[124] Accordingly, the Bill sought to require that federal advertising campaigns be unbiased and factual, that agencies notify appropriate congressional committees of all media contracts, that all media tools inform the public as to source, and the ban on covert propaganda be made permanent.[125] The proposed law also provided civil penalties such as personnel disciplinary action and, for knowing and willful violations, criminal sanctions of not more than $5,000 in fines, and/or imprisonment of up to two years.[126] The bill was referred to the Committee on Government Reform for further consideration.[127]

Not to be outdone, on February 2, 2005, the Senate proposed its own version of the legislation, entitled the "Stop Government Propaganda Act."[128] This bill also noted the role of the GAO in policing the ban on covert propaganda and observed that the Department of Health and Human Services had ignored the GAO legal decision by failing to report its Antideficiency Act violation, as required by law.[129] This act explicitly defined publicity or propaganda to include, among other things, "any audio or visual presentation that does not continuously and clearly identify the Government agency directly or indirectly financially responsible for the message."[130] This act also proposed stiff civil penalties against the responsible federal officer, but no criminal penalties.[131]

[119] *Id.* at 9.
[120] *See supra* note 27.
[121] *See supra* note 28 and accompanying text.
[122] H.R. 373, 109th Cong. (1st Sess. 2005).
[123] *Id.*
[124] *Id.* at § 2(a)(1).
[125] *Id.* at § 2(b)(1-4).
[126] *Id.* at § 4(a).
[127] *Id.* at p. 1.
[128] S. 266, 109th Cong. (1st Sess. 2005).
[129] *Id.* at §§ 2(2, 3 and 10).
[130] *Id.* at § 3(2).
[131] *Id.* at § 4(a).

Interestingly, the act also provided for a qui tam action to enforce the prohibitions of the act.[132] This bill was referred to the Senate Committee on the Judiciary.[133]

This proposed legislation clearly emboldened the GAO to accelerate the dispute with the executive branch.

E. Round 5: The Opponents Go Head to Head

The GAO apparently decided to take the gloves off and confront the OLC directly by sending out a brief but pointed advisory on February 17, 2005, to all heads of federal departments, agencies, "and others concerned" on the subject of prepackaged news stories.[134]

The GAO reminded all concerned that the publicity or propaganda prohibition had been in place since 1951 and that it had recently come to the GAO's attention that prepackaged news stories had become a commonplace media tool employed by federal agencies.[135] The GAO advised that it had found two violations in the past year on the basis that the government's role in the production and dissemination of the materials had been concealed. The GAO recognized that agencies generally had the right to "disseminate information about their policies and activities," but agencies were not to utilize prepackaged news stories that concealed the government's identity.[136] It was further explained that this policy reflected Congressional intent to respect the boundaries between government and the free press, because "allowing the government to produce domestic news broadcasts would infringe upon the freedom of the press and constitute (or at least give the appearance of) an attempt to control public opinion."[137] Therefore, agencies were urged to review proposed story packages to ensure disclosure and to contact the GAO for informal or formal opinions on "the application of these principles on particular cases."[138]

This memorandum did not go unnoticed for very long. By March 1st, the OLC had published its own memorandum on the subject of the publicity or propaganda issue directed to the "General Counsels of the Executive Branch."[139] Responding to the GAO position, the OLC observed that the GAO was a part of the legislative branch and that executive branch agencies were not bound by its legal advice. Rather, the OLC was responsible for providing "authoritative interpretations of

[132] *Id.* at § 4(c). A qui tam action allows a private party to sue on behalf of the state, with any monetary penalties being divided between the plaintiff and the state. Black's Law Dictionary, 1126 (5th ed. West 1979).
[133] *Id.* at 1.
[134] B-304272 Op. Comp. Gen. (February 17, 2005).
[135] *Id.* at 1.
[136] *Id.* at 2.
[137] *Id.* at 2-3.
[138] *Id.* at 3.
[139] U.S. Department of Justice, Office of Legal Counsel, *Memorandum for the General Counsels of the Executive Branch* (March 1, 2005) (hereinafter "OLC 2d Memo"). The Office of Memorandum and Budget also distributed the OLC 2d Memo to department and agency heads in a March 11, 2005, memorandum reminding them that the OLC, not the GAO provided executive agencies with controlling legal opinions. Executive Office of the President, Office of Management and Budget, No. M-05-10 *Memorandum for Heads of Departments and Agencies* (March 11, 2005).

law" on their side of the separation of powers divide.[140] The OLC reiterated the position taken in their July 2004 opinion that the prohibition was against covert propaganda, with the emphasis on propaganda. Failure to give attribution to the government in VNRs was not fatal under appropriations law unless the VNR also contained "advocacy of a particular viewpoint."[141] Executive agencies were therefore directed to ignore the interpretation of the GAO and continue to use VNRs as long as they contained purely informational content.[142] Although the OLC seemed to have won this round, the GAO found an ally in an unexpected source.

F. Round 6: The Morality Police Attempt to Restore Order

The Federal Communications Commission (FCC) is an independent agency of the federal government responsible for the regulation of wire and radio communications in interstate commerce.[143] The FCC enabling act requires the Commission to entertain complaints from any person or "body politic" of anything done by a common carrier under their jurisdiction.[144] In another attempt to draw critical focus on the Bush administration's use of VNRs, Senators Kerry and Inouye wrote to the FCC to complain of the use of unattributed story packages being distributed to broadcast licensees by federal agencies.[145]

The question posed to the FCC by the various complainants was whether the use of VNRs by broadcast licensees was in compliance with the Commission's "sponsorship identification rules."[146] The principle behind those rules was that "viewers are entitled to know who seeks to persuade them with the programming offered over broadcast stations and cable systems."[147] It was the FCC's position that under the applicable statutes and regulations the "nature, source and sponsorship" of broadcast materials must be clearly disclosed by licensees and operators to the viewing public.

[140] *Id.* at 1 (citing Bowsher v. Synar, 478 U.S. 714, 727-32 (1986)). In *Bowsher*, the Supreme Court invalidated certain provisions of the Balanced Budget and Emergency Control Act of 1985, which required the President to follow the recommendations of the Comptroller General (CG), who was an officer of the legislative branch. 478 U.S. at 717-18. The Court found that this legislative scheme violated the separation of powers doctrine because Congress, not the President, retained removal authority over the CG. *Id.* at 732. Therefore, the CG could not exercise executive powers over the execution of the budget. *Id.* In the course of the opinion, the Court noted testimony from a former CG in which he stated: "I may not accept the opinion of any official, inclusive of the Attorney General, as controlling my duty under the law." *Id.* However, the Court observed that "interpreting a law . . . is the very essence of 'execution' of the law." *Id.* Accordingly, the OLC's position in the present case was that executive agencies were not bound to follow the legal opinions of a legislative branch agency, because that is an executive branch function. While that argument may have some technical merit, the reality is that the GAO does interpret appropriations law as part of its statutory duties and executive agencies had best comply if they want to continue to receive funding from the legislative branch, which controls the power of the purse.
[141] OLC 2d Memo at 2.
[142] *Id.*
[143] Communications Act of 1934, 47 U.S.C. § 151. The F.C.C. is headed by five Commissioners who are appointed by the President for five year terms, with the advice and consent of the Senate. 47 U.S.C. § 154(a and c) (2000). The FCC reports to Congress on an annual basis with specific recommendations as to additional legislation that may be needed within their area of concern. 47 U.S.C. § 154 (k)(4) (2000).
[144] 47 U.S.C. § 208(a) (2000).
[145] Federal Communications Commission, Public Notice No. FCC 05-84 (April 13, (2005) (hereinafter "FCC 05-84"). In addition to the two Senators, the FCC received a letter from the Executive Director of the Free Press on behalf of "nearly 40,000" petitioners, and also received thousands of emails about the practice. FCC 05-84 at 1, note 1.
[146] *Id.* at 1.
[147] *Id.* at 1-2.

Specifically, the FCC explained that sections 317 and 507[148] of the Communications Act of 1934, and the FCC regulations enacted pursuant to those sections, required that when a licensee received payment for airing program materials, disclosure of the payment and the identity of the funding source must be made at the time of airing.[149] So that the licensee is adequately informed of the source prior to broadcast in a timely manner, the law goes even further in requiring that each person in the production and distribution chain provide the disclosures to the next person in the chain who is given the material.[150] Ultimately, the required information will reach the licensee before broadcast, and the licensee is required to air the disclosure whether the licensee actually received consideration or not.[151]

Further, the disclosure at the time of airing must include: (1) the fact that the material is sponsored, paid for, or furnished, and (2) the identity of the person supplying the consideration for the material. If the material was furnished by an agent, the identity of the agent's principal is the information to be disclosed.[152] In the event that the material was furnished for free or at a nominal charge and the licensee has not been provided with the requisite disclosures, no sponsorship identification is necessary. [153]

However, when the free material is political or controversial in nature, the FCC imposes a higher standard of disclosure on the basis that the audience is "entitled to know when the program ends and the advertisement begins."[154] The FCC noted that politically oriented groups might be more inclined to hide their sponsorship "to increase the apparent credibility of their messages."[155] Accordingly, free political materials are required to be accompanied by the sponsorship disclosures, and if the material exceeds five minutes in length, the disclosure must appear at both the beginning and end of the program.[156]

In this unanimous decision on the VNR issue, the FCC concluded with a reminder that these rules must be strictly adhered to and violations would be met with administrative sanctions, including fines and license revocations.[157] Further, a criminal penalty was imposed for violation of the disclosure requirements, which could result in a fine of up to $10,000 and/or imprisonment for up to one year.[158]

In a separate statement, Commissioner Adelstein made additional editorial comments: in issuing the Notice, the Commission was not taking any official position on the dispute between the GAO and OLC on the covert propaganda conflict.[159] However, Adelstein observed that "[p]eople have a right to know the real source when they see something on TV that is disguised as 'news.'"[160] He expressed surprise that neither the GAO nor the OLC had "even bothered to mention" that the FCC enforced such disclosure requirements.[161] Finally, he concluded by commenting that the FCC only enforced these rules against broadcasters, but that it was up to Congress to "to further strengthen the responsibility of government agencies to disclose more fully that material is government-produced."[162]

[148] *Id*.
[149] *Id*. at 2 (citing 47 U.S.C. §§ 317 and 507 (2000); and 47 C.F.R. §§ 73.1212 and 76.1615).
[150] FCC 05-84 at 2-3 (citing 47 U.S.C. §§ 507(a-c) (2000)).
[151] FCC 05-84 at 3.
[152] *Id.* (citing 47 C.F.R. §§ 73.1212(e) and 76.1615(d)).
[153] FCC 05-84 at 3 (citing 47 U.S.C. § 317(a)(1) (2000)).
[154] FCC 05-84 at 4 (citing Richard Kielbowicz and Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L. J. 329 at 344, note 80 (2004)).
[155] FCC 05-84 at 4.
[156] *Id.* (citing 47 C.F.R. §§ 73.1212(d) and 76.1615(c)).
[157] FCC 05-84 at 4.
[158] *Id*.
[159] *Id*. at 9.
[160] *Id*.
[161] *Id*. at 10.
[162] *Id*. Congress was listening and the Senate responded with the Truth in Broadcasting Act of 2005, S. 967, 109th Cong. (1st Sess. 2005). The legislation was introduced by Senator Lautenberg on April 28, 2005. It was then referred to committee and later placed on the Legislative Calendar in December 2005. The law would amend the Communications Act of 1934 to ensure that prepackaged news stories produced by the government would adequately inform viewers of the source of the information. *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00967:@@@R (last visited Oct. 5, 2006).

G. THE FINAL ROUND: CONGRESS DECLARES A WINNER—THE GAO IN A TKO

The day after the FCC opinion was released, during discussion of an emergency appropriations bill, Senator Byrd introduced an amendment which provided that no funds could be used to produce prepackaged news stories unless there was "a clear notification to the audience that the story was prepared or funded by that Federal agency."[163] In a lengthy address to the Senate, Byrd described the conflict between the GAO and the OLC over the use of VNRs. Byrd also referred to an in-depth article on the subject of government-produced VNRs from the *New York Times* and had the article printed in the Congressional Record in its entirety.[164] In response to the OLC position that source disclosure is unnecessary as long as the material was "purely informational," Byrd cited to three examples of government-funded VNRs described in the news article and stated, "If paying national columnists and talk show hosts, faking news segments, hiring actors to be reporters 'do not constitute propaganda,' what does?"[165] After some opposition from Senator Gregg and supporting statements from Senators Kennedy and Lautenberg, some modifications to the bill were made and it was passed by the Senate 98-0.[166]

As if the GAO's victory could not be any clearer, the House Conference Report specifically stated that "[t]his provision confirms the opinion of the Government Accountability Office dated February 17, 2005 (B-304272)."[167] The final version of the statute, as enacted, provides:

> Unless otherwise authorized by existing law, none of the funds provided in this Act or any other Act may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution in the United States unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive agency.[168]

After the Senate debate, the conference report and the final text of the statute, the GAO was clearly vindicated in its struggle with the executive branch. They used this clarification from Congress to further solidify their position on the VNR subject and issued additional reports finding violations of appropriations law for the use of VNRs and other media products that did not disclose

[163] 151 Cong. Rec. S3630 (April 14, 2005).
[164] *Id.* at S3631 (citing David Barstow and Robin Stein, *How the Government Makes News; Under Bush, a New Age of Prepackaged News*, NEW YORK TIMES, March 13, 2005 at Sect. 1, p. 1. *See supra*, note 21).
[165] 151 Cong. Rec. S3631, S3635 (April 14, 2005).
[166] *Id.* at 3641.
[167] H.R. Rep. No 109-72, at 1 (2005) (Conf. Rep.).
[168] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, tit. VI, § 6076, 119 Stat. 321, 301 (May 11, 2005). Although this act had no direct relationship to VNRs or propaganda in general, it was probably the first opportunity Congress had to amend the publicity or propaganda prohibition language traditionally contained in appropriations bills to specifically address the VNR issue.

government sponsorship.[169] The administration could do nothing except defer to congressional will.[170]

V. DISCUSSION

One of the many issues raised by the interpretive fisticuffs between the GAO and OLC, irrespective of the eventual intervention of the FCC and Congress, is whether the GAO was actually correct in its position that "covert" propaganda was banned under the language of the appropriations act.[171] The OLC arguably had the better side of this debate because the legislative history, the very definition of propaganda, and the GAO's own body of decisions did not support such a broad interpretation.

The language of the statute, as employed since 1951, prohibits the use of appropriations for "publicity or propaganda" that has not been authorized by Congress.[172] None of the appropriations statutes have ever defined what constituted propaganda for purposes of the prohibition. The OLC therefore resorted to dictionary definitions and legislative history to ferret out the ordinary meaning of the term.[173] The OLC's interpretation of the commonly held definition of propaganda was probably correct: that it required the dissemination of information with the intent to persuade, promote and advocate.[174] Purely providing information without such intent did not constitute propaganda within the meaning of that standard definition regardless of source identification. The legislative history also supported the OLC view that it was Congress' own intent, *inter alia*, to prevent the use of funds by agencies to promote the current administration's political objectives. However, the statutory language was not intended to prevent the legitimate dissemination of information by agencies as part of their statutory mission, regardless of whether the source was identified.[175]

Interestingly, the GAO never countered these arguments in any of its later opinions or memoranda, but simply maintained that regardless of the content of the VNR, failure to disclose source was a *per se* violation of the propaganda prohibition. However, the OLC was again persuasive when it asserted that this position was a departure from previous findings by the GAO.[176]

To support its position, the OLC traced the GAO's prohibition on covert propaganda back to a 1978 decision regarding the Office of Consumer Affairs, which had prepared "canned editorials"

[169] In B-306349 Op. Comp. Gen. (Sept. 30, 2005), the GAO suggested that newspaper articles written on behalf of the Department of Education (DOE) supporting the No Child Left Behind Act (NCLB) may have violated the publicity or propaganda prohibition because government sponsorship of the articles was not disclosed. The GAO requested that the Inspector General of the DOE consider the effect of the recent legislation on practices the DOE had deemed permissible in the past. *Id.* at 2. In B-305368 Op. Comp. Gen. (Sept. 30, 2005), the GAO found Antideficiency Act violations by the DOE in contracting with Armstrong Williams to give favorable commentary on the NCLB on his television show and in newspapers. *Id.* at 14. *See supra* notes 27-28. Finally, in B-304228 Op. Comp. Gen. (Sept. 30, 2005), the GAO reviewed VNRs produced by the DOE, again in support of the NCLB, and found violations because of non-disclosure. The GAO cited to the latest appropriations statute in rejecting the arguments made by the DOE, which were based on the position taken in the OLC Memo that non-disclosure was acceptable as long as the information was strictly factual. *Id.* at 6.

[170] As a result of this legislative statement, the Office of Management and Budget was required to overturn its March 11, 2005, instructions to agencies that they ignore the GAO interpretation of covert propaganda (*See supra* n. 107) and, instead, "fully comply with applicable laws" such as the latest appropriations act. Executive Office of the President, Office of Management and Budget, No. M-05-20 *Memorandum for Heads of Departments and Agencies* (July 21, 2005). Further, the OLC 1st Memo of July 30, 2004, opposing the GAO interpretation of covert propaganda, now contains an "Editor's Note" stating that "Congress subsequently enacted a statute that supersedes this opinion." OLC 1st Memo at 14.

[171] *See supra* note 66 and accompanying text.

[172] *See supra* note 63 and accompanying text.

[173] *See supra* note 97 and accompanying text.

[174] *Id.*

[175] *See supra* note 100 and accompanying text.

[176] *See supra* note 102 and accompanying text.

with the purpose of appearing to make public support greater than it was.[177] The OLC noted that in all subsequent GAO opinions, a determination of a violation of the prohibition was based on the covert nature of the materials, combined with a finding that the materials also constituted propaganda because they attempted to persuade or to advocate a particular position.[178] In the view of the OLC, that was a reasonable interpretation of the statute. However, in the VNR decision, the GAO diverged from its previous statement of the covert propaganda test by now only requiring that the material be misleading as to source, whether the material constituted propaganda or not. This was not a fair reading of the statute in the view of the OLC.[179] Yet, the OLC was reasonably justified in its analysis because neither the statutory language in the appropriations acts nor the body of GAO decisions had ever specifically required that the government identify itself as the author of the materials if they were purely informational in nature. The statute itself only speaks to the dissemination of propaganda, whatever that term means, not to the disclosure of government authorship.

With that said, the GAO position was meritorious as a matter of public policy, whether that comported with the statutory language or not. The government should always identify itself as the author of any materials it publishes to United States citizens.[180] On the prior occasions where the GAO found that the administration had violated the propaganda prohibition, the finding was premised on a determination that the administration had concealed its authorship so the material would be more believable: a classic propaganda technique where the material purports to be authored by one source, but actually is supplied by another.[181] That is precisely what the government did in the VNR scenarios, even though the GAO did not expressly find that the materials amounted to advocacy in the classic propaganda sense. Rather, the GAO seemingly embraced a new definition of government propaganda: whenever the administration conceals its role in the distribution of information, it can only be for one purpose-to persuade or advocate a point of view.

It should also be noted that the GAO actually erred in finding that the VNRs only presented factual materials, because the VNRs utilized direct methods of propagandizing, such as the *testimonial* where a presumably independent reporter exclaims: "This program gets an A Plus."[182] Further, the VNRs used more subtle propaganda methods such as the *appeal to authority* where the President is shown signing the legislation before an American flag, and the Secretary of Education addressing the public on the benefits of the NCLB and how well the program is working.[183] Finally, none of the VNRs addressed any of the public concerns that were raised regarding the effects of the NCLB or Medicare Act 2003. Without raising an opposing viewpoint, the VNRs were essentially skewed to the administration's point of view. This is classic propaganda, although the GAO would not actually say so. Had the GAO found the VNRs to truly be propaganda, as well as covert, there would have been little for the OLC to challenge meritoriously.

[177] OLC 1st Memo at 8. The OLC's citation to this GAO opinion does not lead to the "GAO OCA Decision," but to another unrelated GAO opinion. A search of the GAO database did not reveal the opinion on which the OLC relied.

[178] *Id.*

[179] *Id.* at 9.

[180] The government is permitted under existing law to propagandize to its heart's content abroad without any restrictions as to disclosure of source, particularly in wartime, through the Voice of America and the U.S. Information Agency. Harwood Childs, *Propaganda*, MSN Encarta, § VI, http://encarta.msn.com/encyclopedia_761569545/Propaganda.html (last visited Oct. 5, 2006).

[181] Taylor Stults, *Propaganda*, reprinted from WORLD BOOK MULTIMEDIA ENCYCLOPEDIA, available at http://ics.leeds.ac.uk/papers/pmt/exhibits/727/propaganda.pdf (last visited on Oct. 5, 2006)

[182] *See supra* note 2. Also see *supra* note 75, where the GAO found the Medicare Services VNRs contained some "notable omissions and weaknesses . . . ." *Id.* The "testimonial" is a propaganda technique where an expert or respected public figure is used to sanction the propaganda message and cause the target audience to adopt the belief as their own. *See* Wikipedia.org, *Propaganda*, http://en.wikipedia.org/wiki/Propaganda (last visited on Oct. 5, 2006).

[183] *Id.*

If the government has the duty to provide information on its activities to its citizens, as both the GAO and OLC agreed it does,[184] it must only be allowed to do so as long as the information provided does not cross the often thin line between engaging in legitimate informational activities and advocating a political position.

Clearly, one of the issues raised in this debate between the GAO and OLC is the very meaning of propaganda and its place in a free society. However, the literature on the subject asserts that there is no scientific or juridical definition of the term, only its usage in historical context.[185] Propaganda has been characterized as information "emanating from a source that we do not like."[186] Further, the meaning is dependant upon the context: in education it is *teaching*, in marketing it is *selling*, in the armed forces it is *indoctrination*, in church it is *proselytizing*, in politics it is *propagandizing*.[187] Because of the conceptual difficulties inherent in defining propaganda, most scholars analyze it in the context of war, where propaganda is practiced in its most extreme form.[188] However, the term was first used in a religious context in 1622 when Pope Gregory XV established a commission to bring disaffected persons to accept Catholic Church doctrines. Thus, the word had a positive connotation in Catholic countries, while Protestant countries took the negative view of it.[189] The term did not again come into widespread use until World War I to describe the aggressive "persuasion tactics" used by the government to convince the public to support intervention in that conflict. It is also associated with the media efforts of the totalitarian governments of Germany and Japan during World War II.[190] Despite its usage in a negative context, it has also been suggested that the term can have a positive connotation where propaganda is used in the context of media campaigns to solve society's common problems such as tobacco and drug abuse, forest fires and environmental awareness.[191] Essentially, one view is that the objective of propaganda is simply to persuade the public to a certain point of view.[192] This view parallels the dictionary definitions used by the OLC in support of their argument that one does not have propaganda without some intent to persuade or advocate a position.[193]

It has also been observed that propaganda, in its negative sense, "is to a democracy what the bludgeon is to a totalitarian state."[194] In other words, without the ability to employ physical coercion and intimidation, the only tool an elitist government can use to "tame the bewildered herd" and "manufacture consent" to its policies, no matter how well intentioned, is a well-orchestrated media campaign.[195] The U.S. government, irrespective of political party affiliation, has used propaganda in this manner since World War I to change and shape public opinion to support government policies.[196] Within this broader view, a free society that accepts the use of propaganda by the government, no matter how well intentioned, will transform a democracy into a form of "self-imposed totalitarianism."[197]

As demonstrated by the many millions of dollars of appropriations used by the government in media campaigns, the federal government is clearly in the propaganda business. Whether one agrees or disagrees with the policies advertised by the government, it is essential to identify the

[184] OLC 1st Memo at 11-12, and Principles of Federal Appropriations Law, GAO-04-261SP, Vol. 1, p. 4-227, (3d ed. 2004)
[185] NICHOLAS O'SHAUHNESSY, POLITICS AND PROPAGANDA, WEAPONS OF MASS SEDUCTION 13-14 (U. Michigan Press 2004) [hereinafter O'Shaugnessy].
[186] *Id*. at 14 (citing J.A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (Allan and Unwin Publishers 1996)).
[187] *Id*. at 14.
[188] *Id*.
[189] *Id*.
[190] *Id*.
[191] *Id.* at 15.
[192] *Id*. at vii.
[193] *See supra* note 94 and accompanying text.
[194] NOAM CHOMSKY, MEDIA CONTROL, THE SPECTACULAR ACHIEVEMENTS OF PROPAGANDA, p. 16 (Seven Stories Press 1997).
[195] *Id*. at 14.
[196] *Id.* at 7-9.
[197] *Id.* at 57.

government as the source of the material in order to objectively evaluate the information itself.[198] Otherwise, the information, even though factually accurate, is transformed into propaganda because the source is concealed. This is particularly egregious when the source of the information is purported to be the independent press.

One of the foundations of a free and open society is the ability to criticize the government. This concept is embodied in the First Amendment, which prevents the government from "abridging the freedom of speech, or of the press."[199] To allow the government to advertise its accomplishments disguised in the mantle of media objectivity is, in a sense, to abridge the freedom of the press, as the GAO noted in its advisory to executive agencies.[200] No practice should be more loathsome in a democracy.

However, propaganda, as a legal term, avoids precise definition, as the GAO recognized when it applied the publicity and propaganda prohibition to only "covert" propaganda. If the GAO were to try to enforce the ban against all non-authorized propaganda activities, it would be forced to review every media message generated by the government for objectionable content and substitute its judgment for that of the agency that produced it. Therefore, the GAO took the less contentious way of interpreting the statute and applied its own gloss to the term. Under the GAO's analysis, it is irrelevant whether the message is itself *propaganda* in any accepted sense of the word, but the failure to identify the government as the source makes it so. While this may be a stretch of statutory interpretation, it is a practical and clear-cut way of identifying the indefinable.

Although the OLC was probably correct on all counts in terms of statutory interpretation, the GAO had the institutional courage to adopt a definition of propaganda broad enough to protect the public from the administration's unconstitutional manipulation of the media. Congress was wise enough to agree.

VI. CONCLUSION

Even though Congress vindicated the GAO position, the OLC was arguably correct in its interpretation of the statutory language in the previous appropriations acts, as well as in its understanding of previous GAO decisions on the subject of covert propaganda. However, Congress wields the constitutional power of the purse, as it demonstrated when it adopted specific statutory language requiring disclosure of government authorship of VNRs.

The GAO may have won this battle, but the media war rages on, and until there is permanent legislation in place to control government use of media in the United States, the conflict will not end. It is clearly in the best interests of the citizens of this country to know what the government has accomplished with the federal appropriations entrusted to it, and it is an obligation of the government to inform the citizens of how the money is spent. However, governments are not to be trusted with unfettered access to the high-priced services of Madison Avenue media experts. As long as federal appropriations are available to executive agencies without severe restrictions on their use for publicity and propaganda, an unscrupulous administration will continue to use the federal propaganda machine to convince the public to "consider the most wretched way of life as paradise."[201]

[198] *See supra* note 137 and accompanying text.
[199] U.S. Const. 1st Amend.
[200] *See supra* note 137 and accompanying text.
[201] *Supra* note 1.