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VOTER COMPETENCE AND THE EXILE OF DONALD TRUMP

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“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”²

I. INTRODUCTION

The 2012 presidential election was the most expensive election in U.S. history.³ The Federal Election Committee reported that the election cost approximately \$7 billion.⁴ Ellen Weintraub, the FEC Chairwoman stated that candidates spent an estimated \$3.2 billion, political parties spent \$2 billion, and political action committees another \$2.1 billion.⁵ Observers of the election coverage undoubtedly recognized that the media often spent countless (and expensive) amounts of national airtime on seemingly far-fetched election topics that had little to do with the candidates’ policies or positions on issues.⁶ Donald Trump frequently graced the populace with his interviews with various media outlets that were aimed at garnering support for the proposition that President Barack Obama was possibly not a natural born citizen of the United States and

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² *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

³ Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo Is Wrong*, 47 U. RICH. L. REV. 881, 881 (2013).

⁴ Cheryl K. Chumley, *FEC: 2012 Elections Cost \$7 Billion*, WASH. TIMES (Feb. 1, 2013), <http://www.washingtontimes.com/news/2013/feb/1/fec-2012-elections-cost-7-billion/>.

⁵ *Id.*

⁶ James A. Gardner, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 927 (1984).

therefore ineligible for the office of the presidency.⁷ This “birther” movement gained so much popularity, that in 2011, 25% of Americans believed the President Obama was not a natural-born citizen.⁸ While this distraction kept many people busy, another large portion of the election coverage was dedicated to Governor Mitt Romney’s release of his federal tax returns.⁹

The extensive mainstream media coverage of the birther and tax return “issues” can be described as “faux issues,”¹⁰ which are aimed at exploiting and distracting the voting populace.¹¹ This type of media coverage often has the effect of disenfranchising the citizenry by decreasing overall voter competence.¹² Voters are generally “haphazard consumers of political information,”¹³ which allows false and distracting issues to have significant detrimental effects on information received. Understanding that voters make mistakes, “view facts through a partisan lens, and have some simply outlandish opinions” is crucial in realizing that faux issues easily affect voters.¹⁴ This is evidenced in a study by scientists from Cornell University who claimed that many voters are not intelligent enough to make reasoned decisions and that voters “to the extent [that they] are incompetent . . . are a worse judge of incompetence in other people.”¹⁵ The study also found that incompetent voters are “inherently unable to judge the competence of other people, or the quality of those people’s ideas.”¹⁶ If voters are already, on average, less than informed, the potential effect of faux issues aimed at further distracting the population is frightening.

To increase voter competence and discredit these false issues, specifically during presidential elections, a federal agency needs to be created where voters can obtain nonpartisan, unbiased election information. This hypothesized agency, the Voter Information Office (VIO), would be a place where voters could look to for an objective assessment of election information.

⁷ Brian Levin, J.D., *All Candidates, President Obama Included, Should Release University Transcripts*, HUFFINGTON POST (July 13, 2012), http://www.huffingtonpost.com/brian-levin-jd/all-candidates-president_b_1672388.html.

⁸ Stephanie Condon, *Poll: One in Four Americans Think Obama Was Not Born in U.S.*, CBS NEWS (Mar. 18, 2013, 12:21 AM), http://www.cbsnews.com/8301-503544_162-20056061-503544.html.

⁹ Levin, *supra* note 7.

¹⁰ See generally *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (noting that Justice Stewart did not attempt to categorize the specific film category (pornography), but rather stated, “I know it when I see it.” This *I know it when I see it* methodology can easily be applied to faux issues, as they are not easily definable, but easily distinguishable).

¹¹ E.J. Dionne Jr., *Don’t Knock the Folks on the Bus*, 572 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 140-41 (2000); Gardner, *supra* note 6, at 927-28.

¹² See; Chris Edelson, *Lies, Damned Lies, and Journalism: Why Journalists Are Failing to Vindicate First Amendment Values and How a New Definition of “The Press” Can Help*, 91 OR. L. REV. 527, 528 (2012) (“American journalistic norms facilitate lying by politicians, candidates for office, and other public figures”); David Schleicher, *Irrational Voters, Rational Voting*, 7 ELECTION L.J. 149, 150 (2008).

¹³ Christopher S. Elmendorf & David Schleicher, *Districting for a Low-Information Electorate*, 121 YALE L.J. 1846, 1849 (2012).

¹⁴ Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 383 (2013).

¹⁵ Daily Mail Reporter, *Are Americans Too Dumb for Democracy? Scientists Claim Voters Lack the Sophistication to Recognize Good Ideas*, DAILY MAIL ONLINE (Feb. 29, 2012), <http://www.dailymail.co.uk/news/article-2108345/Are-Americans-dumb-democracy-Scientists-claim-voters-lack-sophistication-recognize-good-ideas.html>.

¹⁶ *Id.*

Whether the issue is if President Obama was born in the United States (yes, he was) or if Mitt Romney was truly the *Scrooge McDuck* that his opponents painted him and accused him of being,¹⁷ the VIO could effectively *correct* these issues without comprising the First Amendment. False issues like these truly do have an effect on the competence and credulity of the electorate.¹⁸ Voter incompetence cannot be allowed to stand “in the way of achieving rational electoral outcomes.”¹⁹

The purpose of this Comment is to combat decreasing voter competency by creating a legislative agency whose purpose to publish nonpartisan, unbiased and objective information during presidential election seasons. Section I will outline and analyze the problem behind voter incompetence. Section II will discuss the relationships that the government, politicians and the private sector have with voter competency. Section III will discuss the proposed solution of the creation of a legislative agency aimed at increasing voter competency.

II. VOTER COMPETENCY IN DYSFUNCTIONAL ELECTIONS

Voter competence is the ability of a voter to vote intelligently.²⁰ An educated vote not only allows a person to correctly vote his or her policy preferences, but in the aggregate, educated votes allow voters to correctly choose the candidates that are preferred by the majority of voters.²¹ This permits candidates that truly share the majority of the voters’ policy preferences to become the elected politicians, which is an important distinction because at times the candidates that win do not share the majorities’ vote preferences.²² The judiciary has suggested that the best way for the population to vote their preferences is to strengthen political parties to equip the voters with better calibrated cues in order to voter more intelligently.²³ This idea is essentially a legal fiction because political parties often appeal to voters’ irrational sides in order to create falsehoods about their opponents,²⁴ so strengthening political parties would only exacerbate the already existing problem. This problem is evidenced when both political parties and candidates in hotly contested races gain advantages by distracting and “dumbing-down” voters by focusing their attention on faux issues that are not wholly relevant to a candidate’s strength as a leader.²⁵ Faux issues are unlikely to be truthful and typically not directly related

¹⁷ See John Podhoretz, *Romney the giver*, N.Y. POST (Sep. 22, 2012), http://www.nypost.com/p/news/opinion/opedcolumnists/romney_the_giver_7nLMOZGulo2zq1Lm rNInjN (noting that when Governor Romney released his tax returns for two years, he earned \$35.6 million, paid almost \$5 million in taxes, and donated \$7 million to charity).

¹⁸ See Condon, *supra* note 8.

¹⁹ *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

²⁰ See Edelson, *supra* note 12, at 535(citing ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE*, 33-34 (2012) (describing voter competence as the “cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge”).

²¹ Elmendorf & Schleicher, *supra* note 14, at 378-80.

²² *Id.* at 383 (citing Richard R. Lau et al., *An Exploration of Correct Voting in Recent U.S. Presidential Elections*, 52 AM. J. POL. SCI. 395, 396-98 (2008)).

²³ Elmendorf & Schleicher, *supra* note 14, at 426.

²⁴ *Id.* at 383.

²⁵ John Hawkins, *The 7 Most Notorious Twists in the Anthony Weiner Scandal*, TOWN HALL (July 27, 2013), <http://townhall.com/columnists/johnhawkins/2013/07/27/the-7-most-notorious-twists-in->

to a candidate's policies or platforms. These issues are raised not to encourage sound policy debate, but rather to specifically discredit or smear a candidate's image.²⁶ When these aforementioned actors effectively distract the voters, voter competence is compromised.

The right to participate in an election exemplifies the democratic process and when this process is "thwarted by . . . deception, the fabric of the nation begins to unravel."²⁷ The actors behind these faux issues are often wealthy and/or hungry for increased media attention. These actors cannot hijack elections solely because they are looking to exploit the system for their own financial or personal gain at the expense of a candidate. An election that is controlled by a few wealthy individuals "hardly can be said to promote . . . [and support] democratic self-government."²⁸

When the specific faux issue gains enough ground and media attention, the voters subsequently become more disenfranchised as the issue increasingly distracts them from legitimate election coverage. The voters are disenfranchised not by having their vote taken from them, but by the influence of the irrelevant issues constantly being streamed in the news cycle. When these issues infiltrate the minds of the voters, the democratic process is weakened because attention is shifted away from both the truth and issues of importance. Ostensibly, during the presidential elections of the modern era, the winner is often the candidate that is able to withstand as many of these faux issues as possible, which is not necessarily the candidate that shares in the majority's policy preferences.²⁹ To have an American presidential election based on candidates' merits and their ability to lead the country would truly be an interesting sight to see. This ideal election has often been stripped from the voters due to these distracting issues. A candidate's policy positions are often the last thing to lose them the election, while the first is a scandal or a faux issue deceptively interjected into the political forum.³⁰

The one positive aspect of these faux issues is that once the election is over, the issues are no longer covered or furthered by their respective "pushers". The media is no longer flooded with attacks on President Obama's birthplace or with politicians demanding the mandatory release of ten years of a presidential candidate's federal tax returns. But just as these issues fade out of existence after

the-anthony-weiner-scandals-n1650344/page/full (It is to be noted that at times, these issues can be relevant, as certain issues/scandals speak to the moral integrity of a candidate, i.e. Anthony Weiner. Anthony Weiner's "issues" can easily be differentiated from the media smearing and discrediting Mitt Romney's character by suggesting that he abused his dog because he left him on top of his car in a kennel during a car ride).

²⁶ See Levin, *supra* note 7 (Donald Trump's "birther" movement); see also Bernie Becker, *Dem Bill Would Require 10 Years of Tax Disclosures by Presidential Candidates*, THE HILL (July 18, 2012), <http://thehill.com/blogs/on-the-money/domestic-taxes/238627-top-democrat-proposes-mandatory-tax-return-release-for-presidential-candidates> (Democratic Congressman Sandy Levin's proposed legislation that would require presidential candidates release ten years of federal tax returns).

²⁷ Daniels, *supra* note 46, at 387.

²⁸ Levinson, *supra* note 3, at 902.

²⁹ "Earn" in this context is used to denote a candidate that wins this or her respective election because a majority of the voters side with the candidate's platform and policy preferences.

³⁰ Noting that it is not mean that legitimate issues of moral character or other serious issues that could undermine the office of the Presidency are to be discarded as faux issues, but rather faux issues are as they are defined in this paper.

an election, they cyclically return to the forefront and dominate the news coverage. This means that the 2016 Presidential Election's coverage of faux issues is destined to be plentiful. If the United States is to consist of a responsive and competent electorate, a change needs to happen as "our democracy is founded on . . . a vision of informed citizens self-governing."³¹

III. GOVERNMENTAL ACTION AIMED AT EDUCATING VOTERS

"[T]he state is generally prohibited from setting standards for accuracy in public discourse that would allow the public to rely on factual statements, [so] within public discourse, the message of the First Amendment is *caveat emptor*."³² Courts have recognized that there needs to be substantial regulation of elections to ensure that they are fair and honest.³³ Without election regulations, the Court in *Storer v. Brown* believed that elections would be chaotic and wholly undemocratic.³⁴ Courts have been reluctant to curb most types of election speech due to First Amendment concerns, and have carefully sorted among the substantial regulations imposed on campaign finance and political actors using their money to influence speech.³⁵ Campaign finance regulation is largely aimed at preventing wealthy entities from transferring their power to the political marketplace.³⁶ While a large majority of the faux issues pushed into the election coverage are done so by wealthy entities, these wealthy individuals do not exclusively push the issues.³⁷ This Comment does not argue for a decrease in the ability for any entity to speak, because that could unduly burden free speech, but rather looks to educate the voters enough so they can differentiate these faux issues from legitimate election issues.³⁸

While the government has not taken any specific actions to combat faux issues, the executive branch has specifically taken advantage of the disputes they create to garner media attention for certain issues.³⁹ This was evidenced by the current administration during the 2012 election when President Obama was

³¹ Matthew Tolliver, *An Educated Voter Is Our Democracy's Best Citizen*, HUFFINGTON POST (Sept. 15, 2012), http://www.huffingtonpost.com/matthew-tolliver/political-discourse_b_1886977.html.

³² Edelson, *supra* note 12, at 559 (citing ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE*, 31 (2012)).

³³ *Storer v. Brown*, 415 U.S. 724, 730 (1974).

³⁴ *Id.*

³⁵ See generally *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *McConnell v. FEC*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976).

³⁶ Levinson, *supra* note 3, at 890, (citing Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998)).

³⁷ Levin, *supra* note 7; Chris Cillizza, *What George Soros's Donations Tell Us About 2012*, WASHINGTON POST (May 8, 2012), http://www.washingtonpost.com/blogs/the-fix/post/what-george-soros-donations-tell-us-about-2012/2012/05/08/gIQAbemfAU_blog.html (For example, billionaire, Donald Trump played a large part in the popularity of the birther movement, and George Soros has often used his extensive wealth to interject his 'issues' into the news).

³⁸ See generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (noting that the Court stated that restricting the political speech of some to increase the relative voice of others could not be sustained under the First Amendment)

³⁹ David Jackson, *Obama Raises the Romney 'Dog Issue'*, USA TODAY (Aug. 19, 2012), <http://content.usatoday.com/communities/theoval/post/2012/08/obama-raises-the-romney-dog-issue-1#.UiOjgBxSMbo>.

campaigning in Iowa on wind energy. This speech was made during the time that the media was salivating over the news “story” that Governor Romney put his family dog, Seamus, in a kennel atop of his car during a family car ride.⁴⁰ This story even escalated to the level where ABC’s Jake Tapper asked President Obama’s campaign manager Stephanie Cutter, “[i]s this one of the big policy debates that the Obama campaign wants to have, whether or not it was appropriate for Governor Romney to put his dog on the top of a car in 1983?”⁴¹ Tapper even described this type of speech by the President as “cable catnip,” illustrating its ability to quickly garner media attention that may not have been there before.⁴² This example of the government using this distracting personal issue to push another agenda evidences the widespread effect and use of faux issues. Jake Tapper was correct when he described this issue as “cable catnip” because like a cat with catnip, the media is unable to resist batting around these faux issues. While one may expect the media to use these issues for ratings advantage, government should be held to a higher standard. These issues not only distract the electorate from the legitimate issues at hand, they decrease voter competency on the legitimate issues because they are not being covered honestly.

The government must assume the role of an interventionist for voters to experience an honest diversity of thought and a free exchange of ideas.⁴³ This interventionist role is best served by the government assuming a role of an honest, unbiased data collector and reporter. Ideally, regular governmental affairs should be kept separate from a sitting President’s campaign, but this ideal is rather difficult in practice. The ability to differentiate between governance and campaigning is a difficult line to draw, because in one breath a leader can honestly discuss divisive issues and his or her proposed solutions for them, and in the next can be pushing a faux issue to discredit an opponent. There needs to be a way to separate a President’s campaign from the President’s role as leader of the United States. “Our democracy is only as good as our voters, and our election laws help determine how good they—or rather, we in practice are.”⁴⁴

A. Politician Influence on Voter Competency

Candidates and elected officials (together “politicians”) both have approached voter competency in strikingly different manners compared over the past sixty years. On one hand, politicians can be legitimately concerned with voter competency and therefore make an honest attempt at increasing voter education. On the other, politicians can treat voters as overly credulous and use faux issues to discredit another party. This tactic distracts voters and trivializes the information that they receive during elections. At rare times, politicians will strive to push legislation that legitimately attempts to increase voter

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² gorapidresponse, *Carney Asked How Citing Romney Dog Is Part of Lifting up Dialogue*, YOUTUBE, <http://www.youtube.com/watch?v=0S1qTnbm218> (last visited Jan. 30, 2014).

⁴³ Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 520-21 (2001).

⁴⁴ Elmendorf & Schleicher, *supra* note 13, at 1886.

competency⁴⁵ without attempting to discredit another in the process.⁴⁶ The Voter Education Project (VEP), started by former U.S. Attorney General Robert F. Kennedy, was organized in response to the turbulent times of the civil rights era; the organization helped to educate and register the disenfranchised voters of the South.⁴⁷ This organization had a mission of nonpartisanship and largely fostered an increased competency in southern voters.⁴⁸

The faux issue politician will use his or her position and influence to push the issue to discredit a candidate, which will marginalize and distract the electorate. During the 2012 election, Representative Sandy Levin (D-MI), the top Democrat on the House Ways and Means Committee, promised to propose legislation that would require that all presidential candidates release ten years of tax disclosures.⁴⁹ Levin promised this during the height of the criticism against Governor Romney's refusal to release tax returns. As one of the top legislators on the House Ways and Means Committee (the chief tax-writing Committee in the House of Representatives), Levin had a certain amount of political clout to use in pushing this issue.⁵⁰ In response to Levin's promise, the Speaker of the House of Representatives John Boehner, stated that the issue was a sideshow and said voters are "not asking where in the hell the tax returns are . . . [w]hether it's the tax returns, whether it's Bain Capital, you'll see every distraction known to man."⁵¹ The distraction wasn't brought to forefront to promote an honest debate on the issue of tax returns in presidential elections, it was done to discredit Governor Romney and portray him as an ultra-wealthy conservative who didn't pay his fair share of taxes. This political potshot has no real effect in pushing legitimate legislation and it is doubtful that if pressed Rep. Levin would have actually brought the bill to the House. This "distraction" is exactly what this Comment hopes to combat, because attempts by politicians like Sandy Levin do nothing but hurt the image of politicians in general and train the electorate to pay attention to the tabloid sidelines. If there was a concerted effort by politicians on both sides of the aisle to discredit these faux issues, their effectiveness would be diminished and eventually their presence in the media would hopefully disappear.

⁴⁵ See Courtney E. Chartier, *Voter Education Project*, NEW GEORGIA ENCYCLOPEDIA, July 15, 2011, <http://www.georgiaencyclopedia.org/articles/history-archaeology/voter-education-project> (noting that the Voter Education Project (VEP) was founded during the civil rights era that gave funds to organizations to administer to voter education programs. The VEP was established by former U.S. Attorney General Robert F. Kennedy partially in order to "eliminate the need for public protests by civil rights organizations." The VEP was a nonpartisan organization that helped register and educate voters.)

⁴⁶ See Bernie Becker, *Dem Bill Would Require 10 Years of Tax Disclosures by Presidential Candidates*, THE HILL (July 18, 2012), <http://thehill.com/blogs/on-the-money/domestic-taxes/238627-top-democrat-proposes-mandatory-tax-return-release-for-presidential-candidates> (Democratic Congressman Sandy Levin's proposed legislation that would require presidential candidates release ten years of federal tax returns. The legislation was offered during the election when the media was focusing on Mitt Romney's tax returns).

⁴⁷ Chartier, *supra* note 73.

⁴⁸ *Id.*

⁴⁹ Becker, *supra* note 74.

⁵⁰ *Id.*; COMMITTEE ON WAYS & MEANS, <http://waysandmeans.house.gov/about/history.htm> (last visited Sept. 1).

⁵¹ Becker, *supra* note 74.

At times, elections no longer are an avenue used to assess a field of candidates, but rather they are a venue for a mud-slinging competition. The issues are rarely ever debated (outside of the official presidential election debates); candidates instead rely on a “he said, she said” model of campaigning.⁵² Candidates seemingly spend the majority of their airtime either discrediting the other candidate, or fending off an onslaught of media faux issues. These election characteristics are at the crux of the problem that harms the current election landscape in the United States. Even though these election features are easily verifiable and deducible, candidates and politicians do little to change them. Arguably, both candidates and politicians receive a benefit from marginalizing voters.⁵³ This may be a rather grim proposition, but it is one relevant in analyzing the effect of faux issues on voter competency. Candidates and elected officials know that their “cogent analysis of complex policy issues” will not light up the airwaves, so they pander to the media and push these faux issues to get into the limelight.⁵⁴

This may be a problem that could be equally blamed on the media, but it starts with the politicians, because without these faux issues being pushed frequently, the media would have much less to work with. The electorate seems to be disinterested in the “cogent analysis of complex policy issues” and more into the gossipy, lowbrow stories.⁵⁵ With the politicians definitely knowing that this is the case, it should be the candidates’ and elected officials’ duty to not “feed the beast” as journalist Matthew Tolliver puts it.⁵⁶ Politicians should hold themselves to a higher standard and should refuse to treat the citizens this way; but unfortunately the goal of the election is to get elected, and candidates will do *whatever* they can to achieve this. There is little hope of changing these behaviors by pointing out that politicians push these faux issues, because people working at these levels can effectively deflect and spin those accusations.⁵⁷ By the time that a reporter asks a politician why the media is discussing an issue, it is already too late; the media circus around the faux issue has already begun. The politician has likely already distracted the voters from the real issue at hand and has effectively discredited an opponent at the cost of the voters’ competency.⁵⁸

In an ideal campaign, the candidates would run on their policies and debate one another over their political stances. But, campaigns are not ideal; they are typically ugly and highly divisive. While a highly divisive campaign isn’t necessarily unfavorable, a highly divisive campaign driven by faux issues is

⁵² James Fallows, *Bit by Bit It Takes Shape: Media Evolution for the 'Post-Truth' Age*, ATLANTIC (Aug. 29, 2012), <http://www.theatlantic.com/politics/archive/2012/08/bit-by-bit-it-takes-shape-media-evolution-for-the-post-truth-age/261741/>.

⁵³ See generally Tolliver, *supra* note 51 (“[T]he public gets the news, and the campaigns, that it deserves. The institutions of media and government are a reflection of us . . . [u]nfortunately, the news stories that attract viewers, and thus dominate the airwaves, are not the ones with cogent analysis of complex policy issues. They are the ones about *other things*.”)

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Jackson, *supra* note 65 (Jake Tapper asks White House Press Secretary Jay Carney, if President Obama’s allusions to Governor Romney putting his dog on his roof was going to elevate political discussions, Carney responds by denying that he “was maybe naïve to think that a one line joke about a dog would become the principal focus of the coverage of the President for the day.”)

⁵⁸ *Id.*

detrimental. Candidates and politicians alike should make a united effort to no longer use these tactics to gain an edge on their opponents. This would support an election based more on merit, rather than an election based on the ability to withstand character attacks and scandals the longest.⁵⁹

B. Voter Competency and Private Actors

“Popular involvement in democratic deliberation requires at least that serious issues be covered in a serious way and that a significant portion of the citizenry is actually exposed to diverse views.”⁶⁰ The private sector culprit, namely, news and media outlets (together “news media”) often are the second responsible party regarding faux issues. Private “think tanks” also have some skin in the game, as they are often considered academic experts with valuable opinions.⁶¹ If think tanks were uniform in their approach to non-partisan, unbiased analysis during elections, voter incompetence would likely be less prevalent.⁶² Both the news media and think tanks should ideally serve as political watchdogs that keep the politicians and government in check by exposing corruption and incompetence.⁶³ Unfortunately, these two entities often fall short of this watchdog role.⁶⁴ “No lie is too extreme to be published, aired, and repeated, with little or no repercussion for its perpetrator.”⁶⁵ This quote is truly reflective of the current type of news that is fed to citizens on a daily basis.

Organizations like the Heritage Foundation and the Brookings Institute (and arguably FactCheck.org as well) are think tanks, which typically are nonprofit organizations that conduct analysis of public policy issues independent of interest groups, governments, or political parties.⁶⁶ These entities are quite influential on American policy, with “leading academics . . . diplomats, policymakers, and military personnel” among their staff.⁶⁷ The most common goal of think tanks is to influence policy makers and the citizens by their expert opinions through books, articles, and other various speaking engagements.⁶⁸ They do not operate like the news media as they present themselves in a more academic manner and “seek to legitimize their positions through academic

⁵⁹ Tolliver, *supra* note 51.

⁶⁰ Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 344 (1998).

⁶¹ Think Tanks will be broadly used throughout this section to refer to organizations such as FactCheck.org, the Brookings Institute, and the Heritage Foundations.

⁶² Danielle Kurtzleben, *Think Tank Employees Tend to Support Democrats*, US NEWS (Mar. 3, 2011), <http://www.usnews.com/news/articles/2011/03/03/think-tank-employees-tend-to-support-democrats>.

⁶³ Baker, *supra* note 95, at 324-25.

⁶⁴ *Id.*

⁶⁵ Edelson, *supra* note 12, at 531 (citing THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM at 62 (2012)).

⁶⁶ Note, *The Political Activity of Think Tanks: The Case for Mandatory Contributor Disclosure*, 115 HARV. L. REV. 1502, 1502 (2002) [hereinafter *The Political Activity of Think Tanks*].

⁶⁷ Kurtzleben, *supra* note 97.

⁶⁸ *The Political Activity of Think Tanks*, *supra*, note 101, at 1502 (citing DAVID M. RICCI, THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS 1 (1993)).

dialogue.”⁶⁹ Originally, think tanks were generally objective, but they are currently becoming increasingly partisan and ideological.⁷⁰ This trend leads to less widespread acceptance because their analysis is viewed as partisan and biased.⁷¹ Think tanks need to return to their former status of neutral analysts to increase their acceptance and legitimacy as an institution.⁷²

Institutional legitimacy is the perception that the actions of an entity are appropriate within a set of social norms, beliefs and values.⁷³ Without this legitimacy, the institutions themselves are less capable of success in their field.⁷⁴ When an entity has institutional legitimacy, their opinions garner more widespread acceptance than entities without this legitimacy.⁷⁵ Nonpartisanship is typically a sought after reputation amongst entities because with it comes widespread acceptance.⁷⁶ This ideal of maintaining a nonpartisan identity is key to the institutional legitimacy of think tanks.⁷⁷ With this nonpartisan identity a think tank is perceived as proposing objective, unbiased opinions, which in-turn gives the think tanks an opportunity to appeal to both parties.⁷⁸ An unbiased opinion is typically perceived as superior compared to a biased opinion because the opiner as a neutral third-party can best serve the interests of the other parties.⁷⁹ Think tanks are having an increasingly difficult time in maintaining this neutral third-party position. This is due to the nature of their funding, which generally comes from wealthy, private donors.⁸⁰ Private donors often give millions of dollars to fund these think tanks.⁸¹ These million-dollar donations often come with “fine-print,” in that usually the donor is usually a partisan figure who hopes to perpetuate their ideology.⁸² Think tanks generally do not hide their ideological character, and even those organizations that were not founded by

⁶⁹ *Id.* citing DIANE STONE, CAPTURING THE POLITICAL IMAGINATION: THINK TANKS AND THE POLICY PROCESS 16 (1996).

⁷⁰ *The Political Activity of Think Tanks*, *supra* note 101, at 1503.

⁷¹ Janie Lorber, *Think Tanks or Partisan Advocates? Distinction Is Getting Harder to See*, ROLL CALL (Dec. 8, 2012), http://www.rollcall.com/news/think_tanks_or_partisan_advocates_distinction_is_getting_harder_to_see-219801-1.html?pg=2.

⁷² A plausible way for think tanks to function without partisan funding is to utilize crowd sourcing.

⁷³ Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 970 (2009) (citing Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995)).

⁷⁴ *Id.* at 971.

⁷⁵ See generally Chris Johnston, *Ideology, SCOTUS, and Institutional Legitimacy*, DUKE UNIVERSITY (June 9, 2012), <http://sites.duke.edu/chrisjohnston/2012/06/29/ideology-scotus-and-institutional-legitimacy/> (noting that test “results strongly suggest that perceived ideological disagreement depresses institutional legitimacy”).

⁷⁶ Lorber, *supra* note 106.

⁷⁷ Jon Ralston, *Has Think Tank Removed Nonpartisan Pretense?*, LAS VEGAS SUN (July 29, 2011), <http://www.lasvegassun.com/news/2011/jul/29/has-think-tank-removed-nonpartisan-pretense/>.

⁷⁸ Lorber, *supra* note 106.

⁷⁹ See generally Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153 (1999) (noting that judges and mediators are perfect examples of when citizens rely on supposed neutral observers to handle their affairs, because as a neutral observer you are in theory not to be biased towards either party).

⁸⁰ Lorber, *supra* note 106.

⁸¹ *Id.*

⁸² *Id.* (noting that “[e]arlier this year, scholars at the libertarian Cato Institute successfully fought off efforts by conservative philanthropists David and Charles Koch to seize control of the organization, arguing it would damage the institute’s reputation for independence”).

donors with a partisan motive, the increased competition for operational funds has forced think tanks to *choose a side*.⁸³ Therefore, it can be said with some degree of reasonable certainty that “think tank behavior is shaped . . . by political and funding sources.”⁸⁴

Think tanks cannot effectively curb faux issues to increase voter competence due to their ever-increasing partisan polarization. Even the so-called moderate think tanks “skew decidedly to the left . . . the Center for Strategic and International Studies and the RAND Corporation . . . have [between] 84 percent and 91 percent” of their employees giving to the Democratic party.⁸⁵ The Council on Foreign Relations and the Aspen Institute, “the two think tanks with the most bipartisan spread of campaign contributions . . . still have more than two-thirds of their employees’ reported contributions going toward Democrats and liberal PACs since 2003.”⁸⁶ Conservative think tanks outnumber liberal think tanks two to one and outspend liberal think tanks by more than three to one.⁸⁷ With these types of statistics, it is increasingly difficult for privately funded and partisan think tanks to be able to provide voters with unbiased information on divisive faux issues during a presidential election. The think tanks would likely not be able to give truly unbiased, nonpartisan information to the voters while remaining loyal to their funding source. They would also be ineffective candidates for the job because faux issues are generated not to spur actual academic discourse, but rather to generate gossip and to discredit another’s character.

The next viable candidate capable of increasing voter competency by decreasing the effectiveness of faux issues is the news media. Famed journalist H.L. Mencken stated that “[t]he American people, true enough, are sheep . . . [t]hey are thus constantly bamboozled and exploited by small minorities of their own number, by determined and ambitious individuals, and even by exterior groups.”⁸⁸ This century-old belief is just as true today; the citizenry are constantly and purposefully duped by the news media. This rather pessimistic view of the nexus between the citizenry and the media is paramount in understanding the amount of influence the media *can* have over the citizens, especially during elections. In any race, the amount or areas of coverage that the news media reports on can disastrously affect candidates’ electability.⁸⁹ This tremendous influence that the media yields tends to produce skewed results because it facilitates deceit by politicians.⁹⁰ Politicians exploit this by

⁸³ *The Political Activity of Think Tanks*, *supra* note 101, at 1505.

⁸⁴ *Id.* (noting that this author also believes that federal tax constraints shape the behavior of think tanks, but this avenue is beyond the scope of this paper).

⁸⁵ Kurtzleben, *supra* note 97.

⁸⁶ *Id.*

⁸⁷ *The Political Activity of Think Tanks*, *supra* note 101, at 1504.

⁸⁸ Elmendorf & Schleicher, *supra* note 14, at 370 (citing H.L. MENCKEN, NOTES ON DEMOCRACY 78 (photo. Reprint 1977) (1926) (noting that the famed American journalist, H.L. Mencken, proposed this is the 1920’s when the news media was not as prevalent and expansive as it is today. His quote rings possibly even truer today than almost a century ago)).

⁸⁹ James Oliphant, *Herman Cain Drops out of Presidential Race*, L.A. TIMES (Dec. 3, 2011), <http://articles.latimes.com/2011/dec/03/news/la-pn-cain-announcement-20111203>.

⁹⁰ Edelson, *supra* note 12, at 528 (Edelson believes that “because many journalists are committed to the ideal of balance above truth, they are often incapable of calling out lies. Instead, they create a false equivalence by suggesting there are two sides to every argument. I call this the “balance trap”

purposefully making false statements, all the while knowing that journalists will generally not expose their lies.⁹¹ The media's failure to uniformly expose lies is a key component in understanding why the United States has such low voting competence.

The duty of the news media should be to "prevent any part of the government from deceiving the people . . . [and to] bare the secrets of government and inform the people."⁹² This duty is not achieved when the news media enables the politicians and candidates for office to spread faux issues. The news media should not just be a soapbox for politicians and candidates to spout their falsehoods; they should act as a "watchdog" and expose government incompetence and interject issues regarding it into the public sphere.⁹³ The media often fail in this idealistic (and probably unrealistic) role because competent voter involvement in elections requires that serious issues be covered in a thoughtful way.⁹⁴ Serious issues are not covered in an analytical way when the main story of the week is comparing President Obama eating dog meat to Seamus, Governor Romney's "mistreated" family pet.⁹⁵ So when the news media fails like this, the country itself suffers.⁹⁶

Just by circulating the story, the media perpetuates the faux issue and makes it newsworthy; and as professor Chris Edelson points out in his balance trap theory, journalists insist on presenting both sides of every story.⁹⁷ This in theory might sound advantageous, but when addressing an issue that is "demonstrably false," like a faux issue, the constant media coverage only gives the non-issue credibility.⁹⁸ The real dangers to this balance trap problem are that the voters "will not be able to separate fact from fiction on matters of public interest"⁹⁹ and "the public discourse will end up with more falsity than truth, and that some of this falsity will be positively toxic."¹⁰⁰ The toxicity that faux issues generate during their fomenting is exactly the type of harm that this Comment hopes to curb. These faux issues lack the social and epistemic value that is sought after by the news media.¹⁰¹ There is no real social value in the

problem—journalism that insists on presenting, without comment, two sides to every story, even when one side is demonstrably false.")

⁹¹ *Id.*

⁹² *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971).

⁹³ Baker, *supra* note 95, at 324-25 (1998).

⁹⁴ *Id.* at 344. See also Edelson, *supra* note 12, at 535 ("informing the public by providing accurate information and exposing false statements of facts by election officials" should be a value that a bona fide member of the press holds).

⁹⁵ Arthur Delaney & Hunter Stuart, *Obama Ate Dog, And He'd Do It Again To Remind You of Seamus Romney (VIDEO)*, HUFFINGTON POST (Apr. 30, 2012), http://www.huffingtonpost.com/2012/04/30/obama-ate-dog-seamus-romney_n_1464749.html.

⁹⁶ See Baker, *supra* note 95, at 344 (The journalists should expose these lies and the politicians should be reprimanded for their deceit); See also Edelson, *supra* note 12, at 530 (citing Rem Rieder, *Calling a Lie a Lie*, AM. JOURNALISM REV., <http://www.ajr.org/article.asp?id=5197> ("Journalists are reluctant to call a lie a lie, as they fear this will make them look biased").

⁹⁷ Edelson, *supra* note 12, at 530.

⁹⁸ *Id.*

⁹⁹ *Id.* at 531.

¹⁰⁰ Paul Horowitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 459-68 (2012) (noting that these ethical and professional norms that the news media is supposed to operate under does not typically apply to bloggers).

¹⁰¹ *Id.* at 468.

propagation of deception, specifically a known deception.¹⁰² The news media should want to inform the public, not marginalize the public. The persistence of faux issues marginalizes the public by distracting their attention from the legitimate issues of an election. This distraction in the aggregate creates a public opinion that is based on false information.¹⁰³ If the public opinion is truly based on this false information created by the perpetuation of distracting issues by the media, how is the government supposed to be able to create “reasonable public policy when the voters have such irrational opinions?”¹⁰⁴ The late C. Edwin Baker, often considered the foremost scholar on the media and journalistic integrity,¹⁰⁵ believed that public opinion could only be positive for the United States if it was informed.¹⁰⁶ He believed that the news media should provide a comprehensive, truthful and intelligent account of events.¹⁰⁷ The media is the primary entity that informs the public, which then the public uses that information to formulate their opinions.¹⁰⁸

The market often determines what news stories and to what extent they are covered.¹⁰⁹ The media benefits too much from this lowbrow journalism and the perpetuation of these faux issues because they often generate increased viewership, which in turn creates larger advertising revenue streams.¹¹⁰ The money generated from viewer-friendly faux issue coverage likely blankets any concern of voter competency. These distractions produce larger viewing audiences, and typically generate more citizen engagement than elections.¹¹¹ This means that, the current political “marketplace” generally fosters speech that is controlled by wealthy individuals or entities.¹¹² This framework is obviously not one conducive to fairness, generally because these few “high-dollar spenders” are often at odds (or perceived to be) with the majority of the electorate.¹¹³

Fully understanding all that is known about the effect that this type of “journalism” has on the voters, the news media should be absolutely free to act and report in this way. This statement is at odds with multiple academics that

¹⁰² Edelson, *supra* note 21, at 533 (citing Mark Tushnet, *Telling Me Lies: The Constitutionality of Regulating False Statements of Fact* 25, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930).

¹⁰³ *Id.* at 531, citing Robert C. Post, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 15 (2012).

¹⁰⁴ Schleicher, *supra* note 36, at 150.

¹⁰⁵ Josh Stearns, *Celebrating the Life of C. Edwin Baker*, FREEPRESS, (Sept. 15, 2013, 3:51 PM) <http://www.freepress.net/blog/09/12/10/celebrating-life-c-edwin-baker>.

¹⁰⁶ Baker, *supra* note 95, at 326.

¹⁰⁷ *Id.* at 348.

¹⁰⁸ Edelson, *supra* note 21, at 528.

¹⁰⁹ Levinson, *supra* note 3, at 902.

¹¹⁰ Tolliver, *supra* note 51 (“News outlets did and do report substantive news, but audience share is the goal. Unfortunately, the news stories that attract viewers, and thus dominate the airwaves, are not the ones with cogent analysis of complex policy issues. They are the ones about *other things*.” (The italicized words denote a link from the original source to an article about the most searched news story of 2011 on bing.com, the Casey Anthony trial. This proves Tolliver’s point in that the public does not care about the policy or actual issues; they care about the *other things*)).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ This can be seen in the current protests against Wall Street, or the “1 Percenters.” While these protests may not specifically be aimed at the financiers the news media, the protests have broadly targeted all members of the top 1% of income.

believe that these distracting and unsophisticated tactics employed by the news media should be regulated somehow.¹¹⁴ If the citizens' ability to differentiate legitimate news from faux news hinges on the curbing of those speakers, then the citizens are lost. The news media should be free to cover and discuss material without intervention and regulation from the government because the citizenry is better off when left to understand the material themselves.

IV. GOVERNMENTAL INTERVENTION FOR AN EDUCATED CITIZENRY

For a democratic society to truly afford citizens an honest promotion of thought, "the government must assume an interventionist role."¹¹⁵ This interventionist role should not to be assumed in the form of additional laws or restrictions on speech, but rather through a nationwide informative project. This route is advantageous because this process allows voters to view all the information presented, whether credible or not, and determine for themselves what is right and what is wrong.¹¹⁶ This deliberation by the voters likely will lead to a more vibrant and competent electorate.¹¹⁷ This sentiment was repeated by Supreme Court Justice Antonin Scalia in the familiar refrain, "[t]he premise of our system is that there is no such thing as too much speech—that the people . . . will separate the wheat from the chaff."¹¹⁸

The faux issues will become less credible as the falsity will be shown through the dissemination of this credible information. No longer will the media profit from the perpetuation of these faux issues. This should in theory effectively eliminate faux issues value to political players because pushing the issues will no longer gain them access to millions of people. This Comment proposes that to achieve these lofty goals, a new federal agency within the legislative branch needs to be created to inform and publish nonpartisan, unbiased and objective information to the voters during presidential elections. The Voter Information Office (VIO) will provide the voters with this information during presidential elections in order to increase voter competency. While the notion of expanding these agencies to tackle other issues is not a novel idea,¹¹⁹ the notion of expanding them in order to combat voter incompetence in presidential elections is novel.

¹¹⁴ See generally Levinson, *supra* note 3, at 904 (advocating restrictions on First Amendment rights of high-dollar spenders in order to bolster "the marketplace of ideas and the and the ability of listeners and low- or non-spending speakers to hear and speak"); see also Baker, *supra* note 95, at 317 (advocating the redefining of the term *press* in regards to the Press Clause in order to promote more competent journalism).

¹¹⁵ Levinson, *supra* note 3, at 926.

¹¹⁶ Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 13 (1995).

¹¹⁷ *Id.*

¹¹⁸ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J. dissent) *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¹¹⁹ Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012) (positing the creation of a new agency that would exist to provide Congress with a mechanism to assist in litigation); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 604 (1994) (positing the idea of expanding on the legislative agencies, but only at significant political and financial expense).

The federal government already has similar agencies with similar missions that benefit the people of the United States. These three legislative agencies all have a common trait in their nonpartisan and objective analysis. They were created to help Congress “bolster its expertise” in areas where they needed expert advice.¹²⁰ The institutional legitimacy of these agencies is of paramount concern in the current highly partisan environment.¹²¹ Even with this legitimacy, the three legislative agencies all share common accusations of partisanship.¹²² These types of accusations are to be expected of any organization that holds oneself out to be nonpartisan and unbiased. With the correct institutional safeguards the effect of these accusations can be minimized.¹²³ All three of these agencies also have the institutional capacity to partake in large-scale data collection and analysis.¹²⁴ This capacity is crucial for the VIO to effectively collect and analyze information for the citizens during Presidential elections.

The first of these agencies is the Congressional Budget Office (CBO), which provides Congress with budget-related information.¹²⁵ The CBO is “strictly nonpartisan and conducts objective, impartial analysis” and its analysts “are appointed solely on the basis of competence, without regard to political affiliation.”¹²⁶ International entities depend on the CBO to provide objective and rigorous analysis of issues.¹²⁷ This global recognition contributes to the institutional legitimacy of the CBO and arguably without this legitimacy the CBO would likely not be an effective budgetary analyst.¹²⁸ This is because if the analysis were to be tainted with partisan ideology, people of differing ideologies would less likely accept it.¹²⁹

Similarly to the CBO, the Congressional Research Service (CRS) is a legislative branch agency that provides Congress with objective research and

¹²⁰ Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 43 (2008).

¹²¹ James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 AM. J. POL. SCI., 139 (2009).

¹²² See Benjamin & Rai, *supra* note 160, at 44 (noting that “even with all the restrictions under which the GAO, CRS and the CBO operate, these entities have been subject to accusations of partisanship. Such complaints have been frequently lodged against the CBO and GAO); see also J.D. Foster, *Eliminating Partisan Analysis from Congress’s Support Agencies*, HERITAGE FOUNDATION, Sept. 18, 2013, 11:39 PM, <http://www.heritage.org/research/reports/2010/11/eliminating-partisan-analysis-from-congresss-support-agencies> (opining that the CBO and the CRS have a liberal bias in their analysis).

¹²³ Benjamin & Rai, *supra* note 160.

¹²⁴ Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 776 (2008).

¹²⁵ Congressional Budget Office (Sept. 16, 2013, 7:13 PM), <http://www.cbo.gov/about/overview>.

¹²⁶ *Id.*

¹²⁷ Donald W. Light, *Congressional Budget Office, Research and Development in the Pharmaceutical Industry-A Cbo Study*. Washington, DC: U.S. Congress (2006), available at <http://www.cbo.gov/sites/default/files/10-02-drug-d.pdf>, 32 J. HEALTH POL. POL’Y & L. 895, 900 (2007) (The European and Canadian parliaments depend on the CBO for assessments on issues).

¹²⁸ Gibson & Caldeira, *supra* note 161 at 151 (evidencing that legitimacy matters and when highly regarded institutions, such as the Supreme Court play judicial politics; this results in significant consequences in regards to the public opinion).

¹²⁹ *Id.* (noting “that institutional legitimacy is an enormously important source of political capital”).

policy analysis.¹³⁰ The CRS maintains an outstanding reputation due to its ability to remain nonpartisan, objective, and reliable.¹³¹ The members of Congress have confidence in the CRS's analysis because of the ability of its analysts to be objective.¹³² This is due in part to Congress's imposition of high standards of objectivity upon the CRS analysts.¹³³ Analysts from the CRS have even been publicly reprimanded for publicly engaging in partisan activities.¹³⁴ A reprimanded CRS analyst was fired for publicly airing his grievances against the Republican Party, because the CRS director believed the analyst would no longer be able to provide objective, nonpartisan analysis to Congress.¹³⁵ The CRS also has an outside-speech policy that forbids CRS analysts from engaging in outside political speech.¹³⁶ This is just an example of how these two agencies respect their mission of objectivity and nonpartisanship, and to what lengths they will go to protect this.

The third and final legislative agency to be evaluated is the Government Accountability Office (GAO). The GAO "is an independent, nonpartisan agency that works for Congress."¹³⁷ Often called the "congressional watchdog," [the] GAO investigates how the federal government spends taxpayer dollars."¹³⁸ The GAO's mission is to provide Congress with information that is timely, objective, nonpartisan, fact-based, fair, non-ideological and balanced.¹³⁹ Unlike the CRS and CBO, the GAO makes policy recommendations for federal agencies.¹⁴⁰

The VIO will not recommend or take positions on policy questions, but will only provide objective, nonpartisan, and unbiased information to voters during elections.¹⁴¹ The VIO will also have an internal office, similar to the CRS, which will review all outgoing reports to maintain balance and objectivity.¹⁴² This internal office will be crucial in assuring that VIO reports

¹³⁰ Congressional Research Service (Sept. 16, 2013, 8:12 PM), <http://www.loc.gov/crsinfo/about/history.html>.

¹³¹ Congressional Research Service (Sept. 16, 2013, 8:14 PM), <http://www.loc.gov/crsinfo/about/values.html>; *Keefe v. Library of Cong.*, 777 F.2d 1573, 1577-78 (D.C. Cir. 1985).

¹³² *Keefe*, 777 F.2d at 1581.

¹³³ *Id.* at 1583.

¹³⁴ *See Davis v. Billington*, 681 F.3d 377, 380 (D.C. Cir. 2012) (noting a formal reprimand of the Assistant Director of the Congressional Research Service because he published pieces critical of former Vice President Dick Cheney. The Director of the CRS questioned the Assistant Director's "ability to lead his division in providing objective, nonpartisan analysis . . . [and] how members of Congress could trust [his] leadership on military-commissions issues given his public opposition to current policy"); Benjamin & Rai, *supra* note 160, at 44-45 (noting that "even with all of the restrictions under which the GAO, CRS and the CBO operate, these entities have been subject to accusations of partisanship . . . [but the] CRS has largely avoided such accusations, but in doing so has demonstrated the lengths to which it believes it needs to go in order to avoid any taint of partisanship . . . [as] it has an internal office whose only job is to review all outgoing reports for balance and objectivity").

¹³⁵ *Davis v. Billington*, 681 F.3d 377, 380 (D.C. Cir. 2012).

¹³⁶ *Id.*

¹³⁷ Benjamin & Rai, *supra* note 160, at 44.

¹³⁸ U.S. Government Accountability Office, (Sept. 16, 2013, 9:12 PM), <http://www.gao.gov/about/index.html>.

¹³⁹ *Id.*

¹⁴⁰ Benjamin & Rai, *supra* note 160.

¹⁴¹ *Id.* at 44 (noting that this refusal is similar to the CRS and CBO whom also refuse to take policy positions).

¹⁴² *Id.* at 44-45.

maintain their objectivity. The members of this internal office will be comprised of a bi-partisan group of Congress members, to best ensure objectivity. The bi-partisan board is a characteristic that is shared by the CRS and the now-defunct Office of Technology Assessment (OTA).¹⁴³ The bi-partisan board not only helps ensure objectivity but also gives institutional legitimacy to the agency in the eyes of the public, just like the CBO, CRS and GAO maintain.¹⁴⁴

The VIO will incorporate the most “pro-objectivity” aspects from each of the legislative agencies to maintain this legitimacy. The head or “director” of the VIO will be nominated by the President and confirmed by the House of Representatives. This is similar to the appointment of a Supreme Court Justice,¹⁴⁵ but instead of the Senate approving the nominee, the House of Representatives will handle the approval process by a majority vote. The VIO will employ roughly ten analysts during the presidential election season, which for these purposes has been limited to every two years preceding a presidential election. For example, if the VIO began operation today it would convene on November 8th, 2014, and end on November 8th, 2016, with the next “term” convening again on November 8th, 2018. The quadrennial convening would allow the VIO to operate on a smaller budget, which is very important in the current economic times.

The VIO will employ a similar but yet distinctive mission statement in relation to the three aforementioned legislative agencies. The mission statement effectively outlines the agencies’ purpose and characteristics. The CBO, GAO and CRS share a similarly worded mission statement that encompasses their goal to remain objective. A similar mission statement would be shared by the VIO to draw comparison to the three extant agencies. This comparison would hopefully allow the VIO to “feed off” the other three agencies’ positive reputations. A sample mission statement of the VIO would be “to provide to the citizenry with objective, nonpartisan and unbiased election-specific information during each presidential election season.” This simple and pertinent mission statement effectively conveys the purpose of the VIO in a way that everyone can understand.

The VIO will not select information arbitrarily to analyze, but yet will employ a method used by the current Obama administration called *We the People*, which encourages citizens to petition the government. Citizens will petition the VIO with their respective election questions and in return will receive an official statement back from the VIO. *We the People* operates in a way that when a petition garners enough support, the White House staffers and policy experts will review it and issue an official response.¹⁴⁶ The VIO will require that 20,000 signatures be obtained in thirty days before an official response will administered. This prerequisite is in place to ensure that petitions before the VIO are relevant and pertinent to presidential elections.¹⁴⁷ The information that these

¹⁴³ *Id.* at 45-46.

¹⁴⁴ *Id.* at 44.

¹⁴⁵ U.S. CONST. art. II, § 2, cl. 2.

¹⁴⁶ The White House, *We the People: Your Voice in Our Government* (Sept. 18, 2013, 9:56 PM), <https://petitions.whitehouse.gov/how-why/step-step-guide> (giving the people a forum to redress and petition the government).

¹⁴⁷ See generally Megan Garber, *The White House Petition Site Is a Joke (and Also the Future of Democracy)*, ATLANTIC (Jan. 16, 2013),

official responses relay will hopefully decrease the circulation and effectiveness of faux issues while at the same time providing the people with an objective source for their election information queries. The readily available access to this information will expectantly over time increase the competency of voters by discrediting faux issues by providing an informed, credible source of information.¹⁴⁸ Voters' unrestrained access to this information is crucial in bolstering their democratic competence.¹⁴⁹ This is likely to occur because the increase in exposure to objective, nonpartisan information will decrease voter incompetency over time.¹⁵⁰

The Voter Information Office is ideally not a perpetual legislative agency. In time it is hoped that eventually the VIO will become an unnecessary governmental agency; because its goals of curbing the effects of faux issues and increasing voter competency will have been achieved. Achievement can take many forms. In regards to faux issues, achievement would be where the news media has been effectively discouraged from reporting them because the voters no longer find these issues as credible or worthy of their time and energy. This is a lofty goal, but can hopefully be achieved over time with an effective VIO. This aspect of a time-sensitive agency is also appealing when considering funding, because as previously mentioned, in the current money-conscious society the federal government need be concerned with spending money wisely.¹⁵¹

Frederick Schauer¹⁵² believes that the United States has such a tradition of free speech that the government itself cannot be trusted "to decide which ideas are true and which are false."¹⁵³ This opinion is not necessarily in conflict with the current proposal, because while the VIO would be distributing objective statements regarding the issues; the statements are not necessarily a true/false determination, but rather an assessment of the issue provided the facts. The readers of the statements ultimately bear the responsibility to decide for themselves whether they believe the information to be credible. The old adage rings true, that one does not need to "reinvent the wheel." This is especially true with the VIO, as it employs an already proven, workable infrastructure. "The

<http://www.theatlantic.com/technology/archive/2013/01/the-white-house-petition-site-is-a-joke-and-also-the-future-of-democracy/267238/> (noting that at times the petition site has been used in a jokingly manner, but realizing this has also gained it notoriety and that legitimate issues are often presented to the government for redress).

¹⁴⁸ Sullenger, *supra* note 44, citing Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI., 463, 467-78 (2004) (opining that citizens are incompetent due to limited facts which they based their decisions on and the lack of informed, credible sources).

¹⁴⁹ N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

¹⁵⁰ Tolliver, *supra* note 51 (noting that "half-baked TV ads play to our baser instincts, knowing that only a small percentage of viewers will dig past the sounds bite" and that the viewers need to divert some portion of the focus away from the "political sideshow" that are behind these TV ads.).

¹⁵¹ Rasmussen, *70% Say Government Does Not Spend Taxpayer Money Wisely*, RASMUSSEN REPORTS (Sept. 18, 2013, 11:18 PM),

http://www.rasmussenreports.com/public_content/business/general_business/october_2010/70_say_government_does_not_spend_taxpayer_money_wisely.

¹⁵² Frederick Schauer, UNIVERSITY OF VIRGINIA SCHOOL OF LAW (Sept. 18, 2013, 11:30 PM), <http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/1206076> (noting that Frederick Schauer is a Harvard Law School graduate who has taught at Harvard University, the University of Michigan, and the University of Virginia law schools and is considered an expert on freedom of speech and the press and constitutional law issues).

¹⁵³ Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 916 (2010).

importance of his [the President's] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.”¹⁵⁴

V. CONCLUSION

The greatest problem that faces the democracy of the United States is an inert citizenry, because “public discussion is a political duty; and . . . should be a fundamental principle of the American government.”¹⁵⁵ This statement in 1927 is as true today as it was then. Uneducated citizens will eventually cause the demise of a democracy. The government cannot allow its citizens to be taken advantage of by the news media, politicians and other actors who wish to disenfranchise the voters for their own personal gains by treating them as incompetent and ignorant. No longer can we allow these faux issues to distract the voters from a real, legitimate, policy-driven election. An election on the merits of a candidate cannot seem like an impossibility. All of these seemingly lofty goals cannot be achieved without changing the current framework of elections. The government needs to assume an interventionist role if the competency of our voters is to improve. The Voter Information Office will be a forum where people can get a nonpartisan, objective and unbiased presentation of the fact because a “[s]ociety cannot exist as a babble of voices.”¹⁵⁶

¹⁵⁴ *Burrows v. United States*, 290 U.S. 534, 545 (1934).

¹⁵⁵ *Whitney v. California*, 274 U.S. 357, 375 (1927).

¹⁵⁶ *Baker*, *supra* note 95 at 365.