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APPLE PIE PROPAGANDA? THE SMITH–MUNDT ACT BEFORE AND AFTER THE REPEAL OF THE DOMESTIC DISSEMINATION BAN

Weston R. Sager

ABSTRACT—For over sixty years, the Smith–Mundt Act prohibited the U.S. Department of State and the Broadcasting Board of Governors (BBG) from disseminating government-produced programming within the United States over fears that these agencies would “propagandize” the American people. However, in 2013, Congress abolished the domestic dissemination ban, which has led to a heated debate about the role of the federal government in free public discourse. Although the 2013 repeal of the domestic dissemination ban promotes greater government transparency and may help counter anti-American sentiment at home, it also gives the federal government great power to covertly influence public opinion. To curb the potential harm of surreptitious government propaganda, while also preserving the benefits of repeal, this Note advocates for requiring the State Department and the BBG to clearly attribute any government-produced programming these agencies disseminate within the United States. This Note contends that attribution can be best accomplished in one of two ways: by passing new attribution legislation similar to that of the failed Truth in Broadcasting Act of 2005 or by expanding the judicially created government speech doctrine to require these agencies to properly attribute any materials they distribute to the American public.

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INTRODUCTION

In 2012, the United States spent over three-quarters of a billion dollars funding government agencies that produce and broadcast programming¹ around the globe.² Yet, for over sixty years, all international broadcasts produced by the federal government could not be disseminated within the United States. A longstanding provision contained within the Information and Educational Exchange Act of 1948 (commonly known as the Smith–Mundt Act) prohibited the federal government from domestically disseminating any government-produced programming intended for a foreign audience, such as Voice of America and Radio Free Europe broadcasts.³ That all changed when the ban was lifted on July 2, 2013, allowing the U.S. Department of State and the Broadcasting Board of

¹ In this Note, “programming” refers to all text, pictures, audio, and video intended for distribution to an audience. The terms “programming,” “broadcasts,” “materials,” and “content” are used interchangeably.

² BROAD. BD. OF GOVERNORS, BROADCASTING BOARD OF GOVERNORS 2012 ANNUAL REPORT 47 (2012), available at <http://www.bbg.gov/wp-content/media/2013/05/BBG-2012-Annual-Report.pdf> [<http://perma.cc/C45D-PCMF>].

³ As explained in Part I of this Note *infra*, a de facto ban existed in the original Smith–Mundt Act that was passed in 1948. See 22 U.S.C. § 1461 (Supp. II 1948). A de jure ban was in place from 1972 to 2013. See *id.* (Supp. II 1972); *id.* §§ 1461, 1461-1a (2012). From 1990 on, Americans could access government-produced materials that were over twelve years old. *Id.* (1994). Additionally, certain Americans could “examin[e]” government-produced programming in person at the State Department’s headquarters starting in 1948. *Id.* (Supp. II 1948).

Governors (BBG) to disseminate their programming to the American people with few restrictions.⁴

The repeal of the domestic dissemination ban has generated an impassioned debate. Supporters laud the repeal because they believe it will promote government transparency, allowing Americans to monitor overseas government broadcasts⁵ and to study source material that was previously off limits.⁶ Others favor the repeal because they believe it will allow the State Department and the BBG to target émigrés with pro-American programming in their native language, countering the foreign propaganda that freely streams into the United States.⁷ Those opposed believe that the repeal will compromise the independence of the press⁸ and allow the federal government to direct propaganda at its own people.⁹ More radical members of this group believe that the repeal is an ominous first

⁴ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1078, 126 Stat. 1632, 1957–59 (codified as amended at 22 U.S.C. §§ 1461, 1461-1a (2012)). For the original text of the bill that was incorporated into the National Defense Authorization Act for Fiscal Year 2013, see H.R. 5736, 112th Cong. (2012) (“Smith-Mundt Modernization Act of 2012”). A predecessor to this bill was introduced on July 13, 2010. H.R. 5729, 111th Cong. (2010) (“The Smith-Mundt Modernization Act of 2010”).

⁵ See, e.g., Emily T. Metzgar, *Public Diplomacy, Smith-Mundt and the American Public*, 17 COMM. L. & POL’Y 67, 99 (2012) (“Reform would make government evaluation of American public diplomacy efforts easier to measure and the increased visibility and transparency would lead to improved accountability to the taxpayers who fund the work.”); Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act’s Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL’Y 1, 1 (2006) (“The domestic dissemination ban may have outlived its usefulness and relevance. . . . [and] contradicts general U.S. policy promoting transparency and encouraging the free and open flow of information.”).

⁶ See, e.g., Palmer & Carter, *supra* note 5, at 11; Charles F. Gormly, Note, *The United States Information Agency Domestic Dissemination Ban: Arguments for Repeal*, 9 ADMIN. L. REV. AM. U. 191, 198 (1995). Others believe the ban was simply ineffective. See, e.g., Jeremy Berkowitz, *Raising the Iron Curtain on Twitter: Why the United States Must Revise the Smith-Mundt Act to Improve Public Diplomacy*, 18 COMM.LAW CONSPPECTUS 269, 286–87 (2009); Palmer & Carter, *supra* note 5, at 29; Gormly, *supra*, at 202–04.

⁷ See, e.g., *NDAA 2013: Congress Approves Domestic Deceptive Propaganda*, RT (May 22, 2012, 5:03 PM), <http://rt.com/usa/propaganda-us-smith-amendment-903/> [<http://perma.cc/MV59-U4AW>]; *Thornberry and Smith Introduce Bill to Help Counter Threats in Information Age*, U.S. CONGRESSMAN MAC THORNBERRY (May 15, 2012), <http://thornberry.house.gov/news/documentsingle.aspx?DocumentID=296108> [<http://perma.cc/FNW7-QR8S>]; *infra* note 160 and accompanying text.

⁸ See, e.g., Glenn Greenwald, *Rep. Smith on His Controversial Bills*, SALON (May 22, 2012, 11:05 PM), http://www.salon.com/2012/05/22/rep_smith_on_his_controversial_bills [<http://perma.cc/PHH2-R9CH>]; see also Palmer & Carter, *supra* note 5, at 11 (“In 1995, reports circulated within USIA that U.S. commercial TV and radio operators were lobbying to retain the [Smith–Mundt] Act restrictions on domestic information in order to limit news competition between government and private news agencies.”).

⁹ Historically, Americans have had an “intense dislike of all sorts of government propaganda operations.” Burton Paulu, *The Smith-Mundt Act: A Legislative History*, 30 JOURNALISM Q. 300, 301 (1953).

step toward a bleak Orwellian future in which the federal government dominates American media.¹⁰

Fueling the debate is widespread misunderstanding about the repeal. The bill's own sponsors, Representatives Mac Thornberry (R-Tex.) and Adam Smith (D-Wash.),¹¹ have expressed differing views about the underlying purpose of their amending legislation.¹² Adding to the confusion are inaccurate stories published shortly after the ban was officially repealed,¹³ as well as preexisting uncertainty about the federal government's ability to disseminate government-produced programming within the United States.¹⁴

As argued in this Note, the repeal of the domestic dissemination ban is both beneficial and detrimental. On the one hand, the repeal grants American citizens greater access to information about the federal government and bestows the federal government with greater flexibility to counter anti-American sentiment within the United States. However, the repeal changed too much too quickly. Despite broad support in the legal academy for a limited repeal,¹⁵ Congress stripped the Smith–Mundt Act of

¹⁰ See, e.g., Mark LeVine, *The High Price of 'Dark Fusion,'* AL JAZEERA (June 4, 2012, 12:14 PM), <http://www.aljazeera.com/indepth/opinion/2012/06/20126294459762126.html> [<http://perma.cc/8VY8-B4HW>] (arguing that the repeal of the domestic dissemination ban is part of an “even darker Orwellianism” developing within the United States); Joe Wolverton, II, *Congressmen Propose Domestic Distribution of Pro-U.S. Propaganda,* NEW AM. (May 30, 2012), <http://www.thenewamerican.com/usnews/congress/item/11560-congressmen-propose-domestic-distribution-of-pro-us-propaganda> [<http://perma.cc/4ETB-E5CB>] (“[C]itizens and residents will be exposed to government-produced propaganda in a manner that would impress even Orwell’s Big Brother.”).

¹¹ H.R. 5736, 112th Cong. (2012). The Smith–Mundt Modernization Act of 2012 was incorporated into the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1078, 126 Stat. 1632, 1957–59 (codified as amended at 22 U.S.C. §§ 1461, 1461-1a (2012)).

¹² Compare Thornberry, *supra* note 7 (stating that the amendment to the Smith–Mundt Act would primarily assist in combating domestic terrorism), with Greenwald, *supra* note 8 (stating that the amendment to the Smith–Mundt Act would primarily promote government transparency).

¹³ See, e.g., Michael Hastings, *Congressmen Seek to Lift Propaganda Ban,* BUZZFEED (May 18, 2012, 3:27 PM), <http://www.buzzfeed.com/mhastings/congressmen-seek-to-lift-propaganda-ban> [<http://perma.cc/5YN-6Y2C>] (misstating that the repeal of the ban applied to all government agencies instead of just the State Department and the BBG); see also Juan Cole, *Congress Wants the Department of Defense to Propagandize Americans,* INFORMED COMMENT (May 20, 2012), <http://www.juancole.com/2012/05/congress-wants-the-department-of-defense-to-propagandize-americans.html> [<http://perma.cc/Y3QP-YJAT>] (mischaracterizing the Smith–Mundt Modernization Act of 2012 as legislation that applied to the Department of Defense).

¹⁴ See Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting,* 40 CAP. U. L. REV. 967, 990–97 (2012); Metzgar, *supra* note 5, at 67–68.

¹⁵ Several academics advocated for repealing the domestic dissemination ban, but only if it were coupled with new limitations. See, e.g., Berkowitz, *supra* note 6, at 307–08 (arguing for a complete overhaul of the government broadcasting bureaucracy and advocating for attribution of government-produced programming because unattributed pieces “increase the amount of distrust between the government and its people”); Metzgar, *supra* note 5, at 96–97 (“Many concerns about potentially

all meaningful restrictions on the domestic dissemination of government-produced programming,¹⁶ imparting the State Department and the BBG with enormous power to anonymously disseminate their programming within the United States.

Rather than argue for or against the repeal of the domestic dissemination ban, this Note contends that government-produced programming disseminated within the United States should be clearly attributed. Unlike a blanket prohibition on the domestic dissemination of government-produced programming, which has proven difficult to enforce,¹⁷ attribution is straightforward and comparatively easy to implement. Moreover, attribution preserves the benefits of the repeal—bolstering national security and fostering government transparency—without allowing the federal government to covertly disseminate influential programming within the United States.

This Note is divided into three Parts. Part I provides an overview of the legislative history of the Smith–Mundt Act from its passage in 1948 up through the repeal of the domestic dissemination ban in 2013. Part II analyzes the text of the 2013 legislation and other applicable laws and regulations. Finally, Part III argues for a legislatively imposed or a judicially imposed attribution requirement for all State Department- and BBG-produced programming disseminated within the United States.

I. LEGISLATIVE HISTORY OF THE SMITH–MUNDT ACT

A. *World War II–1953: Origins of the Smith–Mundt Act*

The Smith–Mundt Act traces its origins to World War II. In an effort to consolidate wartime propaganda efforts, President Franklin Roosevelt formed the Office of War Information (OWI) in 1942 by executive order.¹⁸ The mission of the OWI was to counter Axis propaganda¹⁹ and to provide “information programs designed to facilitate the intelligent understanding . . . of the war policies, activities, and aims of the

loosing Pentagon ‘psy-ops’ on the domestic American public with reform of [the Smith–Mundt Act] can be avoided by carefully defining the conditions under which the ban would no longer apply.”); Palmer & Carter, *supra* note 5, at 34 (arguing for a repeal of the ban on the conditions that government-produced programming be subject to an attribution requirement and that limitations be imposed on the amount of government-produced programming disseminated domestically).

¹⁶ See *infra* Part II.

¹⁷ Berkowitz, *supra* note 6, at 286–87; Palmer & Carter, *supra* note 5, at 29; Gormly, *supra* note 6, at 202–04.

¹⁸ Consolidating Certain War Information Functions into an Office of War Information, Exec. Order No. 9182, 7 Fed. Reg. 4468, 4468–69 (June 13, 1942).

¹⁹ *Id.* at 4469.

Government.²⁰ The recently formed Voice of America (VOA), a government-funded news service, was incorporated into the OWI, and further expanded its broadcasts of pro-American news stories around the world.²¹ The OWI also conducted psychological warfare overseas, using radio and print publications to demoralize the enemy,²² and oversaw the Bureau of Motion Pictures, which collaborated with Hollywood to develop propaganda films.²³ The pro-American Hollywood films were particularly important for bolstering support within the United States. OWI Director Elmer Davis once remarked, “The easiest way to inject a propaganda idea into most people’s minds is to let it go in through the medium of an entertainment picture when they do not realize that they are being propagandized.”²⁴ However, as the outcome of the War became increasingly certain, the need for domestic propaganda waned. In 1945, as major combat operations came to an end, the OWI was terminated and its remaining broadcasting operations were transferred to the State Department.²⁵

Not long after the War, the federal government considered establishing a permanent government broadcasting agency. In October 1945, Representative Sol Bloom (D-N.Y.) introduced a bill that would have allowed the Secretary of State to more aggressively broadcast government-produced programming internationally.²⁶ But due to administrative delays

²⁰ See ALLAN M. WINKLER, *THE POLITICS OF PROPAGANDA: THE OFFICE OF WAR INFORMATION 1942–1945*, at 34 (1978). See generally *History*, BROADCASTING BOARD OF GOVERNORS, <http://www.bbg.gov/about-the-agency/history/> [<http://perma.cc/39PV-BUYR>] (providing a timeline of the development of government broadcasting).

²¹ *VOA History*, INSIDE VOA (Nov. 26, 2014, 5:01 PM), http://www.insidevoa.com/section/voa_history/2330.html [<http://perma.cc/PE4R-GEGU>] (providing a timeline of the development of VOA). By the end of the war, VOA was broadcasting in forty languages. WILSON P. DIZARD JR., *INVENTING PUBLIC DIPLOMACY: THE STORY OF THE U.S. INFORMATION AGENCY 25* (2004). VOA is currently the largest broadcasting service in the United States. See *Voice of America*, BROADCASTING BOARD OF GOVERNORS, <http://www.bbg.gov/broadcasters/voa/> [<http://perma.cc/CB7H-WWH3>]. It is now under the supervision of the BBG. *Id.*

²² WINKLER, *supra* note 20, at 113, 115, 117–19, 142. One of the most fascinating pieces of World War II-era propaganda is a novel written by Nobel Prize-winning author John Steinbeck about a small town invaded by a foreign army. JOHN STEINBECK, *THE MOON IS DOWN* (1942).

²³ CLAYTON R. KOPPEL & GREGORY D. BLACK, *HOLLYWOOD GOES TO WAR: HOW POLITICS, PROFITS, AND PROPAGANDA SHAPED WORLD WAR II MOVIES 59* (1987).

²⁴ *Id.* at 64.

²⁵ HARRY S. TRUMAN, *Statement by the President Upon Signing Order Concerning Government Information Programs (Aug. 31 1945)*, in OFFICE OF THE FEDERAL REG., *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1945*, at 252–53 (1961). After the war, VOA was reduced significantly: two-thirds of its broadcasting staff were let go, and the number of languages broadcast was cut in half. *VOA in the Postwar Years*, INSIDE VOA (Feb. 13, 2007, 7:00 PM), <http://www.insidevoa.com/content/a-13-34-2007-post-wwii-history-111602679/177529.html> [<http://perma.cc/N5TW-TVKK>].

²⁶ See Paulu, *supra* note 9, at 301.

and legislative bickering, the “Bloom Bill” died one year after it was introduced.²⁷ However, the idea of a peacetime government broadcasting agency lived on.²⁸ In the months that followed the demise of the Bloom Bill, Democrats and Republicans continued to spar over whether to establish a permanent government broadcasting agency that would be operational during wartime and peacetime alike.²⁹

Striking the right balance between government broadcasting and private broadcasting proved difficult. A number of Republican congressmen opposed a government-funded broadcasting agency over concerns that government-produced programming would supplant, rather than supplement, privately produced programming.³⁰ As a compromise, a few representatives suggested that a future bill require the State Department to rely primarily on privately produced programming for its broadcasts.³¹ Some even favored turning “the whole [State Department broadcasting] operation over to NBC and CBS,”³² but this was never done. Ultimately, the suggestion of requiring the State Department to employ private broadcasters assuaged Republican concerns about government interference in the private sector, and also addressed budgetary concerns; privately produced programming was believed to be less costly and higher quality than State Department-produced programming.³³

Several months after the failed Bloom Bill, Congress began drafting legislation to establish a permanent government broadcasting agency that would not encroach on the efforts of private broadcasters. In May 1947, Representative Karl E. Mundt (R-S.D.) introduced such a bill, which was entitled the “Information and Educational Exchange Act.”³⁴ The Mundt Bill, as it was more commonly known, drew many of its provisions from the failed Bloom Bill.³⁵ According to Representative Mundt, the bill was an anti-Soviet measure designed to “give legislative authority for our Voice of America short-wave program and also set up a broad over-all program to tell the truth about America in the areas of the world where we are today

²⁷ *Id.* at 302.

²⁸ Despite the legislative tumult, VOA broadcasts persisted, buoyed by temporary funding provided by the Judiciary Appropriation Bill for 1947. *Id.*

²⁹ *Id.* at 302–03. Concern about government–industry relationships in the broadcasting sector persists to this day. *See* Palmer & Carter, *supra* note 5, at 11.

³⁰ Paulu, *supra* note 9, at 303.

³¹ *Id.* at 308.

³² *Id.*

³³ *Id.*

³⁴ H.R. 3342, 80th Cong. (1947).

³⁵ *Id.*; Paulu, *supra* note 9, at 308–09.

being misinterpreted abroad by the voices coming from the Moscow headquarters of Red fascism.”³⁶

Although the Mundt Bill was introduced as a means to counteract communist propaganda, some representatives opposed the bill on the grounds that handing over international government broadcasting to the “leftists” in the State Department would actually *increase* the amount of communist propaganda worldwide.³⁷ Other representatives opposed the Mundt Bill simply because they believed the State Department would administer international broadcasting ineptly.³⁸

Debate over the Mundt Bill was heated.³⁹ At one point during the deliberations, Representative Mundt bemoaned, “Never since I have been in Congress have I heard such a disorganized collection of misinformation circulated about any one piece of legislation as about this legislation.”⁴⁰ Yet, despite vocal opposition throughout the drafting process, the bill easily passed the House⁴¹ and Senate.⁴² In early 1948, President Harry Truman signed into law the Information and Educational Exchange Act of 1948—or, as it was more commonly known, the Smith–Mundt Act.⁴³

Initially, the State Department was given full responsibility for administering the provisions of the Smith–Mundt Act.⁴⁴ The State Department continued to broadcast VOA programming and began disseminating companion news bulletins and motion pictures.⁴⁵ In 1953, President Dwight Eisenhower established a new government agency, the United States Information Agency (USIA), to coordinate the federal government’s international broadcasting and educational exchange

³⁶ 93 CONG. REC. 4638 (1947).

³⁷ See Paulu, *supra* note 9, at 310–11.

³⁸ *Id.* at 310.

³⁹ *Id.* at 311. Debate over the bill spanned six days. *Id.*

⁴⁰ 93 CONG. REC. 6754.

⁴¹ *Id.* at 7617. The bill passed the House by a vote of 273–97. Paulu, *supra* note 9, at 312. Of those who voted for the bill, 121 were Republicans, 151 were Democrats, and 1 was an American Laborite. *Id.*

⁴² The bill passed the Senate by a unanimous vote. Paulu, *supra* note 9, at 314. Before passage in the Senate, the bill was amended slightly by the Senate Committee on Foreign Relations. *Id.* at 313. The most notable change was the separation of broadcasting services from educational exchange services. *Id.*

⁴³ 22 U.S.C. § 1431 (Supp. II 1948); Pub. L. No. 80-402, § 2, 62 Stat. 6 (1948). The Smith–Mundt Act was named after its cosponsors Representative Mundt and Senator H. Alexander Smith (R-N.J.). Paulu, *supra* note 9, at 300 n.1.

⁴⁴ 22 U.S.C. § 1461.

⁴⁵ Paulu, *supra* note 9, at 300. Although the State Department was permitted to create and broadcast its own materials, it was required “to utilize, to the maximum extent practicable, the services and facilities of private agencies, including existing American press, publishing, radio, motion picture, and other agencies, through contractual arrangements or otherwise.” § 1437.

services.⁴⁶ The USIA was created specifically to “lead to substantial economies and significantly improved effectiveness of administration” for countering anti-American propaganda abroad.⁴⁷

I. The De Facto Dissemination Ban.—There is no doubt that the Smith–Mundt Act permitted the federal government to disseminate its message abroad, but it is less certain whether it prohibited the federal government from disseminating its message within the United States. Some have argued that the original version of the Smith–Mundt Act permitted domestic dissemination because it did not contain an explicit prohibition on the domestic dissemination of government-produced programming, and because it allowed certain members of the American public to access these otherwise off-limits materials at specified government agencies.⁴⁸ However, a more plausible reading is that a *de facto* ban existed. Although there was no explicit ban on the domestic dissemination of government-produced programming in the original Smith–Mundt Act, there were clear restrictions on who could view them; government-produced programming could only be “examined” by “representatives of United States press associations” and could only be “made available” to members of Congress.⁴⁹ Such strict constraints on accessing these materials strongly suggest that Congress did not want this information to be widely distributed to the American public.

Moreover, many Congressional members did not trust the State Department because they believed it contained numerous communist sympathizers.⁵⁰ In fact, Congress was so concerned about this that the screening process for those implementing the Smith–Mundt Act’s international broadcasting program was “more stringent than the one given to people working on the atomic bomb during the war.”⁵¹ Consequently, given this acute concern over those responsible for *international* broadcasting, it is doubtful that Congress would have risked allowing the

⁴⁶ Reorganization Plan No. 8 of 1953, 18 Fed. Reg. 4542, 4543 (Aug. 4, 1953) (transferring all broadcasting operations and educational exchange services from the State Department to the USIA).

⁴⁷ DWIGHT D. EISENHOWER, *Special Message to the Congress Transmitting Reorganization Plan 8 of 1953 Relating to the Establishment of the U.S. Information Agency (June 1, 1953)*, in OFFICE OF THE FEDERAL REG., PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1953, at 350 (1960).

⁴⁸ See, e.g., Palmer & Carter, *supra* note 5, at 9.

⁴⁹ § 1461.

⁵⁰ See *id.* § 1434 (“No citizen or resident of the United States, whether or not now in the employ of the Government, may be employed or assigned to duties by the Government under this chapter until such individual has been investigated by the Federal Bureau of Investigation and a report thereon has been made to the Secretary of State . . .”).

⁵¹ Paulu, *supra* note 9, at 311.

State Department to freely disseminate its programming within the United States.

Further, the domestic dissemination of government-produced programming would have been politically toxic. Congress did not want to draw parallels with the government of the Soviet Union, which was widely believed to be inundating its people with propaganda at the time.⁵² Additionally, Americans were tired of watching the government-produced programming that was widely broadcast within the United States during World War II⁵³—subjecting them to more such programming so soon after the War likely would have resulted in public outcry.⁵⁴

Thus, even though no explicit ban on the domestic dissemination of government-produced programming existed in the original version of the Smith–Mundt Act, it was forbidden in practice.⁵⁵

B. 1954–1971: Applying the Smith–Mundt Act

For a dozen years, the de facto domestic dissemination ban remained untouched and untested. Then, in 1965, Congress passed a joint resolution (1965 Resolution) permitting the domestic release of a USIA film on the life of President John F. Kennedy, entitled *Years of Lightning, Day of Drums*.⁵⁶ The 1965 Resolution permitted the USIA to transfer copies of the film to the John F. Kennedy Center for the Performing Arts, and gave the Center exclusive rights to distribute the program for viewing within the

⁵² See ROBERT CONQUEST, REFLECTIONS ON A RAVAGED CENTURY 101–11 (2000).

⁵³ See Palmer & Carter, *supra* note 5, at 6 (“By the end of World War II, many Americans held a negative perception of government propaganda not only because of censorship and misinformation by the American government but also because of the extensive anti-Jew and pro-Nazi propaganda disseminated in Germany throughout the 1930s.”); Paulu, *supra* note 9, at 300 (“In peacetime . . . [Americans] had always opposed government information services The passage of the [Smith–Mundt Act], therefore, marked a significant departure from traditional American policy.”).

⁵⁴ “Americans insisted that government efforts at persuasion at home . . . should remain benign, affirming their popular belief that government should not be the guardian of the public conscience, and that the electorate was capable of making rational choices free of undue influence from government itself” Palmer & Carter, *supra* note 5, at 6.

⁵⁵ A de facto ban on the domestic dissemination of government-produced programming was confirmed “by Congress’[s] perceived need to pass legislation in order to permit the domestic release of certain [government-produced] films.” Brett Holladay, *Making the Argument that the Smith-Mundt Act Has Little Control over the Press’ Publication of U.S. Government-Produced Foreign News*, 10 FIRST AMEND. L. REV. 608, 614 (2012).

⁵⁶ Joint Resolution: To Allow the Showing in the United States of the United States Information Agency Film “John F. Kennedy—Years of Lightning, Day of Drums,” Pub. L. No. 89-274, 79 Stat. 1009 (1965). The film can now be viewed in its entirety online. Bruce Herschensohn, *John F. Kennedy: Years of Lightning/Day of Drums*, YOUTUBE (June 5, 2009), <https://www.youtube.com/watch?v=PvN5ecqCFk0> [http://perma.cc/D3UM-EVQY].

United States.⁵⁷ However, concerns over creating precedent for future domestic dissemination of USIA material led Congress to clarify that the 1965 Resolution was “limited solely to the film” and was not to be construed so as “to establish a precedent for making other materials prepared by the [USIA] available for general distribution in the United States.”⁵⁸ Although Congress was willing to give a one-time pass for a particularly relevant piece of government-produced programming, it was not willing to condone all dissemination of such programming, stating:

Any documentary film which has been, is now being, or is hereafter produced by any Government department or agency . . . concerning the life, character, and public service of any [Government official] . . . shall not be distributed or shown in public in this country during the lifetime of the said official or after the death of such official *unless authorized by law in each specific case*.⁵⁹

Congress’s compulsion to pass a resolution permitting the domestic dissemination of a single USIA film demonstrates that the Smith–Mundt Act effectively prohibited the domestic dissemination of government-produced programming.⁶⁰ If there were any doubts about whether the Smith–Mundt Act contained a de facto ban on the domestic dissemination of government-produced programming, the 1965 Resolution put those doubts to rest.⁶¹

The reach of the de facto domestic dissemination ban on government-produced programming, however, remained unresolved. In 1967, the U.S. Advisory Commission on Information issued a report that advocated for easing the restrictions on the availability of USIA materials within the United States.⁶² Noting that there was “nothing in the [Smith–Mundt Act] specifically forbidding making USIA materials available to American audiences,”⁶³ the Commission suggested that it was time for the “walls [to] come down” and allow the American public to readily access this information.⁶⁴ Not unlike modern-day proponents for repealing the domestic dissemination ban, the Commission believed that allowing Americans to access government-produced programming would promote

⁵⁷ § 2, 79 Stat. at 1009. This transfer of the film and its rights was not complimentary, however—Congress charged the Center \$122,000 to “reimburse the United States Government for its expenditures in connection with production of the film.” *Id.* § 3, 79 Stat. at 1009.

⁵⁸ *Id.* § 1, 79 Stat. at 1009.

⁵⁹ *Id.* § 4, 79 Stat. at 1009 (emphasis added).

⁶⁰ See Gormly, *supra* note 6, at 196.

⁶¹ See *id.*

⁶² FRANK STANTON ET AL., U.S. ADVISORY COMM’N ON INFO., THE TWENTY-SECOND REPORT OF THE UNITED STATES ADVISORY COMMISSION ON INFORMATION 22 (1967).

⁶³ *Id.* at 22–23.

⁶⁴ *Id.*

government transparency and academic study.⁶⁵ However, the Commission stopped short of advocating for the active dissemination of these materials within the United States; instead, it recommended only that Congress “mak[e] available’ USIA materials, not [promote] their domestic distribution.”⁶⁶ Despite this reservation, the Commission’s underlying stance was clear—the domestic dissemination ban should be relaxed. Yet, there was no push from Congress to reform the domestic dissemination ban. In fact, the opposite occurred: in the years that followed the Commission’s report, Congress further emphasized that government-produced materials were not to be disseminated within the United States.

C. 1972–2009: Cementing the Ban

The first true test to the de facto domestic dissemination ban came in 1972 when Senator James L. Buckley (D-N.Y.) requested a USIA-produced film entitled *Czechoslovakia 1968* to be rebroadcast on New York television.⁶⁷ Senator J. William Fulbright (D-Ark.) opposed Senator Buckley’s request, believing that the USIA could only disseminate its programming abroad.⁶⁸ Acting Attorney General Richard G. Kleindienst, arguing on Senator Buckley’s behalf, advocated that the proposed rebroadcast did not violate the text of the Smith–Mundt Act.⁶⁹ Although not “altogether free from doubt,” Mr. Kleindienst believed that the Smith–Mundt Act did not intend to prohibit all dissemination of USIA-produced programming within the United States;⁷⁰ after all, he argued, the agency could “make . . . available upon request” such programming to members of Congress.⁷¹ Senator Fulbright and other members of the Senate Committee on Foreign Relations vehemently disagreed with Mr. Kleindienst’s interpretation of the Smith–Mundt Act, calling it a “distortion of [] legislative intent.”⁷² Specifically, the Committee was concerned that by allowing Senator Buckley to air the film, it would “pave the way for the wholesale distribution of USIA materials” within the United States.⁷³ In an attempt to close this loophole in the Smith–Mundt Act, Senator Fulbright proposed legislation to establish a “blanket prohibition” on the domestic

⁶⁵ *Id.*

⁶⁶ *Id.* at 23.

⁶⁷ Holladay, *supra* note 55, at 614; Palmer & Carter, *supra* note 5, at 9.

⁶⁸ S. REP. NO. 92-754, at 83 (1972).

⁶⁹ *Id.* at 83–84.

⁷⁰ *Id.* at 84.

⁷¹ *Id.* However, Mr. Kleindienst himself recognized that domestic dissemination had its limits, stating that the USIA could not “actively engage in the domestic dissemination of its materials.” *Id.*

⁷² *Id.* at 85.

⁷³ *Id.*

distribution of USIA-produced programming.⁷⁴ Soon thereafter, this blanket prohibition was passed as part of the Foreign Relations Authorization Act of 1972 (1972 Amendment).⁷⁵

The 1972 Amendment made the Smith–Mundt Act’s de facto domestic dissemination ban a de jure ban by explicitly forbidding the distribution of USIA programming within the United States.⁷⁶ However, the 1972 Amendment did more than make official the long-standing de facto dissemination ban; it also expanded the public’s access to government-produced programming by adding “research students and scholars” to the list of those who could legally examine these materials at specified government agencies.⁷⁷ In effect, the 1972 Amendment addressed both the goals of Senator Fulbright, i.e., providing safeguards against the widespread dissemination of influential government-produced programming within the United States, and those of the U.S. Advisory Commission on Information, i.e., increasing public access to these otherwise inaccessible materials.

Thirteen years later,⁷⁸ the 1972 Amendment’s explicit prohibition on the domestic dissemination of government-produced materials was further strengthened. In 1985, Senator Edward Zorinsky (D-Neb.) drafted an amendment to the Smith–Mundt Act (1985 Amendment) that proposed reinforcing the domestic dissemination ban.⁷⁹ Senator Zorinsky was chiefly concerned with the USIA’s “second mandate,” which permitted the Agency to initiate cultural training programs for U.S. citizens.⁸⁰ He believed that this mandate could be used to “propagandize” the American people to

⁷⁴ *Id.*

⁷⁵ Pub. L. No. 92-352, § 204, 86 Stat. 489, 494 (1972).

⁷⁶ *Id.* (“Any [government-produced material] shall not be disseminated within the United States, its territories, or possessions, but, on request, shall be available in the English language at the Department of State, at all reasonable times following its release as information abroad, for examination only by representatives of United States press . . . , and by research students and scholars, and, on request, shall be made available for examination only to Members of Congress.”). By 1989, the USIA was allowing any person to examine these materials regardless of whether she was a journalist, research student, or scholar. *Gartner v. U.S. Info. Agency*, 726 F. Supp. 1183, 1194 n.19 (S.D. Iowa 1989).

⁷⁷ 22 U.S.C. § 1461 (1976).

⁷⁸ The years between the 1972 Amendment and the 1985 Amendment were marked by a restructuring of government broadcasting agencies. In 1973, the Board for International Broadcasting (BIB) was formed to broadcast government-produced programming specifically in countries without a free press. *See* Board for International Broadcasting Act of 1973, Pub. L. No. 93-129, §§ 2, 4, 87 Stat. 456, 457–59. In 1977, under the Carter Administration, the USIA was recast as the International Communication Agency (ICA) in an attempt to rebrand the organization as one that showed “a decent respect for the opinions of mankind.” 22 U.S.C. § 1461 (1996); Reorganization Plan No. 2 of 1977, 91 Stat. 1636. The ICA was short-lived, however, and in 1982 the agency was redesignated the USIA. Department of State Authorization Act, Fiscal Years 1982 and 1983, Pub. L. No. 97-241, § 303, 96 Stat. 273, 291 (1982).

⁷⁹ 131 CONG. REC. 14,945 (1985).

⁸⁰ *Id.*

adopt pro-communist views on foreign policy issues.⁸¹ In furtherance of his proposal to reinforce the domestic dissemination ban, Senator Zorinsky memorably stated: “The American taxpayer certainly does not need or want his tax dollars used to support U.S. Government propaganda directed at him or her.”⁸² In its final form, the 1985 Amendment required that “no funds authorized to be appropriated to the [USIA] shall be used to influence public opinion in the United States, and no program material prepared by the [USIA] shall be distributed within the United States.”⁸³ Just as Senator Zorinsky intended, the 1985 Amendment did little to change existing policy regarding the domestic dissemination ban. Rather, it served to foreclose *any* possibility of the USIA disseminating its programming within the United States.

The passage of the 1985 Amendment marked the zenith of the domestic dissemination ban on government-produced programming. After that date, cracks began to develop in the wall that Senators Fulbright and Zorinsky built. In 1990, Congress passed an amendment to the Smith–Mundt Act (1990 Amendment) that required the USIA director to “make [programming] available to the Archivist of the United States, for domestic distribution . . . 12 years after the preparation of the material.”⁸⁴ Although the 1990 Amendment was of little value for Americans seeking current information on the government’s international broadcasting efforts,⁸⁵ it afforded citizens greater access to these materials for research and study without raising concerns about the USIA creating programming specifically for the purpose of “propagandizing” the American public.

The USIA was the primary agency for producing and broadcasting programming overseas from its creation through the mid-1990s.⁸⁶ In 1994, all government broadcasting efforts targeting countries without a free press were transferred to the Broadcasting Board of Governors (BBG), a new government agency under State Department control.⁸⁷ In 1998, the USIA

⁸¹ *Id.* Similar language appears in the original Smith–Mundt Act, 22 U.S.C. § 1431 (Supp. II 1948) (“The Congress declares that the objectives of this chapter are to enable the Government of the United States to promote a better understanding of the United States in other countries, *and to increase mutual understanding between the people of the United States and the people of other countries.*” (emphasis added)).

⁸² 131 CONG. REC. 14,945.

⁸³ 22 U.S.C. § 1461-1a (1988).

⁸⁴ Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, § 202, 104 Stat. 15, 49 (1990). Materials over twelve years old were thought to be devoid of any ability to propagandize.

⁸⁵ Gormly, *supra* note 6, at 198.

⁸⁶ However, there was a brief period during the Carter Administration when the USIA was reorganized and rebranded as the ICA. *See supra* note 78.

⁸⁷ United States International Broadcasting Act of 1994, Pub. L. No. 103-236, §§ 304, 310, 108 Stat. 382, 434, 442.

was abolished and its responsibilities reassigned to the BBG.⁸⁸ Later that year, the BBG became a government-funded, independent agency in charge of overseeing all government-sponsored, nonmilitary international broadcasting.⁸⁹ Although the source of government broadcasting shifted from an integrated, government-controlled agency to an independent, government-funded agency, the goals and operations of the Smith–Mundt Act—disseminating pro-American programming overseas—remained the same.

The most significant development in this period had little to do with the federal government. Advances in sophisticated information technology, such as the Internet, cellular phones, and satellite television, was rapidly changing how news was distributed and consumed. Just as private broadcasters would be compelled to adapt to these technological developments, so too would the federal government. In the mid-1990s, the legal academy predicted that the free flow of information between countries would soon render the Smith–Mundt Act’s domestic dissemination ban unenforceable.⁹⁰ However, the demise of the domestic dissemination ban would not occur until almost twenty years later.

D. 2010–2013: Repealing the Ban

1. *The 2010 Bill.*—The first attempt at repealing the domestic dissemination ban came in July 2010. Representatives Mac Thornberry (R-Tex.) and Adam Smith (D-Wash.) introduced “The Smith–Mundt Modernization Act of 2010” (2010 Bill) into Congress.⁹¹ At its core, the 2010 Bill was a national security measure designed to “modernize authorities to fight and win the war of ideas against violent extremist ideologies over the [I]nternet and other mediums of information” within the United States.⁹² However, contradictory language within the 2010 Bill would have made its stated goal difficult to achieve. On the one hand, the 2010 Bill would have abolished the domestic dissemination ban, allowing the State Department and the BBG to freely disseminate government-produced programming within the United States.⁹³ On the other, it would

⁸⁸ Pub. L. No. 105-277, 112 Stat. 2681, 2681–776 (1998); Berkowitz, *supra* note 6, at 279.

⁸⁹ 112 Stat. at 2681-776.

⁹⁰ See e.g., Gormly, *supra* note 6, at 202–04. Gormly also believed the ban violated information policy, contradicted the Freedom of Information Act, and frustrated the USIA’s ability to perform its mission. *Id.* at 192–93.

⁹¹ H.R. 5729, 111th Cong. (2010). Eight other representatives cosponsored the bill. *Id.*

⁹² *Id.* However, this purpose seems inherently unachievable given the bill’s prohibition on “influencing” or “propagandizing” the American people: any attempt by the State Department to “win the war of ideas” within the United States inherently would be an exercise in influencing public opinion.

⁹³ *Id.*

have strengthened the 1985 Amendment's prohibition on "influencing public opinion" in the United States⁹⁴ by preventing the federal government from "propagandizing" the American people.⁹⁵ Like the Smith–Mundt Act's previous amending legislation, the 2010 Bill attempted to harmonize allowing Americans greater access to government-produced programming with barring the federal government from unduly influencing free public discourse. However, rather than forge a workable compromise similar to the 1972 Amendment,⁹⁶ the 2010 Bill attempted to adopt two incompatible positions—permission and prohibition—which made the legislation impracticable. Unsurprisingly, the 2010 Bill died in Congress.⁹⁷

Despite its shortcomings, the 2010 Bill is notable because it signaled a turning point in how Congress perceived the Smith–Mundt Act's domestic dissemination ban. In decades prior, Congress was inclined to reinforce the domestic dissemination ban, as it did in 1965, 1972, and 1985,⁹⁸ but by 2010, Congress was willing to consider a complete repeal.⁹⁹ This radical change in perception is attributable to two major developments. First, advances in information technology allowed people to communicate freely, severely diminishing the government's power to control the media. Consequently, many began to doubt the effectiveness of state-made propaganda generally,¹⁰⁰ the domestic dissemination ban's enforceability,¹⁰¹ and the overall feasibility of the statutory regime surrounding government broadcasting.¹⁰² But the most salient reason for amending the Smith–Mundt Act was to curb the threat of domestic terrorism. During the Cold War, Congress was eager to distinguish the United States from the Soviet Union. One way to do this, as demonstrated by Senator Zorinsky's 1985

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ The 1972 Amendment mirrors the dual aims of the 2010 Bill, i.e., promoting government transparency and establishing safeguards against the dissemination of government propaganda. See *supra* Part I.C.

⁹⁷ The 2010 Bill died after being referred to the Committee on Foreign Affairs. *H.R. 5729 (111th): Smith–Mundt Modernization Act of 2010*, GOVTRACK, <https://www.govtrack.us/congress/bills/111/hr5729> [http://perma.cc/Y38Z-NC53].

⁹⁸ *Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1167 (D.C. Cir. 1998) (finding that up through 1998 "Congress[] repeated[ly] amend[ed] the [Smith–Mundt] Act to clarify and strengthen the ban on domestic distribution of USIA materials").

⁹⁹ See H.R. 5729. Additionally, a more conservative bill proposed by Senator John Kerry (D-Mass.) would have decreased the permissible release period from twelve years to two years. Foreign Relations Authorization Act, Fiscal Years 2010 and 2011, S. 2971, 111th Cong. § 127 (2010).

¹⁰⁰ See Adam Weinstein, *Is Congress Really Authorizing US Propaganda at Home?*, MOTHER JONES (May 22, 2012, 6:00 AM), <http://www.motherjones.com/politics/2012/05/congress-propaganda> [http://perma.cc/BS89-XVFB].

¹⁰¹ Gormly, *supra* note 6, at 220.

¹⁰² See S. COMM. ON FOREIGN RELATIONS, FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEARS 2010 AND 2011, S. REP. NO. 111-301, at 13 (2010).

Amendment, was to highlight the differences between how the governments of the United States and the Soviet Union interacted with the media. Congress was able to trumpet the federal government's relative unwillingness to influence the media in large part because government-produced programming was primarily needed overseas to counter anti-American sentiment in countries of strategic importance. After the fall of the Soviet Union and the rise of terrorism, however, government-produced programming was needed to counteract anti-American sentiment abroad *and* at home.¹⁰³ It was this factor—national security—that spurred serious discussions in Congress for repealing the domestic dissemination ban.¹⁰⁴

Overall, the 2010 Bill indicates that Congress was willing to break with decades of precedent by permitting government-produced programming to be broadcast domestically in the name of combating terrorism, but its conflicted language also indicates that Congress had not lost sight of the potential danger of allowing the government to influence public opinion through “domestic propaganda.”¹⁰⁵ Finding the right balance between disseminating government-produced programming within the United States and preventing it from unduly influencing free American discourse, however, proved difficult, which is why the 2010 Bill failed to gain traction in Congress.

2. *The 2012 Bill.*—In 2012, Representatives Thornberry and Smith again introduced legislation repealing the domestic dissemination ban contained within the Smith–Mundt Act.¹⁰⁶ This bill, entitled the “Smith–Mundt Modernization Act of 2012” (2012 Bill), was similar to the 2010 Bill except that it omitted the 2010 Bill's prohibition on “propagandizing” and included clear carve-outs that permitted the government to broadcast relatively freely within the United States. Unlike the 2010 Bill, the 2012 Bill was marketed not as national security legislation, but as government transparency legislation.¹⁰⁷ Belying its national security roots, however, the 2012 Bill was transposed into the voluminous “National Defense

¹⁰³ See H.R. 5729.

¹⁰⁴ Indeed, national security was the stated reason for the repeal in the 2010 Bill. *Id. But see, e.g., Understanding the Smith–Mundt Modernization Act*, HERITAGE FOUND., <http://www.heritage.org/events/2012/05/Smith–Mundt> [<http://perma.cc/H3KU-VQSK>] (discussing how the repeal of the domestic dissemination ban is grounded in considerations other than national security, such as adapting to the realities of information technology and calls for greater government transparency).

¹⁰⁵ See H.R. 5729; see also S. REP. NO. 111-301, at 13 (noting that a two-year dissemination waiting period would assuage “domestic propaganda” concerns).

¹⁰⁶ H.R. 5736, 112th Cong. (2012). It is noteworthy that, unlike previous amendments to the Smith–Mundt Act, the congressional record surrounding both the 2010 Bill and the Smith–Mundt Modernization Act of 2012 is sparse.

¹⁰⁷ See Greenwald, *supra* note 8.

Authorization Act for Fiscal Year 2013”¹⁰⁸ (2013 Amendment), an omnibus defense spending bill.¹⁰⁹ It is unclear why the 2012 Bill was inserted into this lengthy piece of legislation, but it may have been to avoid a contentious debate like that which preceded the passage of the original Smith–Mundt Act in 1948. Regardless of the actual reason, the tactic proved successful: the 2013 Amendment passed both Houses in late 2012,¹¹⁰ and on January 2, 2013, President Barack Obama signed the legislation into law.¹¹¹ With that, the sixty-four-year-old domestic dissemination ban was suddenly and unceremoniously abolished.

II. TEXTUAL ANALYSIS OF THE 2013 AMENDMENT

The 2013 Amendment is neither a dramatic breakthrough in government transparency nor a harbinger of an Orwellian state. Rather, the 2013 Amendment merely grants the State Department and the BBG new freedom to broadcast within the United States.

A. *New and Preexisting Legal Restrictions*

Although the 2013 Amendment repealed the blanket ban on the domestic dissemination of government-produced programming, some restrictions remain. Analyzing these restrictions is important to understanding how government-produced materials may be disseminated domestically; however, they do not, either separately or as a whole, significantly impede the State Department and the BBG from distributing their programming to the American public.

1. *The “Upon Request” Restriction.*—The “upon request” restriction¹¹² is a holdover from earlier versions of the Smith–Mundt Act.¹¹³ As its name implies, this restriction requires the State Department and the BBG to disseminate materials within the United States only “upon

¹⁰⁸ Pub. L. No. 112-239, § 1078, 126 Stat. 1632, 1957–59 (2013).

¹⁰⁹ There were immaterial drafting changes between the 2012 Bill and the version that appeared in the National Defense Authorization Act for Fiscal Year 2013. Compare *id.*, with H.R. 5736.

¹¹⁰ H.R. 4310 (112th): *National Defense Authorization Act for Fiscal Year 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/112/hr4310> [<http://perma.cc/DF77-PXYG>].

¹¹¹ *Id.*; see also Press Release, The White House, Office of the Press Sec’y, Statement by the President on H.R. 4310 (Jan. 2, 2013) (*available at* <https://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310>). Although President Obama comments on several sections of the National Defense Authorization Act for Fiscal Year 2013, he does not mention the section that contains the text of the 2012 Bill. *Id.*

¹¹² 22 U.S.C. § 1461 (2012).

¹¹³ See, e.g., *id.* (Supp. II 1948) (“[Materials], on request, shall be available in the English language at the Department of State . . .”).

request.”¹¹⁴ In other words, the State Department and the BBG may not disseminate their materials on their own volition, but may only make them “available” to those who wish to access them. Prior to the 2013 Amendment, the only legal way to view contemporary government-produced materials was to examine them at the agencies themselves.¹¹⁵ Now, one may obtain broadcast-quality copies of this programming merely by requesting them from the BBG.¹¹⁶ But the most direct and cost-effective way to access State Department- and BBG-produced materials is simply to view them online.¹¹⁷ The BBG posts nearly all of its content on the Internet for free,¹¹⁸ such as news articles and broadcasts produced by Voice of America (VOA),¹¹⁹ Radio Free Europe,¹²⁰ Radio Free Asia,¹²¹ and other

¹¹⁴ *Id.* (2012). Additionally, the requesting third party may be required to reimburse BBG for “reasonable costs.” *Id.*; Domestic Requests for Broadcasting Board of Governors Program Materials, 78 Fed. Reg. 39,584, 39,587 (July 2, 2013) [hereinafter BBG Regulations] (to be codified at 22 C.F.R. pt. 502).

¹¹⁵ § 1461(b)(1) (2006); *see also* Essential Info., Inc. v. U.S. Info. Agency, 134 F.3d 1165 (D.C. Cir. 1998) (rejecting a Freedom of Information Act request made by academics and journalists for release of Internet addresses and programming materials generated by the USIA because the materials were exempt from disclosure); Gartner v. U.S. Info. Agency, 726 F. Supp. 1183 (S.D. Iowa 1989) (affirming the USIA’s decision to prohibit copying USIA materials verbatim and disseminating them within the United States because doing so would have been in violation of the Smith–Mundt Act). Notably, Americans could legally view materials more than twelve years old after the early 1990s. *See supra* note 84 and accompanying text. In practice, however, this time limitation was immaterial; Americans living within the United States could readily obtain BBG material in violation of the pre-2013 Smith–Mundt Act. Daniel C. Walsh, *The History of the U.S. Information and Educational Exchange Act of 1948 and Three Arguments for the Termination of Its Prohibition on Domestic Release of Information*, INT’L J. COMM. L. & POL’Y, Summer 2011, at 1, 10–12. The federal government did not pursue legal action against these violators or the BBG, in part because the Smith–Mundt Act contained “no criminal provisions . . . no penalties at all.” *Id.* at 11 (quoting former USIA attorney John Lindberg).

¹¹⁶ § 1461(b)(1) (2012). The BBG may charge fees at its discretion for access to its broadcast-quality programming. *Id.*

¹¹⁷ *See* BBG Regulations, *supra* note 114, at 39,586. The BBG defines anyone who visits one of their websites as a “Requestor.” *Id.* (“The Agency makes program materials available to Requestors through the Agency’s news and information Web sites designed for foreign audiences.”). Arguably, accessing a website is a volitional act; when a user clicks on a hyperlink to the BBG website or enters a BBG web address in a web browser, the user is requesting to view that material. However, posting material on a website may not always result in the user *intentionally* accessing the material. For example, if another website provides an unattributed link to the BBG website, the user may be directed to BBG content without the user’s knowledge. Whether the request must be intentional, however, is not addressed in either the statute or the BBG regulations.

¹¹⁸ *Id.* (stating that there is no fee for accessing material on BBG websites).

¹¹⁹ VOICE OF AMERICA, <http://www.voanews.com/> [<http://perma.cc/K74G-HTQY>].

¹²⁰ RADIO FREE EUROPE/RADIO LIBERTY, <http://www.rferl.org/> [<http://perma.cc/H6DB-872H>].

¹²¹ RADIO FREE ASIA, <http://www.rfa.org/english/> [<http://perma.cc/9PMM-2NJT>].

government-funded news services, many of which are in foreign languages.¹²²

At first blush, the upon request restriction appears to prevent the State Department and the BBG from imposing their programming on the American public. For example, under this restriction, the State Department and the BBG are prohibited from directly broadcasting their programming over a government-owned-and-operated loudspeaker in a town square, because in such a scenario, no one requested the material—it was distributed to the American public without one or more citizens' consent. However, the State Department and the BBG are not barred from disseminating their materials if they do not obtain the consent of *every* citizen. Turning again to the loudspeaker example, a government-produced program may be rebroadcast publicly if one private citizen first requested the program and then rebroadcasts it herself. Even though the American public may not have consented to listening to these broadcasts, because one person consented to the broadcast, the upon request restriction is satisfied. In essence, the upon request restriction permits the same distribution method Senator Buckley attempted when he sought to rebroadcast the government-produced film *Czechoslovakia 1978*, albeit on a much larger scale: under the current Smith–Mundt Act, *any* citizen may attempt to rebroadcast government-produced programming—not just members of Congress.

The ease of rebroadcasting via third parties is troubling because the potential for misleading the public is arguably greater than if the government had broadcast this programming itself; because the message is emanating from a private entity, the average citizen assumes that the program was not produced by the government. Still, the upon request restriction provides protection from the State Department and the BBG directly imposing their message on the American public. But once government-produced programming is in a third party's hands, there are virtually no restrictions on dissemination.¹²³

a. The request procedure.—Requesting government-produced programming is relatively straightforward.¹²⁴ Any American may simply visit one of the BBG's many websites to access their content free of

¹²² *E.g.*, ALHURRA, <http://www.alhurra.com/> [<http://perma.cc/W3CJ-EY8D>] (Arabic); NOTICIAS MARTÍ, <http://www.martinoticias.com/> [<http://perma.cc/F7Z3-WR26>] (Spanish); RADIO SAWA, <http://www.radiosawa.com/> [<http://perma.cc/5VRZ-HPQW>] (Arabic).

¹²³ The BBG may deny a request to use these materials if the third party acts contrary to the BBG's governing laws, regulations, and principles. BBG Regulations, *supra* note 114, at 39,587. However, there is nothing in the BBG regulations that would *revoke* the third party's right to rebroadcast these materials. *Id.* at 39,584–87.

¹²⁴ *See supra* note 117.

charge.¹²⁵ However, requesting broadcast-quality copies of State Department- and BBG-produced programming—which may be used by television and radio stations among others—requires a more formal process.

There are two types of requests that a third party can make for broadcast-quality materials: a “one-time” request¹²⁶ and an “ongoing subscription” request.¹²⁷ In a one-time request, a citizen, media entity, or organization makes a request to the BBG for programming, and the BBG provides a broadcast-quality copy to the requestor.¹²⁸ The request must serve the BBG’s “statutory mission” and any other applicable laws and regulations,¹²⁹ and if it does not, the BBG may deny the request.¹³⁰ The BBG may also deny requests for several other reasons, including if the requestor does not comply with third-party license requirements or neglects to pay the BBG’s discretionary disbursement fee.¹³¹

An ongoing subscription request is similar to a one-time request, except that it allows the BBG to make materials available on an “ongoing basis” through a “subscription agreement.”¹³² In effect, this allows a domestic entity to rebroadcast BBG programming within the United States, almost as though the State Department or the BBG were broadcasting the materials themselves. Through a subscription agreement, the third party does not need to comply with the letter of the upon request requirement for each piece of State Department- or BBG-produced programming. Once a third party establishes a subscription agreement, that third party may receive and rebroadcast government-produced programming without having to file another request with the State Department or the BBG.

BBG regulations impose two notable restrictions on an ongoing subscription agreement.¹³³ First, the ongoing subscription broadcasts must only rebroadcast BBG programming to “complement, rather than duplicate” the programming produced by other private U.S. broadcasters.¹³⁴ Thus, even under the amended Smith–Mundt Act, the State Department

¹²⁵ See *supra* notes 117–18.

¹²⁶ BBG Regulations, *supra* note 114, at 39,586.

¹²⁷ *Id.* at 39,587.

¹²⁸ *Id.* at 39,586.

¹²⁹ *Id.*

¹³⁰ *Id.* at 39,587.

¹³¹ *Id.*

¹³² *Id.*

¹³³ 22 U.S.C. § 6202 (2012) (enumerating the BBG’s standards and principles); BROAD. BD. OF GOVERNORS INT’L BROAD. BUREAU, II BAM 160 DOMESTIC DISTRIBUTION OF PROGRAM MATERIALS 1 (2013), available at <http://www.bbg.gov/wp-content/media/2013/11/2-160-Domestic-Distribution-of-Program-Materials.pdf> [<http://perma.cc/Y4RT-T5Z6>].

¹³⁴ BROAD. BD. OF GOVERNORS INT’L BROAD. BUREAU, *supra* note 133, at 2; see also §§ 1462, 6202(a)(3)–(4).

and the BBG may not use third parties as a means to compete with private broadcasters currently operating within the United States. Second, third-party broadcasters may not use government-produced programming to “develop audiences within the United States.”¹³⁵ What constitutes “developing an audience” is, however, unclear—the criteria are simply undefined. Although there is considerable uncertainty as to what developing an audience entails, there already appears to be an exception to this rule. BBG regulations explicitly encourage disseminating its materials to those broadcasters located within U.S.-based “foreign diaspora communities.”¹³⁶ The BBG attempts to reconcile this tactic with the aforementioned prohibition on developing an audience within the United States by classifying people who belong to a foreign diaspora community as members of a non-U.S. country. This classification scheme supposedly allows the agency to target them as part of the BBG’s “foreign policy mission.”¹³⁷

2. *Audience Restrictions.*—The upon request restriction is not the only restriction contained within the amended Smith–Mundt Act. Two related restrictions introduced in the 2013 Amendment prohibit the State Department and the BBG from either creating programming for a domestic audience or broadcasting programming within the United States first before disseminating it abroad.¹³⁸ In other words, although the State Department and the BBG may broadcast their programming within the United States, the American people can be neither the intended nor the initial audience.

Although these two restrictions may appear to provide substantial protection from the State Department and the BBG “propagandizing” the American people, in practice they provide only minimal safeguards against widespread dissemination of government-produced programming. The first restriction—that government-produced programming may not be intended for an American audience—is nearly impossible to verify. In certain circumstances, programming intended for a foreign audience may be indistinguishable from programming intended for a domestic audience. Say the BBG produced a piece of programming endorsing U.S. intervention in a foreign country that was first broadcast in an English-speaking country such as the United Kingdom, Australia, or India. Barring an in-depth

¹³⁵ BROAD. BD. OF GOVERNORS INT’L BROAD. BUREAU, *supra* note 133, at 1.

¹³⁶ *See id.*

¹³⁷ *Id.* This exception to the prohibition on developing a domestic audience requires further inquiry. For example: Does the BBG believe that it can only disseminate its materials to domestic broadcasters located in foreign diaspora communities? What are the criteria to determine which communities are foreign diaspora communities? And would a third-party broadcaster be permitted to target only non-U.S. citizens, naturalized U.S. citizens, foreign-language-speaking U.S. citizens, or some combination thereof?

¹³⁸ § 1461(b)(1).

investigation into the story's development from conception to broadcast, there would be no way to determine whether the programming was intended for a foreign audience or an American audience.¹³⁹ The second restriction—that government-produced programming must not be disseminated within the United States before it is disseminated abroad—has little significance.¹⁴⁰ Because modern technology allows for the instantaneous transmission of information across borders, this restriction may result in only a negligible delay in the domestic dissemination of government-produced programming—particularly for programming that does not require translation.

3. *The Influence Prohibition.*—The most striking restriction in the amended Smith–Mundt Act is paradoxically the least meaningful. The amended Smith–Mundt Act retains the text of the 1985 Amendment drafted by Senator Zorinsky, which states that “[n]o funds authorized to be appropriated to the [State Department] or the [BBG] shall be used to influence public opinion in the United States.”¹⁴¹ Standing alone, this “influence prohibition” seems to prevent the State Department and the BBG from disseminating government-produced programming within the United States. After all, the fundamental purpose of this programming is to influence public opinion.

But when the influence prohibition is read in conjunction with the surrounding text, it provides little—if any—restriction on the conduct of the State Department or the BBG. The amended Smith–Mundt Act provides two enormous carve-outs to the influence prohibition. First, the amended Smith–Mundt Act states that the influence prohibition does not “prohibit or delay” the State Department or the BBG from “providing information about its operations, policies, programs, or program material.”¹⁴² Second, the Act states that the influence prohibition does not “prohibit or delay” the State Department or the BBG from “making [their programming] available, to the media, public, or Congress, in accordance with other applicable law.”¹⁴³ In other words, the revised Smith–Mundt Act

¹³⁹ Even if the BBG were guilty of violating this provision, there are no clear consequences. *See id.* § 1461. And, even if they do violate the statutory restrictions in §§ 1461 and 1461-1a, recent history has shown that there are virtually no consequences. *See, e.g.,* Walsh, *supra* note 115, at 12.

¹⁴⁰ It is generally believed that the older the programming is, the less impact it will have as propaganda. Walsh, *supra* note 115, at 12.

¹⁴¹ § 1461-1a(a); Pub. L. No. 112-239, § 1078, 126 Stat. 1632, 1958 (2013).

¹⁴² § 1461-1a(a). A version of this exemption has existed since 1994. *Id.* § 1461-1a (1994). However, the 2013 Amendment greatly expanded the scope of disclosure allowed by the State Department and the BBG: instead of merely allowing these agencies to “respond[] to inquiries . . . about its operations, policies, or programs” as before, *id.* amend. (2012), the State Department and the BBG may now freely “provid[e] information about its operations, policies, programs, or program material” to the U.S. public, *id.* (emphasis added).

¹⁴³ *Id.* (1994).

exempts all programming produced by the State Department and the BBG from being subject to the influence prohibition, rendering this once powerful restriction irrelevant.¹⁴⁴

4. *The “Covert Propaganda” Prohibition.*—Perhaps the most meaningful restriction on the widespread domestic dissemination of government-produced programming lies outside of the Smith–Mundt Act. The State Department’s appropriations bill prohibits the agency from disseminating “propaganda” within the United States without the authorization of Congress.¹⁴⁵ According to the U.S. Government Accountability Office (GAO), programming is propaganda if it is: (1) self-aggrandizing, (2) purely partisan in nature, or (3) covert.¹⁴⁶ Given that the State Department and the BBG overwhelmingly produce apolitical news stories, the first two categories—self-aggrandizement and partisan materials—are largely inapplicable.¹⁴⁷ However, the third category—“covert propaganda”—is relevant to the State Department and the BBG. Unlike the first two categories, covert propaganda does not restrict subject matter; rather, it restricts the means of distribution. Even the most innocuous State Department or BBG programming could be considered covert propaganda if, without congressional approval, it is “circulated as the ostensible position of parties outside the agency”¹⁴⁸ through “surreptitious means.”¹⁴⁹

Essentially, an agency violates the covert propaganda prohibition if the intended audience cannot ascertain the proper source of the government-produced materials.¹⁵⁰ For example, in 1987, the State Department paid unaffiliated consultants to write op-eds in support of the government’s policy on Central America who in turn submitted the op-eds to newspapers

¹⁴⁴ The BBG similarly believes that the influence prohibition does not restrict it from broadcasting within the United States. In its agency regulations, the BBG maintains that although it is ostensibly prohibited from influencing public opinion in the United States, it “may . . . [m]ake program materials available in the Unites [sic] States, when appropriate.” BBG Regulations, *supra* note 114, at 39,586.

¹⁴⁵ See, e.g., Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7055, 125 Stat. 786, 1243–44 (2011).

¹⁴⁶ KEVIN R. KOSAR, PUBLIC RELATIONS AND PROPAGANDA: RESTRICTION ON EXECUTIVE AGENCY ACTIVITIES 6 (2005). Executive agencies defer to the GAO (formerly known as the U.S. Government Accounting Office) for interpretation because “publicity” and “propaganda” are not defined in the legislation. 1 OFFICE OF THE GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-197 (3d ed. 2004).

¹⁴⁷ See 1 OFFICE OF THE GEN. COUNSEL, *supra* note 146, at 4-199 to -201.

¹⁴⁸ See *id.* at 4-202.

¹⁴⁹ KOSAR, *supra* note 146, at 7. However, government agencies may legally distribute unattributed programming if (1) it is impossible to verify (e.g., promoting liberty generally), or (2) it influences only the emotions of the public (e.g., placing an American flag behind a government spokesperson during a speech). *Id.*

¹⁵⁰ Office of Nat’l Drug Control Policy, B-303495, 2005 WL 21443, at *4 (Comp. Gen. Jan. 4, 2005).

under their own names.¹⁵¹ The GAO found that the State Department violated the covert propaganda prohibition because the newspapers' readers incorrectly attributed the source of the op-eds to someone other than the government agency.¹⁵² Similarly, in 2005, the GAO found a government agency guilty of disseminating covert propaganda when it distributed misleading, unattributed video news clips to television broadcasters.¹⁵³

The covert propaganda prohibition provides the most promising check on the State Department and the BBG from freely disseminating their unattributed materials within the United States because, unlike the other restrictions mentioned above, it has a track record of enforcement. However, like these other restrictions, it, too, may have little effect in practice. First, the covert propaganda prohibition may be inapplicable if the 2013 Amendment constitutes implicit congressional approval for anonymous dissemination of government-produced programming. Broadly construed, the 2013 Amendment, by virtue of abolishing the one meaningful limitation on the domestic dissemination of government-produced programming, could be deemed congressional approval to engage in otherwise prohibited covert propaganda.¹⁵⁴ Even assuming that Congress did not grant the State Department and the BBG permission to engage in covert propaganda, proving a violation is exceedingly difficult—the agency must have “attempt[ed] to persuade or deceive the public through surreptitious means”¹⁵⁵ beyond “any legitimate doubt.”¹⁵⁶ In the unlikely event of a violation, the repercussions are not severe,¹⁵⁷ in the past, when

¹⁵¹ Dep't of State's Office of Pub. Diplomacy for Latin Am. & the Caribbean, 66 Comp. Gen. 707 (1987). Not all of the consultants' op-eds were deemed covert State Department propaganda, however—some were properly attributed. *Id.*

¹⁵² *See id.* at 708.

¹⁵³ Office of Nat'l Drug Control Policy, B-303495, 2005 WL 21443, at *5 (“By its own records, ONDCP's prepackaged news stories reached more than 22 million households, without disclosing to any of those viewers—the real audience—that the products they were watching, which ‘reported’ on the activities of a government agency, were actually prepared by that government agency, not by a seemingly independent third party. This is the essence of the ‘covert propaganda’ violation—agency-created materials that are ‘misleading as to their origin.’” (citation omitted)); *see also* Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., B-302710, 2004 WL 1114403, at *11 (Comp. Gen. May 19, 2004).

¹⁵⁴ In a 2005 GAO opinion, the ONDCP made a similar argument justifying its use of unattributed government-produced programming because of a provision allowing “news media outreach” under the Drug-Free Media Campaign Act of 1998. Office of Nat'l Drug Control Policy, B-303495, 2005 WL 21443, at *6. Although the ONDCP's argument failed, similar conduct under the amended Smith–Mundt Act may be permissible because of the Act's substantial carve-outs. *See supra* notes 141–44 and accompanying text.

¹⁵⁵ KOSAR, *supra* note 146, at 7.

¹⁵⁶ 1 OFFICE OF THE GEN. COUNSEL, *supra* note 146, at 4-198.

¹⁵⁷ *See, e.g.*, Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., B-302710, 2004 WL 1114403, at *11.

agencies were found guilty of engaging in covert propaganda, they merely submitted a report of wrongdoing to the President and Congress.¹⁵⁸

Overall, because of the uncertainty over whether a violation could even occur under the amended Smith–Mundt Act, the difficulty of proving a violation, and the absence of meaningful consequences when a violation does occur, this restriction cannot be relied upon to prevent the State Department and the BBG from engaging in deceptive distribution of government-produced programming. Other federal agencies have been found guilty of violating similarly worded propaganda prohibitions in recent years,¹⁵⁹ and it would come as no surprise if the State Department and the BBG were to engage in similar activity under the amended Smith–Mundt Act.

B. *Evaluating the Impact of the 2013 Amendment*

The 2013 Amendment resolves key issues for supporters of national security and government transparency. By repealing the Smith–Mundt Act’s domestic dissemination ban, the 2013 Amendment permits the State Department and the BBG to target those communities that are susceptible to the anti-American propaganda that freely streams into the United States.¹⁶⁰ Additionally, the 2013 Amendment increases government transparency by allowing the American public to monitor how the federal government is spending taxpayer money on international broadcasting.¹⁶¹ Although this was an ancillary motive for the 2013 Amendment,¹⁶² there is nonetheless great value in having researchers, journalists, and academics independently analyze how the State Department and the BBG employ government-produced programming. Moreover, the 2013 Amendment lets the American people access reputable—albeit agenda-driven—news sources, which may provide a more holistic picture of various issues. Finally, the 2013 Amendment brings the Smith–Mundt Act in line with technological realities. In the years leading up to 2013, the State Department and the BBG did not police how their materials were

¹⁵⁸ See, e.g., Office of Nat’l Drug Control Policy, B-303495, 2005 WL 21443, at *8.

¹⁵⁹ See KOSAR, *supra* note 146, at 1–3 (listing questionable and illegal propaganda activity by executive agencies). This general lack of compliance is due in part to federal agencies not having the appropriate measures in place to effectively monitor the dissemination of their materials. *Id.* at 5.

¹⁶⁰ Rebecca A. Keller, *Influence Operations and the Internet: A 21st Century Issue*, MAXWELL PAPER NO. 52, at 69, 75 (2010) (“[N]o . . . law prohibits foreign nations or organizations from targeting US citizens with propaganda and/or deception.”). Perhaps the most notable foreign propaganda freely accessible by Americans is Russia Today (RT), a quasi-news organization funded by the Russian government. See *Russia Today TV to Make Unique Contribution to Global Information—German Expert*, RIA NOVOSTI (July 6, 2005, 9:42 PM), <http://en.ria.ru/society/20050607/40486831.html> [<http://perma.cc/67CX-8RDZ>].

¹⁶¹ See Metzgar, *supra* note 5, at 99.

¹⁶² See *supra* Part I.D.

disseminated within the United States, largely because of the difficulty associated with restricting the flow of information in the Internet era.¹⁶³ Now, should their materials reach those living in the United States, these agencies need not worry about violating the Smith–Mundt Act.

However, the 2013 Amendment creates new problems. Allowing the State Department and the BBG to freely disseminate their materials within the United States could compromise free public discourse.¹⁶⁴ Neither the amended Smith–Mundt Act nor any other law or regulation contains substantive limitations on what the State Department or the BBG may disseminate within the United States.¹⁶⁵ Although there are a number of restrictions that the State Department and the BBG must follow, they are ineffective, unverifiable, rendered irrelevant by carve-outs, or some combination thereof. More critically, there are no meaningful consequences should the State Department or BBG violate one or more of these restrictions.

Theoretically, the American people have the ability to elect representatives who would defund these agencies should they abuse their power. However, this traditional check on government overreach is largely ineffective against modern propaganda. Modern propaganda is often indistinguishable from privately produced news because it is by-and-large truthful and accurate; it gently guides a viewer to adopt a particular point of view rather than inundate him with an obvious political message.¹⁶⁶ Indeed, there is little risk the State Department and the BBG will disseminate patently inaccurate or misleading stories. The risk is that these agencies will disseminate stories that cover only those issues that advance the federal government’s stance, thereby painting an incomplete picture of the issue. Thus, it is important that when the government speaks to the people, it is clear who is speaking.

III. IMPLEMENTING ATTRIBUTION

The potential harm in the domestic dissemination of government-produced materials does not lie in government broadcasting itself; those living in the United States are fully capable of recognizing the biases that accompany government-produced programming.¹⁶⁷ Rather, the potential harm lies in disseminating these programs *without attribution*. The public

¹⁶³ Compliance with the Smith–Mundt Act’s domestic dissemination ban leading up to the 2013 Amendment was questionable. See Walsh, *supra* note 115, at 9, 12–13.

¹⁶⁴ See *infra* Part III.

¹⁶⁵ See *supra* Part II.A. For proposed solutions to this issue, see *infra* Part III.

¹⁶⁶ See Keller, *supra* note 160, at 79 (“Propaganda, to be effective, must be believed. To be believed, it must be credible. To be credible, it must be true.” (quoting Hubert H. Humphrey)).

¹⁶⁷ See Palmer & Carter, *supra* note 5, at 6.

expects independent analysis when watching private broadcasts.¹⁶⁸ When the public is misled about the independence of a broadcast, not only are the viewers deceived, but also free public discourse as a whole is damaged.¹⁶⁹ Hence, the State Department and BBG must be required to attribute their programming.¹⁷⁰

But unlike reinstating a ban on the domestic dissemination of government-produced programming, which is probably unenforceable given modern information technology, implementing attribution has a realistic chance of success and has already proven feasible in other contexts.¹⁷¹ Attribution is also more desirable than banning the domestic dissemination of government-produced programming because it prevents the government from surreptitiously influencing public opinion without denying the American public's access to these materials.

As described below, attribution of government-produced programming may be achieved in one of two ways: (1) by passing new attribution legislation similar to that of the failed Truth in Broadcasting Act of 2005, or (2) by expanding the judicially created government speech doctrine to require these agencies to properly attribute any materials they distribute to the American public.

A. Current Government-Produced Programming

It is common practice for news stations to broadcast news produced by others. Private companies and federal government agencies frequently produce and distribute video news releases (VNRs) that are then broadcast without attribution on news stations across the country.¹⁷² According to a 2003 National Public Radio panel discussion on the use of VNRs, 100% of television broadcasters aired VNRs, and many stations aired them several times a month.¹⁷³

Given the federal government's willingness to work with broadcasters, it is likely that the State Department and the BBG will begin distributing

¹⁶⁸ Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 111 (2006).

¹⁶⁹ *Id.* at 111–12 (“A stealth appeal in the evening news, where the audience may expect greater independence . . . is more likely to deceive the audiences. Indeed, it is because such placements are likely to deceive that stealth marketers find them valuable. Persuasion is easiest where the audience is most credulous and least defended against promotional messages.”).

¹⁷⁰ For examples of federal agencies, including the State Department, disseminating unattributed programming, see *supra* notes 152–59 and accompanying text.

¹⁷¹ Attribution has been successfully implemented in campaign finance reform, for example. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–55, § 305, 116 Stat. 81, 101.

¹⁷² See Janel Alania, Note, *The “News” from the Feed Looks Like News Indeed: On Video News Releases, the FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005*, 24 CARDOZO ARTS & ENT. L.J. 229, 233 (2006).

¹⁷³ *Id.*

their own VNRs to interested broadcasters. As explained earlier in this Note,¹⁷⁴ State Department- and BBG-produced programming may be provided to an interested broadcaster at no charge.¹⁷⁵ The broadcaster benefits from this arrangement because airing complimentary programming allows the broadcaster to devote more resources to other projects.¹⁷⁶ Typically, VNRs are, in fact, provided to broadcasters for free, because under current law,¹⁷⁷ neither the entity that produced the VNR nor the broadcaster is legally compelled to attribute the source of the material, allowing the relationship to persist undetected.¹⁷⁸ A broadcaster has little incentive to attribute these materials *pro forma*, because when the VNR is aired anonymously, the audience assumes it was produced by the broadcaster, thereby maintaining the appearance of credibility. However, when VNRs are broadcast without attribution, the consumer does not view them in the appropriate context, potentially resulting in a distorted opinion of the issue. When this is repeated thousands of times over, society as a whole risks unwittingly adopting a biased viewpoint.

B. Reviving the Truth in Broadcasting Act of 2005

In the early 2000s, the federal government widely distributed unattributed government-produced programming within the United States. From 2003–2005, the federal government spent \$1.62 billion on VNRs and other public relations programming,¹⁷⁹ much of which was aired anonymously.¹⁸⁰ In response to this questionable practice, Senators Frank Lautenberg (D-N.J.) and John Kerry (D-Mass.) introduced a bill entitled the “Truth in Broadcasting Act of 2005,”¹⁸¹ which would have required the federal government to “conspicuously identif[y]” any government-produced programming.¹⁸² This bill would have set forth clear, specific attribution requirements. For television programs (e.g., VNRs), the bill would have required the federal agency to display “PRODUCED BY THE

¹⁷⁴ See *supra* Part II.A.1.a.

¹⁷⁵ See Jeffrey Peabody, *When the Flock Ignores the Shepherd—Corralling the Undisclosed Use of Video News Releases*, 60 FED. COMM. L.J. 577, 579 (2008).

¹⁷⁶ *Id.* at 581.

¹⁷⁷ 47 U.S.C. § 317(a)(1) (2012).

¹⁷⁸ *Id.* Some have argued that this constitutes an in-kind contribution and thus should be attributed. Peabody, *supra* note 175, at 593. Controversial or political messages are always subject to a disclosure requirement. Goodman, *supra* note 168, at 97–98. However, given that most State Department and BBG programming is apolitical news, it is unlikely that this material would be either controversial or political. See, e.g., VOICE OF AMERICA, *supra* note 119.

¹⁷⁹ Bejesky, *supra* note 14, at 991.

¹⁸⁰ The federal government produced and distributed hundreds of VNRs in support of invading Iraq in the months leading up to the conflict. See *id.* at 990–92; Peabody, *supra* note 175, at 581–82.

¹⁸¹ S. 967, 109th Cong. (as introduced by Senate, Apr. 28, 2005).

¹⁸² *Id.*

U.S. GOVERNMENT” onscreen for the program’s entire duration,¹⁸³ for radio programs, the bill would have required the federal agency to “audibly inform” the audience that the program was produced by the federal government.¹⁸⁴ And, in order to prevent third-party tampering, the bill would have made it illegal for “any person” to remove the government attribution.¹⁸⁵ This legislation, by virtue of its simplicity, specificity, and comprehensiveness, would have made it nearly impossible for any federal agency—including the State Department and the BBG—to air unattributed programming within the United States.

Unfortunately, the Truth in Broadcasting Act was never passed. Before it could go to a vote, the bill was completely rewritten. The revised Truth in Broadcasting Act, renamed the “Prepackaged News Story Announcement Act of 2005,” was a watered-down version of the original. In its edited form, the bill vaguely required federal agencies to provide “clear notification” that a program was prepared by the federal government.¹⁸⁶ And, unlike the original Truth in Broadcasting Act, the Prepackaged News Story Announcement Act did not make it unlawful to remove the attribution from the broadcast, instead delegating the determination of noncompliance to the Federal Communications Commission.¹⁸⁷ So ineffectual was the revised version of the legislation that one commentator called it a “toothless hound” in comparison to the “watchdog” version that preceded it.¹⁸⁸ Even though this insipid version of the Truth in Broadcasting Act may have been introduced to gain bipartisan support, it failed to do so—the bill died in Congress.¹⁸⁹

Exhuming the original text of the Truth in Broadcasting Act would provide a much-needed check on the broad powers afforded to the State Department and the BBG under the 2013 Amendment. For the legislation to be effective, however, it must adopt the Truth in Broadcasting Act’s requirement for explicit attribution of government-produced materials and its strict anti-tampering penalties for third parties.¹⁹⁰ But to be truly effective, this legislation must go beyond the text of the Truth in Broadcasting Act and establish meaningful, clearly defined penalties for a

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Prepackaged News Story Announcement Act of 2005, S. 967, 109th Cong. § 2 (as reported by Senate, Dec. 20, 2005).

¹⁸⁷ *Id.*

¹⁸⁸ Peabody, *supra* note 175, at 587.

¹⁸⁹ S. 967 (109th): *Prepackaged News Story Announcement Act of 2005*, GOVTRACK, <https://www.govtrack.us/congress/bills/109/s967> [<http://perma.cc/4RNF-M267>].

¹⁹⁰ See *supra* note 15 and accompanying text. Attribution requirements for campaign finance reform may also serve as a viable template. See 2 U.S.C. § 441d (2012).

violation by a federal agency. Additionally, this legislation must require independent oversight to verify that federal agencies are properly attributing their programming. With these precautions in place, the risk of a federal agency circumventing the law would be diminished significantly.

Passing attribution legislation in the same vein as the Truth in Broadcasting Act of 2005 would preserve the benefits of the 2013 Amendment while minimizing its drawbacks. It would allow the State Department and the BBG to legally broadcast its message within the United States and promote the 2013 Amendment's goal of greater government transparency. But most importantly, effective attribution legislation would assuage any concerns of the State Department and the BBG "propagandizing" the American people.¹⁹¹ Admittedly, requiring attribution may render government-produced programming less credible to its target audience (i.e., those communities susceptible to anti-American propaganda) because it would clearly flag when the government is voicing its message. However, it is also possible that government programming presented in an honest, transparent fashion would foster trust with its viewership.

C. *Revisiting Johanns v. Livestock Marketing Ass'n*

The State Department and the BBG may also be compelled to attribute any of their materials disseminated within the United States under the government speech doctrine.¹⁹² This legal doctrine is in its nascent stages, and its application to government-produced programming is uncertain.¹⁹³ Nonetheless, it is an attractive route for requiring attribution because it does not require the broad political support necessary to pass the effective, but potentially controversial, attribution legislation described above.

In essence, the government speech doctrine protects the government from First Amendment challenges.¹⁹⁴ The government can selectively fund a program to encourage activities that promote the public interest without being required to also fund alternative programs that address the problem in other ways.¹⁹⁵ In so doing, the government is deemed not to have discriminated on the basis of viewpoint; rather, "it has merely chosen to fund one activity to the exclusion of the other."¹⁹⁶ In practical terms, individuals cannot challenge government speech under the Free Speech

¹⁹¹ See *Kidwell v. City of Union*, 462 F.3d 620, 627 n.1 (6th Cir. 2006) (Martin, J., dissenting).

¹⁹² See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 578–80 (2005) (Souter, J., dissenting).

¹⁹³ *Id.* at 574 ("The government-speech doctrine is relatively new, and correspondingly imprecise.").

¹⁹⁴ See Mia Guizzetti Hayes, Comment, *First Amendment Values at Serious Risk: The Government Speech Doctrine After Johanns v. Livestock Marketing Ass'n*, 55 CATH. U. L. REV. 795, 802 (2006).

¹⁹⁵ *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

¹⁹⁶ *Id.*

Clause because it conflicts with their private viewpoints.¹⁹⁷ This “glaring exception to the First Amendment” allows the government to insert its viewpoint in public discourse, without the need to also give a voice to those groups with which it disagrees.¹⁹⁸ Simply put, under this doctrine, the government need not be “viewpoint neutral.”¹⁹⁹

But not all speech emanating from the government is government speech. Speech is only considered government speech when the government communicates a message directly to the public, or alternatively, when it uses private speakers to transmit specific information pertaining to a government program.²⁰⁰ In this latter scenario, the private actor is “essentially an organ of the government” so it is “constructively the government that is speaking,” even though the message is disseminated by a nongovernmental entity.²⁰¹ However, the government is barred from inserting government speech into certain public forums,²⁰² such as in streets and parks,²⁰³ public university funding of student publications,²⁰⁴ and political elections.²⁰⁵ These are considered areas where the government is deemed to be *selecting* a message, rather than *voicing* a message;²⁰⁶ whereas the former is considered unconstitutional because the government is regulating private viewpoints, the latter is considered constitutional because the government is simply advancing its viewpoint.²⁰⁷ It is a tenuous distinction, and one that is often difficult to discern in practice.²⁰⁸

The government speech doctrine permits the State Department and the BBG to disseminate their viewpoints within the United States without violating the Constitution. When the State Department and the BBG speak through a private entity (e.g., by transmitting VOA programming through a private television or radio station), that speech is protected under the government speech doctrine because it is transmitted directly through an

¹⁹⁷ *Id.*

¹⁹⁸ Leading Case, *Government Speech Doctrine—Compelled Support for Agricultural Advertising*, 119 HARV. L. REV. 277, 283–84 (2005).

¹⁹⁹ *Id.* at 283.

²⁰⁰ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

²⁰¹ *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2416 (2004).

²⁰² See Leading Case, *supra* note 198, at 285 (“[A]lthough the government normally enjoys editorial discretion when making public broadcasts, it is obliged to be viewpoint neutral when producing certain types of broadcasts on certain subjects.”).

²⁰³ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

²⁰⁴ *Rosenberger*, 515 U.S. 819.

²⁰⁵ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

²⁰⁶ Leading Case, *supra* note 198, at 284.

²⁰⁷ See *id.*

²⁰⁸ See *id.*

organ of the government²⁰⁹ and because it does not take place in one of the public forums that require viewpoint neutrality.²¹⁰ Therefore, the State Department and the BBG need not be concerned about presenting viewpoint-neutral programming, and may selectively choose to cover some stories over others.²¹¹

However, it is less clear whether the State Department and the BBG need to *attribute* their message under the government speech doctrine. Between 2000 and 2001, the Supreme Court held in *Board of Regents of University of Wisconsin System v. Southworth* and in *Legal Services Corp. v. Velazquez* that the government generally must be accountable to the electorate when it speaks.²¹² However, just a few years after these rulings, the Court refined its stance in *Johanns v. Livestock Marketing Ass'n*.²¹³ In this case, two beef producing associations brought action against the United States Department of Agriculture and sought injunctive relief with respect to the generic advertising funded by targeted assessment on cattle sales and importation.²¹⁴ The advertisements promulgated by the government were attributed to “America’s Beef Producers” without any explicit mention of the government’s support or involvement.²¹⁵ The claimants argued that the government was improperly concealing its role in funding the campaign.²¹⁶ Writing for the majority, Justice Scalia held that given the particular facts of the case, the government was not obligated to clearly attribute its involvement because the constitutionality of the advertisements did not rest upon “whether or not the reasonable viewer would identify the speech as the government’s.”²¹⁷ Although the Court stopped short of permitting the government to broadcast its message without attribution in all situations, it indicated that, at least in certain circumstances, the government need not identify itself when communicating with the public.

In his dissent, Justice Souter vehemently disagreed with the majority’s stance that the American people need not always know when the

²⁰⁹ For example, when a television station is broadcasting information created solely by the government, it may be considered an organ of the government.

²¹⁰ See *supra* notes 202–05.

²¹¹ Leading Case, *supra* note 198 at 283–84 (“Government speech is a glaring exception to the First Amendment norm that the government must be viewpoint neutral. . . . As *Johanns* highlights, the tenuous distinction [for whether the government has editorial discretion] rests upon whether the government selected the message, not upon whether the government voices it.”).

²¹² *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

²¹³ 544 U.S. 550 (2005).

²¹⁴ *Id.* at 555–56.

²¹⁵ *Id.* at 555.

²¹⁶ *Id.* at 577–78 (Souter, J., dissenting).

²¹⁷ *Id.* at 564 n.7 (majority opinion).

government is speaking.²¹⁸ To protect the public's First Amendment rights, Justice Souter argued that "the political process [must serve] as a check on what government chooses to say."²¹⁹ When the public does not know if the government is speaking, they are ignorant of the government's position, meaning that the government can engage in any speech—however controversial—without fear of electoral repercussions.²²⁰ Therefore, Justice Souter argued, the public must always know when the government is speaking²²¹—an opinion not unlike that held by those who supported the passage of the Truth in Broadcasting Act of 2005.²²²

Johanns served only to further muddy the waters for an already unclear issue about whether government-produced materials should be properly attributed. Interestingly, the reasoning espoused in Justice Souter's dissent has gained traction in a number of federal circuits. In the 2006 Sixth Circuit case *American Civil Liberties Union of Tennessee v. Bredesen*, the court interpreted the majority's opinion in *Johanns* narrowly, advancing the position that if speech is controlled by the government, the government must attribute its involvement.²²³ Later, the Sixth Circuit affirmed *Bredesen* in *Kidwell v. City of Union*.²²⁴ In the *Kidwell* dissent, Judge Boyce Martin, Jr. went even further than the majority in affirming *Bredesen*, arguing that government speech should be attributed in order "to prevent confusion and subliminal governmental propaganda in the marketplace of ideas."²²⁵ The Ninth Circuit has also suggested that attribution may be required under the government speech doctrine, stating that "an attribution claim might form the basis for an as-applied First Amendment challenge" to government speech.²²⁶ The majority of circuits have yet to address this issue post-*Johanns*, which leaves open the possibility that other circuit courts will join the Sixth and Ninth Circuits in

²¹⁸ Justice Souter was joined in his dissent by Justices Kennedy and Stevens. *Id.* at 570 (Souter, J. dissenting).

²¹⁹ *Id.* at 575; see also *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.").

²²⁰ See *Johanns*, 544 U.S. at 577–79 (Souter, J., dissenting).

²²¹ See *id.* at 575.

²²² See S. REP. NO. 109-210, at 1 (2005).

²²³ 441 F.3d 370, 375, 377 (6th Cir. 2006). The Sixth Circuit also found that even if the government does not attribute its speech, it may nonetheless constitute government speech. *Id.*

²²⁴ See 462 F.3d 620, 624 (6th Cir. 2006) ("[W]hen the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes." (quoting *Bredesen*, 441 F.3d at 375)).

²²⁵ *Id.* at 627 n.1 (Martin, J., dissenting); *id.* ("[T]he government, when it speaks, ought to be required to make clear that it is in fact the government that is speaking.").

²²⁶ *Charter v. U.S. Dep't of Agric.*, 412 F.3d 1017, 1020 (9th Cir. 2005).

support of Justice Souter's belief that government speech should be attributed.

The trajectory of the government speech doctrine indicates that a judicially imposed attribution requirement for government-produced programming may be on the horizon. The *Southworth* and *Velazquez* opinions, Justice Souter's dissent in *Johanns*, and the recent opinions of the Sixth and Ninth Circuits constitute a growing body of law supporting attribution when the government speaks. This is an encouraging development. If the American people cannot reasonably identify when the government is speaking to them, it makes sense that the government should be compelled to attribute the source. Otherwise, the American people will have no knowledge of the government's actions and thus no compulsion to push back, potentially affording the government "enormous power" over public discourse.²²⁷ Whether a judicially imposed attribution requirement will take hold, however, is far from certain given the volatility of the government speech doctrine in recent years.²²⁸

CONCLUSION

The domestic dissemination ban in the Smith–Mundt Act is rooted in the Cold War. As with other vestiges of that era that have succumbed to technological and social modernity, so, too, has the domestic dissemination ban. The 2013 Amendment now allows the State Department and the BBG to better combat domestic terrorism, and also promotes greater government transparency. However, the 2013 Amendment creates new problems. Now, there is little preventing the State Department and the BBG from widely disseminating unattributed government-produced programming within the United States.

The danger of domestic dissemination does not lie in the dissemination itself; rather, it lies in *anonymous* dissemination. To curb the potential harm of covert government propaganda, there must be either legislation or a judicial doctrine that requires the State Department and the BBG to attribute their materials. The Truth in Broadcasting Act of 2005 provides an excellent template for a future bill that would require attribution on government-produced programming. Similarly, a judicially imposed attribution requirement under the government speech doctrine may also solve the problem. The Sixth and Ninth Circuits' acceptance of Justice Souter's reasoning in the *Johanns* dissent indicate that a judicially imposed attribution of government-produced programming may be forthcoming.

²²⁷ See Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 129 (2010).

²²⁸ See Leading Case, *supra* note 198, at 277–78.

Fortunately, there is little evidence that the State Department and the BBG have any desire to “propagandize” the American people.²²⁹ But the best rules are ones that are enacted before they are needed. It is critical to establish safeguards now—before the United States enters into a new conflict or engages in some other highly controversial activity—that will prevent the federal government from covertly influencing public opinion within the United States. The government will continue to speak, and the American people must know to whom they are listening.

²²⁹ See Josh Rogin, *Much Ado About State Department ‘Propaganda,’* FOREIGN POL’Y (May 23, 2012, 2:28 PM), http://thecable.foreignpolicy.com/posts/2012/05/23/much_ado_about_state_department_propaganda [<http://perma.cc/63EY-DQD7>].