

**THUNDERSTRUCK: THE GOVERNMENT ACCOUNTABILITY
OFFICE’S RECENT RULING ON AGENCY SOCIAL MEDIA USE**

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Social media is a powerful and useful tool for facilitating communication between federal agencies and their constituents. However, the recent ruling by the Government Accountability Office (“GAO”) that a social media campaign undertaken by the Environmental Protection Agency (“EPA”) violated both the Federal Antideficiency Act (“FADA”) and the prohibition on grass-roots lobbying has raised questions regarding how agencies can continue to utilize social media going forward without committing similar infractions. The EPA’s campaign, which it undertook to promote its controversial Waters of the United States rule, was primarily conducted via the social media platforms Twitter and Thunderclap. These platforms provide a particularly effective means through which agencies can interact with members of the public. A clearer standard regarding what constitutes good practice versus what behaviors are disallowed needs to be determined in the interest of encouraging this valuable means of civil engagement.

I. INTRODUCTION

Few people are concerned they may be complicit in an illegal propaganda scheme by opening Twitter or Facebook. However, maybe they should reconsider given the recent decision by the

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Government Accountability Office (“GAO”),¹ which states that the Environmental Protection Agency (“EPA”) has been deceiving its social media² followers³ into doing just that.⁴ Although the GAO’s decision clearly describes the infractions in the EPA’s particular case, it does not establish a well-defined and broadly applicable standard for agencies that wish to continue to use social media going forward. Because social media usage is a valuable tool through which federal departments and agencies can connect with citizens, a clearer standard is needed, as well as one that facilitates the ongoing utilization of this valuable outreach tool.

The use of social media by federal departments and agencies is not a recent development. The White House maintains a social media presence on every platform imaginable;⁵ the Department of Energy features an impressive thirty-five boards⁶ on its Pinterest page;⁷ and the National Institute of Mental Health (“NIMH”)

¹ The GAO is an independent, nonpartisan agency that monitors how other federal departments spend taxpayers’ money. *About GAO*, GAO (Feb. 22, 2016), <http://www.gao.gov/about/>.

² The Merriam-Webster dictionary defines social media as “forms of electronic communication ([such] as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content ([such] as videos).” *Social Media*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Feb. 21, 2016).

³ A follower is someone who subscribes to receive another social media user’s updates. *Follower*, WEBOPEDIA, <http://www.webopedia.com/TERM/F/follower.html> (last visited Feb. 21, 2016).

⁴ See Eric Lipton & Michael D. Shear, *E.P.A. Broke Law With Social Media Push for Water Rule, Auditor Finds*, N.Y. TIMES (Dec. 14, 2015), <http://www.nytimes.com/2015/12/15/us/politics/epa-broke-the-law-by-using-social-media-to-push-water-rule-auditor-finds.html>.

⁵ See *Federal Agencies*, GOVSM (Jan. 12, 2016), http://govsm.com/w/Federal_Agencies (showing a chart of all the federal agencies and the extent of their presence on social media).

⁶ On Pinterest, a self-described “visual bookmarking tool that helps you discover and save creative ideas,” users save, or “pin,” web clippings to digital pages called “boards.” *A Guide to Pinterest: All About Pinterest*, PINTEREST (Jan. 12, 2016), <https://help.pinterest.com/en/guide/all-about-pinterest>.

⁷ U.S. Department of Energy, PINTEREST (Jan. 12, 2016), <https://www.pinterest.com/energy/>.

boasts more followers than even the most Twitter-happy teens,⁸ and regularly garners more retweets than any other government agency.⁹ Although the utilization of social media platforms by government entities might not be a novel concept, the legal boundary associated with that utilization is ambiguous and should be clearly defined. The recent GAO ruling¹⁰ that the EPA illegally conducted a social media blitz to promote the Waters of the United States (“WOTUS”) clean-water rule brought the uncertainty surrounding what constitutes appropriate social media use by federal agencies to the forefront of public inquiry.¹¹ The ruling focused on the EPA’s use of the social media platform Thunderclap.¹² In this ruling, the GAO censured the EPA for violating both the Federal Antideficiency Act (“FADA”) and the

⁸ Twitter is a social media platform that allows users to communicate via short messages referred to as “Tweets.” Tweets may contain photos, videos, or hyperlinks, but are limited to 140 characters in length. *New User FAQs*, TWITTER (Jan. 12, 2016), <https://support.twitter.com/articles/13920#>. Thirty-three percent of American teens use Twitter and have an average of ninety-five followers. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CTR. 32 (Apr. 9, 2015), http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf. The NIMH, in contrast, boasts more than 876,00 followers, @NIMH.gov, TWITTER (Feb. 22, 2015), https://twitter.com/NIMHgov?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor.

⁹ Andrew Einhorn, *U.S. Army Tops List of Most Engaging Agency Twitter Feeds*, GOVLOOP (Mar. 27, 2012), <https://www.govloop.com/community/blog/u-s-army-tops-list-of-most-engaging-agency-twitter-feeds/>.

¹⁰ *Envtl. Prot. Agency*, B-326944, 2015 WL 8618591 (Comp. Gen. Dec. 14, 2015) [hereinafter GAO-B-326944].

¹¹ See Lipton & Shear, *supra* note 4.

¹² GAO-B-326944, *supra* note 10, at 3. Thunderclap is a website that relies on principles of crowdsourcing to increase the reach and impact of users’ social media campaigns. *What Is Thunderclap?*, THUNDERCLAP (Feb. 22, 2016), <https://www.thunderclap.it/about>. Crowdsourcing is the practice of drawing upon a pool of outside talent to create a product or deliver a service. *Crowdsourcing*, WEBOPEDIA (Mar. 3, 2016), <http://www.webopedia.com/TERM/C/crowdsourcing.html>.

prohibition on grass-roots lobbying.¹³ It is imperative for the EPA and other agencies to understand both of these provisions to avoid similar issues in the future, but also for the GAO to continue to clarify how these provisions will be interpreted with regard to social media.

This Recent Development discusses the GAO's decision and argues that the guidance provided does not establish a clear rule for acceptable agency social media use going forward. Part II begins with a brief discussion of the WOTUS rule and its importance, and Part III follows with an explanation of the existing prohibitions on grass-roots lobbying by federal departments and agencies, as well as the restrictions imposed by FADA. Part IV elucidates how these prohibitions govern federal agencies' use of social media, with particular focus given to Thunderclap. Thunderclap has garnered fairly limited attention in discussions of the legal concerns surrounding social media use—possibly due to its relatively quiet presence on the social media scene—but the potential legal issues the platform presents merit further consideration.¹⁴ Part V discusses the GAO's recent decision in greater detail, and Part VI compares the EPA decision to previous GAO actions. Part VII considers how agencies can apply the lessons from the EPA decision to their social media use going forward, and argues that the supposed “bright line” drawn by the GAO's recent decision is not all that bright.¹⁵ Part VIII then concludes by reiterating the suggestion that the GAO establish a clearer standard for when agencies' social media use constitutes illicit lobbying.

¹³ GAO-B-326944, *supra* note 10, at 1. FADA violations can result in suspension, fines, and even imprisonment for the responsible agency employees. 1 WEST'S FED. ADMIN. PRAC. § 531 (2015).

¹⁴ See Nina Hart, Elisabeth Ulmer & Lynn White, *Soc. Media: Changing the Landscape of Rulemaking*, 30 NAT. RESOURCES & ENV'T 1, 27, 28 (2015).

¹⁵ See Lipton & Shear, *supra* note 4.

II. THE WATERS OF THE UNITED STATES RULE AS AN EXTENSION OF THE CLEAN WATER ACT

The GAO's decision criticized the EPA's social media blitz to promote the WOTUS rule. This section explains the controversy surrounding the WOTUS rule by focusing on: (A) the rule's role as an extension of the Clean Water Act and (B) why the rule's finalization was met with significant resistance.

A. *Background on the Rule Itself*

The EPA's infractions stemmed from their social media campaign promoting the WOTUS rule, which arises under the Clean Water Act ("CWA"). The CWA, passed in 1972, aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁶ It primarily aims to do so by eliminating the discharge of any and all pollutants into all "navigable waters,"¹⁷ defining "navigable waters" as "the waters of the United States, including the territorial seas."¹⁸ The phrase "waters of the United States" is not unique to the CWA; on the contrary, it has its origins in a much older statute dating to 1899.¹⁹ However, the exact meaning of the phrase has provoked contention and dispute since the CWA's inception.²⁰ The phrase's interpretation is important as it governs the statute's jurisdictional

¹⁶ 33 U.S.C. § 1251(a) (2012).

¹⁷ *Id.*

¹⁸ *Id.* § 1362(7).

¹⁹ See Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. § 403 (2015).

²⁰ See M. Reed Hopper & Todd F. Gaziano, *Watch Out for That Puddle, Soon It Could Be Federally Regulated*, WALL ST. J. (Dec. 7, 2014, 5:23 PM), <http://www.wsj.com/articles/m-reed-hopper-and-todd-f-gaziano-watch-out-for-that-puddle-soon-it-could-be-federally-regulated-1417990935> ("Initially the Army Corps and EPA interpreted waters of the U.S. to mean those that could be used as channels of navigation for interstate commerce . . .

Within a few years, however, the two agencies claimed regulatory authority over wetlands and other nonnavigable waters that had no significant connection to interstate commerce.").

reach;²¹ however, the EPA does not bear the burden of interpreting this particular piece of statutory language alone. The U.S. Army Corps of Engineers (“Corps”) and the EPA jointly administer § 404 of the CWA,²² which governs the disposal of dredged fill materials into waters of the United States,²³ and the two organizations have offered several iterations of joint guidance documents intended to clarify which water bodies are subject to § 404 jurisdiction.²⁴ The Supreme Court’s decision in *Rapanos v. United States*, in which the federal government brought suit against a property owner accused of discharging pollutants into “waters of the United States,” was originally heralded as an opportunity to achieve clarity as to the CWA’s scope, particularly addressing whether wetlands are covered.²⁵ Unfortunately, the result in *Rapanos* led to further confusion.²⁶ The plurality held that wetlands only fell within CWA jurisdiction if adjacent to a traditionally covered water body.²⁷ Justice Kennedy’s concurring opinion, in contrast, proposed the highly nebulous “significant nexus test,”

²¹ See Order of Stay, *State of Ohio v. U.S. Army Corps of Eng’rs*, No. EPA-HQ-OW-2011 at 2 (6th Cir. Oct. 9, 2015) [hereinafter Order of Stay] (explaining that opponents of the WOTUS rule are largely worried that its implementation will result in an impermissible expansion of the agencies’ regulatory jurisdiction).

²² *Section 404 Permit Program*, U.S. EPA, <http://www.epa.gov/cwa-404/section-404-permit-program> (last updated Jan. 20, 2016).

²³ See 33 U.S.C. § 1344 (2015).

²⁴ See *Section 404: Policy and Guidance*, U.S. EPA, <http://www.epa.gov/cwa-404/policy-and-guidance> (last updated Oct. 28, 2015).

²⁵ 547 U.S. 715, 739 (2006) (“In sum, on its only plausible interpretation, the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’”).

²⁶ P. Ryan Henry, *Muddying the Waters: United States v. Cundiff Adds Confusion & Complexity to the Ongoing Debate over the Scope of Fed. Jurisdiction Under the Clean Water Act*, 22 VILL. ENVTL. L.J. 285, 286 (2011) (“As courts struggle to define the jurisdictional boundaries of the CWA, cases centering on whether wetlands should be protected as ‘waters of the United States’ under the CWA continue to arise.”).

²⁷ 547 U.S. at 742.

which extends CWA jurisdiction to wetlands so long as there is a hydrological connection to a traditionally covered water body.²⁸ As a result of the discrepant opinions proffered in *Rapanos*, whether CWA jurisdiction extended to marginal water bodies such as tributaries was even more unclear, and as such, even more heavily contested.²⁹ Subsequent jurisdictional decisions made by the Corps were challenged, eventually resulting in a circuit split.³⁰ The EPA and the Corps decided to put an end to all the confusion once and for all via a formal rulemaking.³¹ Hence, the WOTUS rule, which aims to conclusively define “waters of the United States” once and for all,³² and which officially went into effect on August 28, 2015.³³

²⁸ *Id.* at 717.

²⁹ See Brandee Ketchum, *Like the Swamp Thing: Something Ambiguous Rises from the Hidden Depths of Murky Waters—the Supreme Court’s Treatment of Murky Wet Land in Rapanos v. United States*, 68 LA. L. REV. 983, 986 (2008); see also *id.* at 1010 (“For the distinction between Justice Kennedy’s approach and the plurality’s to have any meaning, one would need to show that a non-navigable wetland with a surface connection to a navigable body of water or its tributary, if filled, would not have a significant effect on the water quality of the abutting navigable waterway or tributary.”).

³⁰ See *Hawkes Co., Inc. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 996 (8th Cir. 2015) *cert. granted sub nom. U.S. Army Corp of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 615 (2015); *Belle Co., L.L.C. v. U.S. Army Corps of Engineers*, 761 F.3d 383, 386 (5th Cir. 2014) *cert. denied sub nom. Kent Recycling Servs., LLC v. U.S. Army Corps of Engineers*, 135 S. Ct. 1548 (2015).

³¹ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054 (June 29, 2015) (Supplementary Information) (“[T]he rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.”). The formal rulemaking process for federal agencies requires a notice and comment period before a rule can be implemented. 5 U.S.C. § 553 (2015).

³² The WOTUS rule defines “waters of the United States” as all waters traditionally protected under the CWA, as well as most seasonal streams, wetlands near protected river and streams, and bodies of water that are significantly connected to traditionally protected waters. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 124 (June 29, 2015) (to be codified at 33 C.F.R. § 328.3).

B. *Resistance to the WOTUS Rule*

The finalization of the WOTUS rule, similar to the Corps' earlier jurisdictional decisions, was met with marked resistance, largely from states and agricultural groups.³⁴ Numerous states petitioned for a stay of the rule, claiming that the enhanced jurisdictional definition proffered therein would extend the power of the EPA and the Corps too far, upsetting the balance between state and federal action.³⁵ The state petitioners were additionally concerned that the new rule was contrary to the Court's ruling in *Rapanos*, in that it misapplied the "significant nexus" test, and further, that the rulemaking process itself was suspect.³⁶

The EPA pushed for all challenges to the rule to be heard before the D.C. Circuit, but the state actors petitioning the rule argued otherwise.³⁷ As a result, the challenges were eventually consolidated into a single action in the Sixth Circuit before the Joint Panel on Multidistrict Litigation ("JPML").³⁸ A divided panel of the U.S. Court of Appeals for the Sixth Circuit issued a stay of the WOTUS rule's enforcement on October 9, 2015,³⁹ despite some dispute regarding whether the court had the jurisdiction to hear the case in the first place.⁴⁰ The jurisdictional issue was put to

³³ 40 C.F.R. §§ 110 et seq.; "Multiple Challenges Filed To the 'Water of the U.S.' Rule", LLOYD GOSSELINK ATTORNEYS AT LAW (Oct. 16, 2015), <http://www.lglawfirm.com/multiple-challenges-filed-to-the-waters-of-the-u-s-rule/>.

³⁴ See GOSSELINK, *supra* note 33; see also *It's Time to Ditch the Rule*, DITCH THE RULE, http://ditchtherule.fb.org/custom_page/its-time-to-ditch-the-rule/ (last visited Feb. 21, 2016) (arguing that the WOTUS rule extends the jurisdictional reach of the CWA too far).

³⁵ Order of Stay, *supra* note 21.

³⁶ *Id.*

³⁷ See GOSSELINK, *supra* note 33.

³⁸ *Id.*

³⁹ Order of Stay, *supra* note 21.

⁴⁰ Jonathon H. Adler, *Sixth Circuit Puts Controversial 'Waters of the United States' (WOTUS) Rule on Hold*, THE VOLOKH CONSPIRACY (Oct. 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/09/sixth-circuit-puts-controversial-waters-of-the-united-states-wotus-rule-on-hold/>.
Petitioners contested whether the Sixth Circuit had subject matter jurisdiction to

rest on February 22, 2016, when the Court of Appeals for the Sixth Circuit ruled that it has the jurisdiction to hear the consolidated challenges.⁴¹ With the controversy regarding jurisdiction settled, the Sixth Circuit's earlier decision stands, indicating that, in the opinion of the court, the rule's opponents have shown a likelihood of success on the merits.⁴² The EPA is complying with the stay, but has continued to vigorously promote the WOTUS rule, pending definitive litigation to the contrary.⁴³ In the interest of promoting the rule, the EPA took to its various social media accounts in the latter half of 2015, launching an aggressive publicity campaign controversial enough to merit the attention of the GAO and eventually resulted in the adverse GAO ruling.⁴⁴

III. OVERVIEW OF THE ANTI-LOBBYING ACT AND THE FEDERAL ANTIDEFICIENCY ACT

All federal agencies are subject to laws governing their lobbying activities. This section further explains those laws and their effect on agencies by providing background on: (A) the Federal Anti-Lobbying Act, (B) conditions on the use of funds by federal agencies, (C) the Federal Antideficiency Act, and (D) prohibitions on the dissemination of "covert propaganda."

A. *The Federal Anti-Lobbying Act*

Failure to comply with anti-lobbying laws can have serious negative consequences for the agencies involved. Unfortunately for

hear their challenge. *See* 33 U.S.C. § 1369(b)(1) (detailing which actions of the Administrator under the CWA can be reviewed by circuit courts).

⁴¹ Timothy Cama, *Court to Hear Case Against Obama's Water Rule*, THE HILL (Feb. 22, 2016, 1:18 PM), <http://thehill.com/policy/energy-environment/270281-court-to-hear-case-against-obamas-water-rule>.

⁴² Order of Stay, *supra* note 21.

⁴³ Memorandum to EPA Deputy Assistant Administrator, et al., *Re: Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination* at 1 (Nov. 16, 2015), http://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf.

⁴⁴ *See* Lipton & Shear, *supra* note 4.

the EPA, its campaign to promote the WOTUS rule—conducted via social media—drew attention not only for its message, but also its questionable legality. The crux of the EPA’s social media troubles lies in several commonly referenced prohibitions on illicit lobbying by federal departments and agencies, mainly the Federal Anti-Lobbying and Antideficiency Acts.⁴⁵ The Federal Anti-Lobbying Act outlines the applicable prohibitions on grassroots lobbying by agencies:

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation⁴⁶

Although this provision was drafted before the advent of social media⁴⁷—the mention of telegrams is particularly telling—its intended message still rings clear: grass roots lobbying is explicitly prohibited at the federal level. “Grass roots” lobbying is defined as “communication by executive officials directed to members of the public at large, or particular segments of the general public, intended to persuade them in turn to communicate with their elected representatives on some issue of concern to the executive.”⁴⁸ This could take the form of agency employees producing documents solely for use by private third parties who want to promote particular legislation, authoring communications that will be circulated without indicating the government’s role in

⁴⁵ GAO-B-326944, *supra* note 10, at 2.

⁴⁶ 18 U.S.C. § 1913 (2015).

⁴⁷ The earliest iteration of the Anti-Lobbying Act is credited to 1948. *Id.*

⁴⁸ Memorandum Opinion for the Attorney General, *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts* at 304, n.6 (Sept. 28, 1989).

their creation, or simply using government resources to conduct personal lobbying activities.⁴⁹

It should be noted that agencies are not forbidden from engaging in policy promotion entirely; the examples from the Department of Education and Department of Veteran Affairs discussed *infra* section IV show how policy promotion can be conducted without running afoul of the propaganda prohibitions.⁵⁰ Rather, agencies are free to promote their policies, providing that they do not employ any form of propaganda, defined as “covert activity intended to influence the American public.”⁵¹ The federal Anti-Lobbying Act is not intended to suppress communication between the Executive and Legislative branches of government altogether, but rather, to prevent excessive influence from tainting the legislative process.⁵²

B. *Conditions on Agency Use of Funds for Lobbying*

The EPA is additionally subject to several limitations on how money can be spent, the most recent of which are codified under the Code of Federal Regulations’ conditions on use of funds.⁵³ Similarly to the stipulations of the Federal Anti-Lobbying Act, the provisions outlined in section 34.100 of the Code instruct that “[n]o appropriated funds may be expended . . . to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress[.]”⁵⁴ A social media campaign can run afoul of this restriction if it is designed to influence the decision of a Member of Congress.⁵⁵ Such campaigns inevitably involve an investment of both budget and personnel,

⁴⁹ *Lobbying Activities*, NIH ETHICS PROGRAM, <https://ethics.od.nih.gov/topics/lobbying.htm> (last updated Feb. 19, 2013).

⁵⁰ See Lipton & Shear, *supra* note 4.

⁵¹ *Id.*

⁵² *Lobbying Activities*, NIH ETHICS PROGRAM, <https://ethics.od.nih.gov/topics/lobbying.htm> (last updated Feb. 19, 2013).

⁵³ 40 C.F.R. § 34.100 (2016).

⁵⁴ *Id.*

⁵⁵ *Id.*

which opens the door for a potential § 34.100 violation.⁵⁶ In addition to the conditions listed in the Code of Federal Regulations, agencies must also comply with any restrictions on spending outlined by Congress in a given year's appropriations bill.⁵⁷ Since 1951, almost all appropriations statutes have prohibited the use of appropriated funds for purposes of publicity or propaganda, meaning that agencies should, by now, be well aware of the restrictions.⁵⁸

C. *The Federal Antideficiency Act*

The other major applicable legislation at issue in the GAO's recent decision regarding the EPA, is the Federal Antideficiency Act ("FADA").⁵⁹ FADA forbids any government employee from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."⁶⁰ A FADA violation occurs where any government employee expends appropriated funds in an unauthorized—or even explicitly prohibited—manner.⁶¹ In the case of an agency's social media use, a FADA violation may occur when an agency uses

⁵⁶ See Tom Fox, *Using Social Media for your Federal Agency*, WASH. POST (Mar. 18, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/03/18/using-social-media-for-your-federal-agency/> ("Whatever route you ultimately take, you need to be mindful that doing this right requires investing in staff time and budget (and a healthy dose of trust) to make social media work for your agency and the citizens you serve.").

⁵⁷ Both the 2014 and 2015 Appropriations Acts, which are cited in the GAO's decisions, instruct that "[n]o part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress." Consolidated Appropriations Act, 2014, PL 113-76, Jan. 17, 2014, 128 Stat 5; see also Consolidated And Further Continuing Appropriations Act, 2015, PL 113-235, Dec. 16, 2014, 128 Stat 2130.

⁵⁸ Memorandum for the General Counsels of the Executive Branch, *Re: Whether Appropriations May be Used for Informational Video News Releases* at 1 (Mar. 1, 2005), <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-10.pdf>.

⁵⁹ 31 U.S.C. § 1341 (2015).

⁶⁰ *Id.* § 1341(a)(1)(A).

⁶¹ *Antideficiency Act*, GAO, <http://www.gao.gov/legal/anti-deficiency-act/about> (last visited Jan. 17, 2016).

federal funds to conduct a social media campaign in a prohibited manner.⁶² In the EPA's situation, it violated FADA because it used federal funds to pay their staff to develop and disseminate information in a way that violated both the Federal Anti-Lobbying Act and the conditions outlined in § 34.100 of the Code of Federal Regulations.⁶³ Other examples of possible FADA violations include when costs for an agency activity exceed the amount appropriated for that activity, or when funds appropriated in one fiscal year are used to proactively pay for activity in a subsequent fiscal year.⁶⁴

D. *Prohibitions on "Covert Propaganda"*

When agencies are accused of illicit lobbying, the prohibited expenditures at issue are usually those used to produce or disperse "covert propaganda."⁶⁵ The GAO defines covert propaganda as "materials . . . prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency[.]"⁶⁶ Thus, certain uses of social media might be prohibited if the disseminated materials communicate an agency's viewpoint without clearly identifying the agency as the source. Given that social media is, by definition, designed to facilitate the sharing and circulation of "information, ideas, personal messages, and other content,"⁶⁷ it is not surprising that an agency can run afoul of the propaganda prohibitions, even when its motives are ostensibly pure. It is important to note that although

⁶² See Molly Bernhart Walker, *In Hot Water: EPA Social Media Violated Propaganda, Anti-Lobbying Rules, Antideficiency Act, says GAO*, FIERCEGOVERNMENTIT (Dec. 15, 2015), <http://www.fiercegovernmentit.com/story/hot-water-epa-social-media-violated-propaganda-anti-lobbying-rules-antidefi/2015-12-15>.

⁶³ *Id.*

⁶⁴ *Violations of the Antideficiency Act*, 14 DOD FINANCIAL MANAGEMENT REGULATION 2-1, 2-11 (2006), http://comptroller.defense.gov/Portals/45/documents/fmr/archive/14arch/14_02_Aug06.pdf.

⁶⁵ Fed. Trade Comm'n, B-229257, 1988 WL 227903 (Comp. Gen. June 10, 1988) [hereinafter GAO- B-229257].

⁶⁶ *Id.*

⁶⁷ *Social Media*, *supra* note 2.

the GAO is charged with responding to Congressional requests concerning potential propaganda prohibition violations by agencies and reporting on any violations they discover,⁶⁸ its interpretations of law are not binding on members of the Executive Branch.⁶⁹ Rather, it is the Office of Legal Counsel (“OLC”) that determines the binding interpretations of law for the Executive Branch. However, consistent with the GAO’s definition of what constitutes covert propaganda, the OLC determined in 1988 that all “covert attempts to mold opinion through the undisclosed use of third parties” will be considered as such.⁷⁰

IV. SOCIAL MEDIA AND LOBBYING: “HONEST BROKER” OR “PARTISAN ADVOCATE”

Social media is a valuable tool for federal agencies, but one they must wield with discretion. This section describes social media’s applicability for agencies by outlining: (A) examples of successful agency social media campaigns, (B) why social media is such an effective tool for agency outreach and activism, (C) how agencies differ from other social media users, and (D) agency usage of Thunderclap specifically.

A. Social Media Use by Federal Agencies and Departments

The emphasis on agency propriety and accountability is not without reason. An agency ideally acts as an “honest broker,” dictating a clear course of action based on sound scientific reasoning,⁷¹ rather than a “partisan advocate,” expressing favoritism toward a given cause,⁷² when pursuing rulemaking of

⁶⁸ 31 U.S.C. § 712.

⁶⁹ Memorandum for the General Counsels of the Executive Branch to Heads of Departments and Agencies (Mar. 1, 2005) (on file with the Office of Management and Budget), <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-10.pdf>.

⁷⁰ *Id.*

⁷¹ Roger Pielke Jr., *The Honest Broker*, ROGER PIELKE JR.’S BLOG (July 31, 2010), <http://rogerpielkejr.blogspot.com/2010/07/honest-broker.html>.

⁷² Chulyoung Kim, *Partisan Advocates*, 66 BULLETIN OF ECONOMIC RESEARCH 313, 314 (2012).

any kind.⁷³ Unfortunately for agencies, the line between the two roles has not historically been well defined. However, the potential for messages from federal agencies and departments to stray into the territory of propaganda has not dissuaded the majority of federal agencies from utilizing Facebook, Twitter, YouTube, and Instagram to connect with constituents.⁷⁴ There are enough success stories, as discussed *infra*, to make social media an appealing option, despite the threat of potential sanctions by the GAO if things go wrong.⁷⁵ The Department of Education, for instance, uses the hashtag #AskFAFSA to encourage students and their families to engage in Twitter-hosted discussions on financing their college educations.⁷⁶ The Department of Veterans Affairs initiated their #VetQ campaign to promote the services offered by various veteran's organizations.⁷⁷ For agencies that choose to embrace social media, the ability to connect more effectively with citizens makes the expenditure of time and budget well worth the risk.⁷⁸

B. *The Allure of Social Media for Agency Usage*

Even beyond the possibilities for enhanced outreach and connectivity, the relatively new world of social media offers added allure for agencies looking to enhance their online rulemaking processes.⁷⁹ Despite the EPA's recent troubles, oversight bodies like the Administrative Conference of the United States⁸⁰ have

⁷³ Eric Lipton & Coral Davenport, *Critics Hear E.P.A.'s Voice in 'Public Comments'*, N.Y. TIMES (May 18, 2015), http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html?_r=0.

⁷⁴ Fox, *supra* note 56.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *Federal Agencies*, GOVSM, http://govsm.com/w/Federal_Agencies (last visited Jan. 12, 2016).

⁷⁸ Fox, *supra* note 56.

⁷⁹ *Id.*

⁸⁰ Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers* 2-3 (2013), <https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf>.

⁸⁰ The Administrative Conference of the United States is an independent federal agency, comprised of both federal officials and private sector experts,

encouraged agencies to take full advantage of the latest technologies to connect with their constituents and thereby improve federal administrative processes.⁸¹ Applying new social networking technologies to the established administrative rulemaking process will hopefully promote transparency by the government actors involved in the administrative rulemaking process, as well as reach and involve a wider array of stakeholders than ever before.⁸² Given this idealistic view of how social media might be effectively utilized by government agencies, it is easy to see how agencies like the EPA might slip from permitted stimulation of the overall rulemaking process to the improper promotion of a particular proposed rule. The thin line between the two makes the establishment of a clear standard all the more necessary.

C. How Agencies Differ From Other Users of Social Media

As evidenced by the GAO's recent decision, although federal departments and agencies are encouraged to utilize the power of social media, they must proceed more judiciously than other users of social media might. Businesses and the general public use social media to promote their individual agendas, engage others' interest, and, in the case of businesses, to drive sales.⁸³ While these uses might also seem reasonable for an agency to employ, the federal government has decided that agencies should be held to a more

that exists to improve the administrative process. *About the Administrative Conference of the United States (ACUS)*, ACUS, <https://www.acus.gov/about-administrative-conference-united-states-acus> (last visited Feb. 22, 2016).

⁸¹ ERULEMAKING PROGRAM MANAGEMENT OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (2010), https://www.regulations.gov/docs/FactSheet_eRulemaking_Best_Practices.pdf.

⁸² *Id.*

⁸³ See Chuck Cohn, *How to Properly Use Social Media to Fit Your Business Strategy*, FORBES (Jan. 23, 2015 at 5:44 PM), <http://www.forbes.com/sites/chuckcohn/2015/01/23/how-to-properly-use-social-media-to-fit-your-business-strategy/2/#5f99e7e25026>.

restrictive standard in their use of social media.⁸⁴ While private users of social media may freely act as their own “partisan advocates,” agencies are held to the higher, “honest broker” standard.⁸⁵ For this reason, agencies have developed tools to help them maintain their role as objective mediators.⁸⁶ Most notably, numerous apps and online platforms offer special, amended Terms of Service (“TOS”) agreements that allow agencies to utilize those services in a way that is both effective and legal.⁸⁷ These amended TOS agreements maintain the platform’s functionality, while removing features like advertisements that might otherwise be mistakenly interpreted as endorsements.⁸⁸ Thunderclap, for example features an alternative TOS agreement for government users.⁸⁹ In contrast, Twitter’s standard terms of use are considered appropriate for both government users and members of the general public, with no amending required.⁹⁰ Moreover, every agency is required to have a point of contact to sign and negotiate federal-compatible TOS agreements on behalf of the agency.⁹¹ The

⁸⁴ See Memorandum for the Heads of Executive Departments and Agencies, *Antideficiency Act Implications of Certain Online Terms of Service Agreements* at 1 (Apr. 4, 2013), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-10.pdf>.

⁸⁵ Lipton & Davenport, *supra* note 73.

⁸⁶ One such tool is the negotiated terms of service agreements available for federal agencies. See *Negotiated Terms of Service*, DIGITALGOV, <http://www.digitalgov.gov/resources/negotiated-terms-of-service-agreements/> (last visited Jan. 30, 2016).

⁸⁷ *Id.*

⁸⁸ Justin Herman, *Facts on the Federal-Compatible Terms of Service Agreement for Yelp*, U.S. GEN. SERVS. ADMIN.: GSA BLOG (Aug. 20, 2015), <http://gsablogs.gsa.gov/gsablog/2015/08/20/facts-on-the-federal-compatible-terms-of-service-agreement-for-yelp/>.

⁸⁹ See *Thunderclap Federal Terms of Use*, THUNDERCLAP, https://www.thunderclap.it/federal_tou (last updated Aug. 1, 2013).

⁹⁰ See *Negotiated Terms of Service*, DIGITALGOV, <http://www.digitalgov.gov/resources/negotiated-terms-of-service-agreements/> (last visited Jan. 30, 2016); see also *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos?lang=en> (last updated Jan. 27, 2016).

⁹¹ *Agency Points of Contact for Federal Compatible Terms of Service Agreements*, DIGITALGOV, <http://www.digitalgov.gov/resources/agency-points->

General Services Administration (“GSA”), in consultation with the Office of Management and Budget (“OMB”) and Department of Justice (“DOJ”), has also published several guides and online resources to help agencies navigate social media to simultaneously protect themselves from these errors while still projecting themselves well.⁹²

D. *Agency Use of Thunderclap*

1. *Background on Thunderclap*

Federal agencies are increasingly turning to social media to engage their constituents,⁹³ and services like Thunderclap allow them to do so with even greater effectiveness. Thunderclap bills itself as “the first ever crowdspeaking platform,”⁹⁴ drawing a parallel to other online services, such as GoFundMe and Kickstarter, that rely upon the power of numbers to accomplish a common goal.⁹⁵ The

of-contact-for-federal-compatible-terms-of-service-agreements/ (last visited Jan. 30, 2016).

⁹² Memorandum for the Heads of Executive Departments and Agencies, *Antideficiency Act Implications of Certain Online Terms of Service Agreements* at 1 (Apr. 4, 2013), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-10.pdf>; see, e.g., Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act* (Apr. 7, 2010), https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf; Memorandum for the Heads of Executive Departments and Agencies, *Guidance for Agency Use of Third-Party Websites and Applications* (June 25, 2010), https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-23.pdf.

⁹³ Memorandum for the Heads of Executive Departments and Agencies, *Antideficiency Act Implications of Certain Terms of Service Agreements* (Apr. 4, 2013), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-10.pdf>.

⁹⁴ *What Is Thunderclap?*, THUNDERCLAP, <https://www.thunderclap.it/about> (last visited Feb. 22, 2016).

⁹⁵ GoFundMe offers charities and individuals a platform via which they can easily reach out to and accept donations from others. *How It Works*, GOFUNDME, <https://www.gofundme.com/tour/> (last visited Feb. 22, 2016). Kickstarter, similarly, allows users to crowdsource funding for creative projects.

basic service is free and enables users to easily amplify their social reach.⁹⁶ Users launch “campaigns,” which typically consist of a simple message and accompanying photo, which they then promote individually through email and social media.⁹⁷ Other Thunderclap users indicate their support for a given campaign by simply clicking a button on that campaign’s page.⁹⁸ If a campaign “tips” or reaches its supporter goal—as determined by the campaign organizer prior to launch—before a set end date, the campaign message is automatically “blasted out” via supporters’ Facebook, Twitter, and Tumblr accounts.⁹⁹ The end result is effectively an “online flash mob,”¹⁰⁰ wherein a successful campaign is able to reach not only its direct supporters, but also all of the social media followers of those direct supporters.¹⁰¹ Ideally, scaling up in this way serves to counteract the fact that no single Tweet carries more weight than any other.¹⁰² With Thunderclap, however, campaign organizers can essentially send shockwaves across the social media universe, ensuring that their message does not fall on the potentially deaf ears of an overly saturated follower base.¹⁰³

Hello, KICKSTARTER, <https://www.kickstarter.com/about?ref=nav> (last visited Feb. 22, 2016).

⁹⁶ *Frequently Asked Questions*, THUNDERCLAP, <https://www.thunderclap.it/faq> (last visited Feb. 22, 2016).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* Tumblr is a social media platform that allows users to post media of almost any form to a highly customizable blog page. *About*, TUMBLR, <https://www.tumblr.com/about> (last visited Feb. 22, 2016).

¹⁰⁰ A flash mob is a group of people that gathers at a previously determined time and location to perform a specific action and then immediately disperse. *Flash Mob*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/flash%20mob> (last visited Mar. 4, 2016).

¹⁰¹ *Frequently Asked Questions*, THUNDERCLAP, <https://www.thunderclap.it/faq> (last visited Feb. 22, 2016).

¹⁰² See Jeff Bercovici, *Thunderclap, A New Tool For Amplifying Your Tweet Into a Sonic Boom*, FORBES (May 31, 2012, 4:06 PM), <http://www.forbes.com/sites/jeffbercovici/2012/05/31/thunderclap-a-new-tool-for-amplifying-your-tweet-into-a-sonic-boom/#40065bb7263a>.

¹⁰³ *Id.*

2. *Examples of Agency Thunderclap Usage*

The EPA is not alone in its use of Thunderclap; numerous other federal departments and agencies have utilized the platform, some with a considerable degree of success.¹⁰⁴ Following the widely publicized school shooting at Sandy Hook Elementary in Newtown, Connecticut,¹⁰⁵ the White House launched a Thunderclap campaign with the aim of persuading Congress to consider President Barack Obama's proposed executive actions to decrease gun violence.¹⁰⁶ Organizers built the campaign around the hashtag #NowIsTheTime,¹⁰⁷ and strategically planned for it to tip immediately prior to a Senate vote on amendments to its gun bill.¹⁰⁸ The campaign garnered backing from 18,417 supporters, and reached an estimated 16,107,542 people, indicating that the topic was plainly of interest to the American public.¹⁰⁹

AmeriCorps utilized Thunderclap to celebrate the organization's twentieth birthday, inviting supporters to give the gift of their social reach.¹¹⁰ Nearly 4,300 people signed on to share the message, leading #AmeriCorps20 to become a trending topic on Twitter,¹¹¹ and ultimately reaching almost 52 million people.¹¹²

¹⁰⁴ See *Bringing the Thunder*, THUNDERCLAP, <https://www.thunderclap.it/casestudies> (last visited Feb. 22, 2016).

¹⁰⁵ On December 14, 2012, a gunman in Newtown, Connecticut killed twenty-six people in a tragic massacre. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES, Dec. 14, 2012, <http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>.

¹⁰⁶ *Case Study: The White House*, THUNDERCLAP, https://d3ennrj2q0c71.cloudfront.net/assets/CASESTUDY_WHITEHOUSE-6e200b00184fdcfb47aeb4c429db3cb.pdf (last visited Feb. 22, 2016).

¹⁰⁷ The # symbol accompanies a keyword or phrase that is searchable across social media platforms, including Twitter. *Using Hashtags on Twitter*, TWITTER, <https://support.twitter.com/articles/49309> (last visited Feb. 22, 2015).

¹⁰⁸ *Case Study: The White House*, *supra* note 106.

¹⁰⁹ *Id.*

¹¹⁰ *How 51 Million People Celebrated AmeriCorps' 20th Birthday*, THUNDERCLAP, <https://www.thunderclap.it/casestudies/americorps> (last visited Feb. 22, 2016).

¹¹¹ Trending Twitter topics are those hashtags or keywords determined by an algorithm to be of interest to a particular user. *FAQs About Trends on Twitter*,

The Americorps campaign was amongst the most successful Thunderclap campaigns ever,¹¹³ and clearly demonstrates Thunderclap's positive potential as a tool for agency outreach.

3. *Unique Legal Concerns Associated with Thunderclap*

The same features that make Thunderclap an effective tool for increasing an agency's outreach and visibility can prove problematic when a campaign violates one of the prohibitions on lobbying by a federal department or agency.¹¹⁴ The GAO's recent decision regarding the EPA's use of Thunderclap, however, is the first indication that inappropriate uses of the Thunderclap platform are subject to review and sanctioning.¹¹⁵ Thunderclap, in their federal terms of use, is careful to note that all campaigns carried out by government entities are subject to federal law.¹¹⁶ Thus, the onus is on the agencies themselves, rather than Thunderclap as a company, to ensure that campaigns meet the federal standards of compliance.¹¹⁷ However, as evidenced by the EPA's recent missteps,¹¹⁸ clearer guidance as to what constitutes appropriate versus illegitimate use is necessary if agencies are to continue to utilize Thunderclap going forward. Absent clear guidance, an increasing number of agency social media campaigns will likely be subject to GAO review and condemnation.

V. THE RECENT GAO RULING AGAINST THE EPA

The GAO is an independent government agency frequently referred to as the "congressional watchdog."¹¹⁹ Its primary purpose

TWITTER, <https://support.twitter.com/articles/101125> (last visited Feb. 22, 2015).

¹¹² *How 51 Million People Celebrated AmeriCorps' 20th Birthday*, THUNDERCLAP, <https://www.thunderclap.it/casestudies/americorps> (last visited Feb. 22, 2016).

¹¹³ *Id.*

¹¹⁴ *See infra* Section III.

¹¹⁵ *See* GAO-B-326944 *supra* note 10.

¹¹⁶ *Thunderclap Federal Terms of Use*, *supra* note 89.

¹¹⁷ *Id.*

¹¹⁸ *See* Lipton & Shear, *supra* note 4.

¹¹⁹ *About GAO*, *supra* note 1.

is to look into how other departments of the federal government spend taxpayers' money, and does so by conducting audits at Congress' request.¹²⁰ As an independent and wholly nonpartisan agency, the GAO is able to provide members of Congress with objective and unbiased information.¹²¹ The duties of the GAO include auditing the operations of other agencies, investigating allegations of inappropriate activities or use of funds, generating reports on the overall performance of agencies and programs, analyzing policy options, and issuing legally binding decisions regarding agency activities.¹²² In its role as "congressional watchdog," the GAO received a request in June of 2016 from members of the Senate Committee on Environment and Public Works to investigate the EPA's use of social media to promote the WOTUS rule.¹²³ The result of their investigation was the recent ruling, which determined that the EPA had impermissibly expended federal funds in violation of FADA.¹²⁴

A. *Overview of the Recent Ruling*

The recent GAO ruling criticized the EPA's use of funds to conduct a campaign via Twitter, Thunderclap, and various other social media platforms in order to promote the agency's Waters of the United States ("WOTUS") rule.¹²⁵ The GAO determined that the way in which the campaign's message was disseminated constituted covert propaganda, and, as such, was an impermissible use of funds in violation of FADA.¹²⁶ The campaign drew attention from some members of Congress, largely due to the significant opposition to the rule it sought to promote.¹²⁷ The WOTUS rule, which seeks to clarify which waters are considered protected under

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ GAO-B-326944, *supra* note 10, at 1.

¹²⁴ *Id.* at 2.

¹²⁵ *Id.*

¹²⁶ Lipton & Shear, *supra* note 4.

¹²⁷ See Lipton & Davenport, *supra* note 73.

the CWA,¹²⁸ was contentious from the start.¹²⁹ In response, the EPA launched an aggressive social media campaign in an attempt to rally supporters.¹³⁰ The agency faced an uphill battle. The WOTUS rule was proposed “in light of the [preexisting] statute, science, Supreme Court decisions in *U.S. v. Riverside Bayview Homes*,¹³¹ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,¹³² and *Rapanos v. United States (Rapanos)*,¹³³ and the agencies’ experience and technical expertise.”¹³⁴ Nevertheless, the WOTUS rule was met with staunch opposition by states and industry groups,¹³⁵ as was reflected during

¹²⁸ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054, 37055 (finalized June 29, 2015) (to be codified at 33 C.F.R. pt. 328.3).

¹²⁹ The American Farm Bureau Federation, an agriculture lobby, actually created a website entirely devoted to “ditching” the proposed rule. See DITCH THE RULE, *supra* note 35.

¹³⁰ See Lipton & Shear, *supra* note 4. (“[The EPA] blitzed social media to urge the public to back an Obama administration rule intended to better protect the nation’s streams and surface waters[.]”).

¹³¹ See generally *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (holding that Corps regulatory authority extended to wetlands, and that the Corps definition of waters as including wetlands adjacent to navigable waters was a reasonable one).

¹³² See generally *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (holding that the Corps’ rule extending definition of “navigable waters” under CWA to include intrastate waters used as habitat by migratory birds exceeded the authority granted to them under the CWA).

¹³³ See generally *Rapanos v. United States*, 547 U.S. 715, 739–42 (2006) (holding that the term “navigable waters” covers relatively “permanent, standing or flowing bodies of water,” but not intermittent or ephemeral flows of water, and only those wetlands with a “continuous surface connection to bodies that are ‘waters of the United States’ in their own right” are subject to the CWA).

¹³⁴ *Clean Water Rule: Definition of Waters of the United States*, REGULATIONS.GOV, (June 29, 2015), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-20862>.

¹³⁵ See DITCH THE RULE, *supra* note 34; see also Karen Bennett & John Henson, *Redefining “Waters of the United States”: Is EPA Undermining Cooperative Federalism?*, THE FEDERALIST SOCIETY (May 5, 2015), <http://www.fed-soc.org/publications/detail/redefining-waters-of-the-united-states-is-epa-undermining-cooperative-federalism>.

the mandatory notice and comment period.¹³⁶ The rule was finalized in the early summer of 2015,¹³⁷ in part due to the support raised during the agency’s social media campaign.¹³⁸

The GAO’s investigation of the EPA’s WOTUS campaign was initiated in response to a request from Senator James M. Inhofe¹³⁹ concerning whether the campaign violated the propaganda and anti-lobbying provisions outlined in the corresponding fiscal years’ appropriations acts.¹⁴⁰ The GAO, as its standard practice, first contacted the EPA in order to gather additional information and insight regarding the situation.¹⁴¹ The EPA provided its own legal analysis in response, in addition to electronic access to all relevant documents.¹⁴² The EPA contended that it conducted the campaign legally, and sought solely to clarify public confusion regarding the WOTUS rule and provide its constituents opportunities to engage in the rulemaking process.¹⁴³ Nevertheless, the GAO ultimately ruled that the EPA’s use of appropriated funds to implement the campaign—particularly the message disseminated via Thunderclap—violated the federal prohibitions against propaganda and grassroots lobbying.¹⁴⁴

¹³⁶ See VANESSA K. BURROWS & TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 2 (2011) (“The requirement under § 553 to provide the public with adequate notice of a proposed rule is generally achieved through the publication of a notice of proposed rulemaking in the *Federal Register*.”).

¹³⁷ *Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy*, EPA (May 27, 2015), <http://yosemite.epa.gov/opa/admpress.nsf/0/62295CDDD6C6B45685257E52004FAC97>.

¹³⁸ Lipton & Shear, *supra* note 4.

¹³⁹ Senator Inhofe, a Republican, has served on the U.S. Senate for over twenty-two years. *Sen. James “Jim” Inhofe*, GOVTRACK.US, https://www.govtrack.us/congress/members/james_inhofe/300055 (last visited Feb. 22, 2016).

¹⁴⁰ GAO-B-326944, *supra* note 10, at 1. The fiscal years relevant for the purposes of the GAO’s investigation were 2014 and 2015. *Id.*

¹⁴¹ *Id.* at 2.

¹⁴² *Id.*

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.* at 11.

B. *The EPA's Social Media Campaign Promoting WOTUS*

The EPA's Social Media Campaign had several components, all of which were underscored and individually endorsed by its already considerable Twitter presence.¹⁴⁵ Followers of the EPA Office of Water's Twitter account,¹⁴⁶ in particular, were inundated with a substantial number of tweets promoting the WOTUS rule, as well as the EPA's parallel campaigns on other social media platforms, namely, Thunderclap.¹⁴⁷ The EPA tweeted a simple picture with an accompanying message to promote its Thunderclap campaign.

Figure 1:

¹⁴⁵ The EPA maintains upwards of thirty accounts for various purposes. *EPA Twitter Accounts*, TWITTER, <https://twitter.com/EPA/lists/epa-twitter-accounts/members> (last visited Jan. 17, 2016).

¹⁴⁶ U.S. EPA Water (@EPAwater), TWITTER, <https://twitter.com/EPAwater> (last visited Feb. 22, 2016).

¹⁴⁷ Ari Philips, *RTs Aren't Endorsements: The Unusual Story of How This Government Agency Broke the Law Using Twitter*, FUSION (Dec. 16, 2015, 8:14 AM), <http://fusion.net/story/245349/government-agency-breaks-law-using-social-media/>.

N.C. J.L. & TECH. ON. 293, 318
Thunderstruck



The illegality of the WOTUS rule’s implementation aside, the EPA’s use of Thunderclap was initially notable for no reason other than for its novelty, as Thunderclap is a relative newcomer on the social media scene.¹⁴⁹ Billing itself as “the first-ever crowdspeaking platform that helps people be heard by saying something together[,]” Thunderclap is, on its face, the ideal vehicle for an organization looking to reach as many people as possible.¹⁵⁰ For the EPA, the Thunderclap campaign to promote the WOTUS rule is estimated to have reached approximately 1.8 million people.¹⁵¹ A message titled “I Choose Clean Water” was promoted on the EPA’s Thunderclap page.

¹⁴⁸ U.S. EPA Water (@EPAwater), TWITTER (Sept. 21, 2014, 4:10 PM), <https://twitter.com/epawater/status/513797379804655617>.

¹⁴⁹ Lipton & Shear, *supra* note 4.

¹⁵⁰ *About*, THUNDERCLAP, <https://www.thunderclap.it/about> (last visited Jan. 17, 2016).

¹⁵¹ Philips, *supra* note 147.

Figure 2:

I Choose Clean Water
by U.S. Environmental Protection Agency category: **Environment**

“Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community.”
<http://thndr.it/1sLh51M>

SUPPORTERS
980 of 500
196% of goal supported

SOCIAL REACH
1,803,761
People

TIME LEFT
Complete
Ends Sep 29, 2:00 PM EDT

U.S. Environmental Protection... EMBED </>

152

The Thunderclap campaign garnered particular attention from the GAO due to concerns that “[w]hile EPA’s role was transparent to supporters who joined the campaign, [that did] not constitute disclosure to the 1.8 million people potentially reached by the Thunderclap.”¹⁵³ Because the EPA failed to design a message that clearly identified them as the author to their ultimate audience rather than just their immediate one, the GAO ruled that the campaign constituted covert lobbying, and was contrary to the explicit restrictions on using appropriated funds for propaganda purposes outlined in the 2014 and 2015 fiscal year appropriations acts.¹⁵⁴ As the Federal Antideficiency Act forbids an agency from using appropriated funds for prohibited purposes, the GAO also found the EPA guilty of a FADA violation.¹⁵⁵

¹⁵² U.S. Environmental Protection Agency (@EPAwater), *I Choose Clean Water*, THUNDERCLAP, <https://www.thunderclap.it/projects/16052-i-choose-clean-water> (last updated Sept. 29, 2014, 2:00 PM).

¹⁵³ GAO-B-326944, *supra* note 10, at 13.

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Id.*

C. *The Aftermath of the GAO's Ruling*

Even though the EPA has continued to endorse the WOTUS rule,¹⁵⁶ the rule has not yet been implemented.¹⁵⁷ The Sixth Circuit Court of Appeals temporarily blocked its nationwide implementation in a stay issued in October of 2015, citing concerns that the rule's requirements were overly ambiguous.¹⁵⁸ The GAO's decision is therefore unlikely to have any effect on the substance of the rule itself, at least for the time being. Rather, what the EPA must now grapple with is the reality that all publicity might not, in fact, be good publicity. The GAO's ruling will likely not result in any civil or criminal penalties;¹⁵⁹ although violations of the federal Antideficiency Act can result in administrative discipline,¹⁶⁰ fines,¹⁶¹ and potentially even incarceration,¹⁶² there has been no indication that penalties of that severity will be pursued.¹⁶³

If criminal penalties are pursued, the responsible parties could face fines up to \$5,000, two years imprisonment, or both.¹⁶⁴ Such penalties are applicable to any government officer or employee

¹⁵⁶ Lipton & Shear, *supra* note 4.

¹⁵⁷ Memorandum to EPA Deputy Assistant Administrator, et al., *Re: Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination* 1 (Nov. 16, 2015), http://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf.

¹⁵⁸ Brent Kendall & Amy Harder, *U.S. Appeals Court Blocks EPA Water Rule Nationwide*, WALL ST. J. (Oct. 9, 2015, 4:34 PM), <http://www.wsj.com/articles/u-s-appeals-court-blocks-epa-water-rule-nationwide-1444400506>.

¹⁵⁹ Lipton & Shear, *supra* note 4.

¹⁶⁰ Potential disciplinary actions include written reprimands, suspension without pay, or removal from office. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-11, SECTION 145—REQUIREMENTS FOR REPORTING ANTIDEFICIENCY ACT VIOLATIONS (2015), https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s145.pdf.

¹⁶¹ 1 WEST'S FED. ADMIN. PRAC. § 531 (2015).

¹⁶² *Id.*

¹⁶³ Lipton & Shear, *supra* note 4.

¹⁶⁴ 31 U.S.C. § 1350.

who knowingly violates FADA.¹⁶⁵ In the EPA’s case, this could include both the staff members directly responsible for administering the controversial social media blitz, as well as any senior officials who were conscious of the potential negative implications, but nevertheless signed off on the campaign.¹⁶⁶

Even if no such penalties arise, the ruling reads as a black mark on the EPA’s record, providing ready ammunition to those already opposed to the WOTUS rule.¹⁶⁷ In a statement released shortly after the GAO’s findings were announced, Senator James M. Inhofe of Oklahoma¹⁶⁸—chairman of the Senate Environment and Public Works Committee—denounced what he termed “E.P.A.’s illegal attempts to manufacture public support for its Waters of the United States rule and sway congressional opinion.”¹⁶⁹ Given that the EPA currently faces significant legal challenges to the rule’s implementation,¹⁷⁰ the last thing it needs is to first be sullied in the court of the public opinion, and then cast as an agency of cozeners willing to “go to extreme lengths and even violate the law to promote its activist environmental agenda[.]”¹⁷¹

VI. PREVIOUS GAO DECISIONS

Previous GAO decisions regarding illegal lobbying by federal agencies may provide some insight as to how agencies might avoid these sorts of issues going forward. This section explores these insights by discussing: (A) the GAO’s 2004 decision regarding the Centers for Medicare and Medicaid Services, (B) the GAO’s 2005 decision regarding the Department of Education, and (C) how those cases compare to the EPA’s present situation.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Lipton & Shear, *supra* note 4.

¹⁶⁸ Senator Inhofe, a Republican, has served on the U.S. Senate for over twenty-two years. *Sen. James “Jim” Inhofe*, GOVTRACK.US, https://www.govtrack.us/congress/members/james_inhofe/300055 (last visited Feb. 22, 2016).

¹⁶⁹ *Id.*

¹⁷⁰ Kendall & Harder, *supra* note 158.

¹⁷¹ Lipton & Shear, *supra* note 4.

A. *The Centers for Medicare and Medicaid Services*

Putting aside concerns about the potential effects on public opinion, the GAO's decision against the EPA is not an unprecedented one.¹⁷² Agencies can glean some limited guidance from the GAO's previous decisions when contemplating the legality of a lobbying activity. The Centers for Medicare and Medicaid Services ("CMS"), which is part of the Department of Health and Human Services ("HHS"), were found guilty of a similar infraction in 2004, after CMS distributed various print and television advertisements intended to inform Medicare beneficiaries about changes to the program subsequent to the passage of the Medicare Prescription Drug, Improvement and Modernization Act of 2003.¹⁷³ Although the GAO found in an earlier opinion that CMS' distribution of the print materials "did not violate publicity or propaganda prohibitions,"¹⁷⁴ the GAO later determined that certain video news releases prepared and disseminated by CMS—as an agency under the HHS—did constitute violations.¹⁷⁵ At issue, specifically, was the Centers' failure to disclose that the video news releases, which were essentially short clips accompanied by a suggested script intended to be presented as news stories by the broadcasters to whom they were distributed, had been prepared and circulated using appropriated federal funds.¹⁷⁶ The GAO in that case found a clear violation of the Antideficiency Act,¹⁷⁷ after determining that CMS had covertly channeled its message through the mouths of the news broadcasters.¹⁷⁸ CMS was subsequently ordered to report the

¹⁷² *Id.*

¹⁷³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-B-302710, DEP'T OF HEALTH AND HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS.—VIDEO NEWS RELEASES 1 (2004) [hereinafter GAO-B-302710].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 31 U.S.C. § 1341(a).

¹⁷⁸ GAO-B-302710, *supra* note 173.

violation to both Congress and the President pursuant to the reporting requirements outlined in 31 U.S.C. § 1351.¹⁷⁹

B. *The Department of Education*

In 2005, the Department of Education (“DOE”) was slapped with a similar violation, when it was found to have hired a public relations firm, Ketchum, Inc., to produce a series of “Deliverables”—television and radio ads—which were used to covertly promote the No Child Left Behind (“NCLB”) Act.¹⁸⁰ Of particular concern in that case was that the DOE—via its contract with Ketchum—paid political commentator Armstrong Williams¹⁸¹ to allow the promotional ad to air during his weekly show *The Right Side* and “to comment regularly on the No Child Left Behind Act without assuring that the Department’s role was disclosed to the targeted audiences.”¹⁸² Because Williams’ production group submitted monthly invoices for billing purposes, the GAO was able to easily trace the extensive lobbying activities undertaken by Williams to promote the NCLB Act.¹⁸³ Williams’ activities, which included interviews, speeches, and published columns, extended far beyond the terms of his original contract with Ketchum and the DOE.¹⁸⁴ In that sense, the DOE’s case was perhaps even more clear-cut than CMS’s. In the case of the DOE, the GAO was literally handed a list containing the myriad ways in which the department had attempted to “conceal [its] authorship and make it appear that respected, independent authorities had endorsed [its]

¹⁷⁹ *Id.*

¹⁸⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-B-305368, DEP’T OF EDUC.—CONTRACT TO OBTAIN SERVICES OF ARMSTRONG WILLIAMS 3 (2005) [hereinafter GAO-B-305368].

¹⁸¹ Armstrong Williams is a popular conservative political commentator who hosts a daily radio show, as well as a nationally syndicated TV program. *AW: The Mastermind*, ARMSTRONG WILLIAMS, <http://www.armstrongwilliams.com/about/> (last visited Feb. 22, 2016).

¹⁸² GAO-B-305368, *supra* note 180.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

position[.]”¹⁸⁵ For the GAO’s purposes, it would be hard to imagine a better example of the type of covert activities it aims to prevent.

C. *Comparisons to the Present Case*

i. *Similarities to the CMS Case*

There are clear parallels between the case at hand and the two prior decisions by the GAO noted above. The GAO made mention in its finding on CMS of the fact that the incident was the first time it had cause to review the use of appropriated funds by a government actor to produce video news releases (“VNRs”).¹⁸⁶ Similarly, its recent ruling on the EPA is the first time it has reviewed the use of government funds to produce and launch a social media campaign. In defending its actions, CMS argued that “the production of the VNR materials constitutes a ‘standard practice in the news sector’ and a ‘well-established and well-understood use of a common news and public affairs practice.’”¹⁸⁷ For the Thunderclap campaign, the EPA might likewise have argued that, in an era where an aggressive Internet presence is beneficial to the success of any organization, it was simply following what has come to be accepted as “standard practice” in the field, and definitely constituted a “well-understood use” of the platforms employed. EPA representatives asserted as much in a letter to the GAO written during the course of the GAO’s investigation, asserting that the EPA’s social media campaign was “an appropriately far-reaching effort to educate the American public about an important part of E.P.A.’s mission: protecting clean water.”¹⁸⁸

ii. *Similarities to the DOE Case*

Similarly to the CMS case, there are notable parallels between the EPA’s conduct and that of the DOE. The DOE erred not in its employment of and reliance on a public and reputable mouthpiece

¹⁸⁵ *Id.*

¹⁸⁶ GAO-B-302710, *supra* note 173.

¹⁸⁷ *Id.*

¹⁸⁸ Lipton & Shear, *supra* note 4.

(Williams), but rather in the failure to ensure Williams' contractual relationship with the DOE was transparent.¹⁸⁹ Similarly, the EPA was not wrong in using Twitter, Thunderclap, or any other social media platform to disseminate its message. The EPA only ran into trouble when it attempted to make it seem as if others, unprovoked and entirely independently, shared its agenda.¹⁹⁰ To quote the GAO in its ruling on the DOE, "the government was attempting to convey a message to the public advocating the government's position while misleading the public as to the origins of the message."¹⁹¹ In the EPA's situation, it was inarguably doing the same. Social media, however, is nebulous and rapidly evolving. The same rules that clearly condemn actions such as those taken by the DOE might not apply as cleanly to agency social media use, hence the need for a clearer standard.

VII. WHERE IS THE LINE FOR AGENCIES USING SOCIAL MEDIA TO ADVOCATE?

A. *The GAO Ruling as a Supposed "Bright Line" Governing Agency Social Media Use*

The GAO's logic in their decision on the EPA's WOTUS campaign is easy enough to follow. The question remains, however, as to how the GAO might rule in a situation where the agency behavior at issue is not so clearly suspect. The recent decision regarding the EPA's WOTUS blitz was hailed as a "bright line" ruling "for federal agencies experimenting with social media."¹⁹² However, given the fluid and constantly evolving nature of social media usage, it is hard to imagine that even the brightest line will not quickly blur. Following the GAO's decision, House Republicans quickly set about attacking another recent social media outreach by the EPA, this one promoting the Clean Power

¹⁸⁹ GAO-B-305368, *supra* note 180.

¹⁹⁰ *Republicans Target EPA's Social Media on Clean Power Plan*, ASME (Dec. 19, 2015), <http://ppec.asme.org/latest-news/energy-news/republicans-target-epas-social-media-on-clean-power-plan/>.

¹⁹¹ GAO-B-305368, *supra* note 180.

¹⁹² Lipton & Shear, *supra* note 4.

Plan.¹⁹³ As previously mentioned, the GAO's recent ruling is, if nothing else, a blow to the EPA's credibility, which likely led House Energy and Commerce Chairman, Fred Upton,¹⁹⁴ and others to question whether improper practices similar to those used to promote the WOTUS rule were also employed regarding the Clean Power Plan.¹⁹⁵

Those concerned with the practices used to promote the Clean Power Plan cited the EPA's use of the hashtag #ActionClimate as another potential violation of the rules against covert propaganda.¹⁹⁶ If, however, the GAO were to find that such usage did constitute a violation, it would open a veritable Pandora's box. Intensive, widespread social media campaigns—particularly like the one carried out by the EPA via Thunderclap—are one thing; features as inherent and arguably essential to social media platforms as hashtags are, however, are quite another.¹⁹⁷ The suspect actions by the EPA with respect to the Clean Power Plan, which were part of “an extensive social media messaging campaign in support of the Clean Power Plan, [that included] authoring blog posts, and posting messages on Facebook and Twitter,” as well as Thunderclap, seem in many ways indistinguishable from those actions labeled as “covert propaganda” in the GAO's ruling on the WOTUS rule campaign.¹⁹⁸

In defense of its outreach efforts, the EPA emphasized that it places “a high priority on providing the public timely, accurate and accessible information about the environment and our rulemaking activities,” and “[s]ocial media is an increasingly important tool in

¹⁹³ ASME, *supra* note 190.

¹⁹⁴ Representative Upton, a Republican, has represented Michigan's 6th congressional district for over twenty-three years. *Rep. Fred Upton*, GOVTRACK.US, https://www.govtrack.us/congress/members/fred_upton/400414 (last visited Feb. 22, 2016).

¹⁹⁵ ASME, *supra* note 190.

¹⁹⁶ *Id.*

¹⁹⁷ See Julia Turner, *#InPraiseofTheHashtag*, NEW YORK TIMES MAGAZINE (Nov. 2, 2012), http://www.nytimes.com/2012/11/04/magazine/in-praise-of-the-hashtag.html?_r=0 (“[T]he hashtag is the new URL.”).

¹⁹⁸ ASME, *supra* note 190.

this public outreach and education effort.”¹⁹⁹ The EPA’s claims fall well within the general desires for greater access and transparency in government, as consolidated under the theory of civic republicanism, which holds that state action is legitimate only so far as it advances the common good.²⁰⁰ As such, civic republicanism emphasizes improving the decision-making process in whatever way best serves the public interest.²⁰¹ Social media, with its broad accessibility and contemporary prevalence, provides an effective means of pursuing civic republicanism’s lofty goals. However, if the GAO seeks to promote ideals such as these, it must clarify which forms of social media use are allowed, and which are prohibited.

B. *But Is the Line “Bright” Enough?*

The GAO’s decision reads as a warning to federal agencies that plan to utilize social media as a promotional tool going forward, but the distinction between what is and is not permitted use needs to be more clearly delineated. The GAO, in making its decision, relied on statutes that were passed prior to the contemplation of social media, and that fail to accommodate its nuances as a result. The potential for abuse is admittedly important to consider. However, social media is such a valuable tool that it should not be regulated to the point of triviality. There have been enough success stories to speak to social media’s potential as a means of involving the citizenry into the government process, particularly as it involves administrative rulemaking.²⁰² Platforms like Thunderclap, in particular, serve to facilitate outreach efforts that can extend well beyond a government entity’s usual sphere of influence. For these reasons, the GAO needs to determine a clearer standard to guide government agencies and departments that wish to incorporate social media into their outreach strategy.

¹⁹⁹ *Id.*

²⁰⁰ Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528 (1992).

²⁰¹ *Id.*

²⁰² *See supra* Section IV.

VIII. CONCLUSION

Social media has become an increasingly powerful tool for reaching and mobilizing the American people.²⁰³ “Social media isn’t the future, it’s the present,”²⁰⁴ and users now turn to it not only for entertainment, but also for opportunities to engage with those they follow and improve their followers’ overall interactive experience.²⁰⁵ It is not surprising that federal departments and agencies have embraced social media as a means to communicate directly with their constituents, as well as rally support for their various initiatives. Given social media’s utility, it would be shortsighted to disallow it altogether. Nevertheless, the potential for abuse clearly necessitates governance. Drawing a clear delineation between what constitutes good practice versus what behaviors are disallowed will be crucial if that governance is to be successful. The GAO’s recent decision regarding the EPA’s social media campaign to promote the WOTUS rule is not the “bright line” rule that agencies need. The prohibitions on lobbying and use of federal funds will need to be more clearly interpreted before the prohibitions can be applied to agencies’ tweets, posts, and Thunderclap campaigns.

²⁰³ Fox, *supra* note 56.

²⁰⁴ *Id.*

²⁰⁵ *Id.*