RAISING THE IRON CURTAIN ON TWITTER: WHY THE UNITED STATES MUST REVISE THE SMITH-MUNDT ACT TO IMPROVE PUBLIC DIPLOMACY

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I. INTRODUCTION

Four armed men in plainclothes, claiming to be Iranian police officers, kidnapped Mansur Osanloo, a Tehran public transportation union official, on the evening of July 10, 2007.[1] Osanloo yelled out his name and job title as the men dragged him off a public bus, and several riders soon reported the abduction to Tehran authorities and Osanloo's wife.[2] After word of the kidnapping spread

† J.D. and Institute for Communications Law Studies Certificate Candidate, May 2010, The Catholic University of America, Columbus School of Law. The author would like to thank Professor Donna Coleman Gregg for her wonderful insight and suggestions in writing this comment. He would also like to thank the Executive Board and staff of the *CommLaw Conspectus* for all their hard work in preparing this paper for publication.

1 Ron Synovitz, *Iran: Radio Farda Journalist Covers Economic Stories that Tehran Tries to Suppress*, PAYVRAND'S IRAN NEWS, July 12, 2007, *available at* http://www.payvand.com/news/07/jul/1139.html. The four men dragged Osanloo off his bus and started beating him in the streets. The men claimed they were arresting a thief and dragged him into an unidentified car and drove away. *See* Condemn the Kidnapping of Mansour Osanloo, http://www.labournet.net/world/0707/iran5.html (last visited Sept. 19, 2009).

2 Synovitz, *supra* note 1. Osanloo is a well-known figure within the Iranian labor movement and has been a frequent target of the Iranian government for the past several years. *See* International Transport Workers Federation: Tehran Bus Dispute, http://www.itfglobal.org/urban-transport/tehranbuses.cfm (last visited Sept. 19, 2009). Osanloo, along with other union officials, have fought with the government for higher salaries and improved working conditions, as inflation has increased ten-fold. *See* Safa Haeri, *Leaders of Tehran Bus Company Arrested, The Union Dissolved*, IRAN PRESS SERVICE, Dec.

quickly to several other union leaders, one of the union leaders anonymously called Radio Farda broadcaster Roozbeh Bolhari in the Czech Republic.[3] Bolhari had previously worked as a journalist in Iran for 17 years, and had spent the last year and a half with Radio Farda.[4] He phoned a few contacts, including Mrs. Osanloo, and reported the story of the abduction on-air within hours, broadcasting into Iran.[5] Bolhari's report of the incident was one of the first in the world, and was likely the only way that many Iranians could have learned about the event, due to the Iranian government's media censorship.[6]

Radio Farda, based in Prague and overseen by the U.S. Broadcasting Board of Governors ("BBG"), has played a significant role during the past decade in providing Iranians with uncensored news.[7] The station has also reported stories that the international news media has failed to cover.[8] Radio Farda employs freelance reporters throughout Iran who undertake great risks to relay their stories back to Prague,[9] which are reported through the organization's radio

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24, 2005, *available at* http://www.iran-press-service.com/ips/articles-2005/december-2005/bus_union_leaders_arrested_241205.shtml.

3 Synovitz, *supra* note 1. Bolhari covered stories of union suppression and workers strikes in Iran for a dozen newspapers in Iran during the 17-year period. The government eventually closed all of the newspapers. *Id.*

4 *Id.*

5 *Id.*

6 *See id.* The Iranian government has engaged in media censorship since 1979 when the Ayatollah Khomeini shut down all non-Islamic newspapers. *See* John Kifner, *2 More of Teheran's Leaders Die as Challenge to Revolution Grows,* N.Y. TIMES, Sept. 16, 1981, at A1. However, since President Ahmadinejad took office in 2006, he has taken additional new steps to jam radio signals, block websites deemed inappropriate, and arrest bloggers who oppose his government. Associated Press, *Iranian Censors Clamp Down on Bloggers: Pressure, Arrests End Years of Freewheeling Web Access,* MSNBC.COM, Aug. 14, 2006, http://www.msnbc.msn.com/id/14343239/.

7 *See* Jay Solomon, *Radio Farda Hits Delicate Balance*, WALL ST. J, June 13, 2008, at A10; *see also* Jeffrey Gedmin, *Voices that Tehran Fears*, WASH. POST, Sept. 19, 2007, at A23. Congress appropriated funding for a Persian-language radio service in 1998 called Radio Azadi, and in 2002, the Broadcasting Board of Governors overhauled Azadi, and renamed the station Radio Farda. Solomon, *supra* note 7. The Iranian government has labeled Farda as "counterrevolutionary" and has taken "considerable effort[s] to jam [its] signals" within the country. Gedmin, *supra* note 7.

8 For example, Radio Farda provided in-depth coverage on the gas rationing practices in 2007 when Iran faced a gas shortage. Gedmin, *supra* note 7. It also reported on a 2007 crackdown of female dress code violations. *Id.* Gedmin, the president of Radio Free Europe/Radio Liberty says he considers Radio Farda to be a "surrogate broadcast[er]," in the absence of a free and uncensored Iranian media. Jeffrey Gedmin, *Our Colleagues Believe in Radio Farda's Mission*, MIDDLE EAST QUARTERLY, Fall 2008, at 53–56. One in four Iranians listen to Radio Farda or other BBG programming every week. James K. Glassman, *Media is Half the Battle*, WALL ST. J, Sept. 14, 2007, at A13.

9 Gedmin, *supra* note 7 (reporting that one young reporter was charged in court with conducting "activities against national security" and noting that other reporters have repeatedly been interrogated and have had family members threatened). In 2008, Reporters Without Borders reported that Iranian officials had executed freelance journalist Adnan Hassan-

and Web outlets.[10] Despite its valiant work, Radio Farda continually struggles to receive adequate levels of funding,[11] while various legislators question the operations of the station and put their own conditions and restrictions on the station's programming.[12] Such struggles occur not only with Radio Farda, but also with other BBG stations including Al-Hurra, an Arabic satellite TV station, and Radio Marti, which focuses on providing similar programming in Cuba.[13]

The BBG is in charge of all "civilian international" broadcasting sponsored by the United States, and reports to Congress on the operations of the agency.[14] However, because a 60-year-old law restricts how the State Department domestically disseminates information intended for consumption in other countries, this programming and information is not available to the American public.[15] Some experts state that Congress is reluctant to provide funding for radio stations because they cannot manage or listen to these stations on a regular basis.[16]

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pour due to his work for Radio Farda and Voice of America. Solomon, *supra* note 7. In addition, Radio Farda was victim of a cyber attack last year. *See* Agence France Presse, *RFE/RL Websites Hit by Mass Cyberattack*, Radio Free Europe/Radio Liberty, Apr. 28, 2008, *available at* http://www.rferl.org/content/Article/1109642.html. The attacker used a "denial-of-service" attack, which floods the target Web site with fake requests making it useless to other users. *Id.*

[10] Press Release, Broadcasting Board of Governors, Radio Farda Launches First of Three Programs Spotlighting Developments in Iran (Feb. 19, 2003), *available at* http://www.bbg.gov/pressroom/pressreleases-article.cfm?articleID=62.

[11] *See* Abid Khan, *President Wants More Funds for "Democracy Promotion" in Iran*, Nat'l Iranian-Am. Council, June 27, 2007, http://www.niacouncil.org/index.php?option=com_content&task=view&id=819&Itemid=2.

[12] Gedmin, *supra* note 7; Solomon, *supra* note 7 ("Senators led by Tom Coburn (R. Okla.) want guarantees that Radio Farda doesn't host guests who promote pro-Tehran policies. They want broadcasters to use tougher language, including calling governments like Tehran 'terrorist' states.").

[13] *See* Ellen McCarthy, *Va.-Based, U.S.-Financed Arabic Channel Finds Its Voice*, WASH. POST, Oct. 15, 2004, at A1 (explaining how Congress has threatened to cut funding for Al-Hurra because of high costs and its promotion of views counter to U.S. interests); John S. Nichols, *Wasting the Propaganda Dollar*, 56 FOREIGN POL'Y, Autumn 1984, at 129, 131–32 (describing how Radio Marti has faced similar resistance from Congress over budget effectiveness).

[14] BBG, About the Agency-FAQ's, http://www.bbg.gov/about/faq.html (last visited Nov. 10, 2009). The Broadcasting Board of Governors was originally established as part of the United States Information Agency ("USIA") in 1994. *Id.* BBG, About the Agency-FAQ's, http://www.bbg.gov/about/faq.html (last visited Nov. 10, 2009). It is responsible for overseas programming in 60 different languages, serving an audience of 175 million listeners and viewers weekly via radio, television, and the Internet. *Id.* BBG became an independent agency when USIA was dissolved in 1999. *See id.*

[15] *See* Marc Lynch, *The Alhurra Project: Radio Marti of the Middle East*, ARAB MEDIA & SOC'Y, Summer 2007, http://www.arabmediasociety.com/?article=268.

[16] *See id.* The management of Al-Hurra has faced turmoil due to various criticisms from Congress and Government Accountability Office ("GAO"). *Id.*

Congress passed the United States Information and Educational Exchange Act ("Smith-Mundt Act") in 1948, which authorized the creation of a new governmental communications infrastructure.[17] The purpose of this new agency was to educate people in foreign nations about the United States, its policies, and its beliefs.[18] The Act led to the establishment of the United States Information Agency ("USIA") in 1953,[19] which eventually came to oversee radio stations like Voice of America ("VOA") and Radio Free Europe.[20] These radio stations played a critical role in propaganda efforts during the Cold War from the 1950s through the 1990s.[21]

However, the Smith-Mundt Act contains a provision that prohibits the domestic dissemination of any materials that the U.S. government distributes overseas.[22] Congress enacted this ban in 1948 in response to several concerns among lawmakers. First, some members of Congress had concerns about the perception of the United States indoctrinating its own citizens, particularly in light of the domestic propaganda campaigns that took place in Germany and Japan during World War II.[23] Second, some members of Congress viewed the State Department with distrust, believing the agency contained many Communist sympathizers, and hoped the domestic dissemination ban would curtail the power of State Department bureaucrats.[24] Finally, Congress sought to engage

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[17] United States Information and Educational Exchange Act of 1948 (Smith-Mundt), Pub. L. No. 80-402, 62 Stat. 6 (1948) (codified as amended at 22 U.S.C. § 1446 (2006)).

[18] Matt Armstrong, *Rethinking Smith-Mundt*, SMALL WARS J. (2008), http://smallwarsjournal.com/blog/journal/docs-temp/77-armstrong.pdf.

[19] Reorganization Plan No. 8 of 1953, 18 Fed. Reg. 4542-43 (1953) (transferring the responsibilities given to the Secretary of State under the Smith-Mundt Act to the newly-created USIA, which remained under State Department authority).

[20] *See* JOSEPH S. NYE, SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 102–03 (2004).

[21] Voice of America was first established during World War II and was placed under the auspices of the USIA after the Smith-Mundt Act. *See* ALAN L. HEIL, JR., VOICE OF AMERICA, A HISTORY 56 (2003). Today, VOA broadcasts to 125 million people around the world on a weekly basis in 45 different languages, and employs more than 1300 people who work in more than 90 different studios, on an annual budget of $194.3 million per year. Voice of America, http://www.voanews.com/english/About/fastfacts.cfm (last visited Nov. 10, 2009). Radio Free Europe, established in 1949, broadcasts more than 1000 hours per week in 28 different languages. Radio Free Europe/Radio Liberty, http://www.rferl.org (last visited Apr. 9, 2009).

[22] 22 U.S.C. § 1461(a) (2006).

[23] Nancy Snow, *The Smith-Mundt Act of 1948*, 10 PEACE REV. 619, 619 (1998).

[24] *See* 93 CONG. REC. 6537, 6540 (1947) (statement of Rep. Rankin). Congressman Rankin expressed fears about Communists infiltrating the country through "foreign immigrant professors." *Id. But see* 93 Cong. Rec. 6437, 6543–44. (statement of Rep. Chenoweth). Congressman Chenoweth was more sympathetic to fighting a propaganda war with the Soviet Union, but did not find it appropriate for the State Department to be supervising such a program, citing the increasing costs of maintaining Dept. of State staff and drawing a "distinction between information and propaganda." *Id.*

the private sector media in this effort, reflected by a provision in the Smith-Mundt Act that directed the Secretary of State "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."[25]

Today, many experts argue the Smith-Mundt Act is not only obsolete, but also hinders an effective 21st century public diplomacy strategy, given the economic, political, and technological changes in the sixty-one years since the Act became law.[26] The development of the Internet has made it nearly impossible for the U.S. government to prevent American citizens from discovering U.S. propaganda efforts overseas, particularly radio and television programs easily accessible online.[27] American foreign policy faces more complex challenges today, compared to the Cold War era when only two superpowers battled each other: the United States and the Union of Soviet Socialist Republics ("U.S.S.R.").[28] The terrorist attacks on September 11, 2001, the wars in Iraq and Afghanistan, and the ongoing turmoil between Israel and Palestinian forces in the past decade reflect a more complicated world that requires the United States to use new and innovative methods to reach populations in other countries. The State Department needs to use the Internet to effectively engage with other countries, without fear of violating a law that no longer makes sense. However, State Department procedural guidelines still state that the Smith-Mundt law remains valid and that officials cannot post programming meant for international audiences to the department's official website.[29] The continually evolving foreign policy of the United States and the rapid and significant advances in communications technology highlight the need for a comprehensive review of the Smith-Mundt Act's prohibition on domestic dissemination of public diplomacy materials distributed in foreign nations.

Part I of this Comment discusses the history of public diplomacy legislation, examines the Congressional debates during the drafting of the Smith-Mundt Act, and highlights the discussions in Congress during the Cold War on how to

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[25] United States Information and Educational Exchange Act of 1948, Pub. L. No. 80-402 § 1005, 62 Stat. 6, 14 (1948).

[26] *See, e.g.*, Juliana Geran Pilon, *Obsolete Restrictions on Public Diplomacy Hurt U.S. Outreach and Strategy*, BACKGROUNDER (Heritage Found., Washington, D.C.), Dec. 3, 2007, at 1; BRYAN HILL, THE SMITH-MUNDT ACT OF 1948: COMMENTS, CRITIQUES, AND THE WAY FORWARD 3 (2007) ("[O]ne can plainly see that the vagaries of a 1940s law cannot reign in flow of information, ideas, and news that occurs today.").

[27] HILL, *supra* note 26 at 3.

[28] *See* NEIL KLOPFENSTEIN, USIA'S INTEGRATION INTO THE STATE DEPARTMENT: ADVOCATING POLICY TRUMPS PROMOTING MUTUAL UNDERSTANDING 1–3 (2003) (noting how the new "globalized world of instant communication and round-the-clock media coverage" brought about the end of the USIA).

[29] U.S. DEP'T. OF STATE, U.S. DEP'T. OF STATE FOREIGN AFFAIRS MANUAL VOLUME 5—INFO. MGMT. 6–7 (2009), *available at* http://www.state.gov/documents/organization/85754.pdf.

clarify and reinforce the domestic dissemination ban. It then explores how Congress handled public diplomacy issues in the 1990s with the end of the Cold War and the development of the Internet, which effectively made the Act's distinction between domestic and international audiences irrelevant.

Part II of this Comment discusses how courts and Congress have interpreted the meaning of the Smith-Mundt Act during the past sixty years and how key terms in the Act—propaganda, dissemination, and distribution—have been defined. This section also discusses Congressional concern that the American public could misconstrue public diplomacy materials if allowed access to such information. Part III addresses the current problems with the Smith-Mundt Act. First, it examines the amount of information sources today, compared to when the Act was passed in 1948. It also discusses how the Act may now conflict with the First Amendment right to access publicly available information, particularly in light of the evolving definition of "publicly available" for media entities. In doing so, Part III delineates between the right of access for the media and that of the general public, allowing for a potentially broader amount of rights for media entities to obtain information currently forbidden. This Part then discusses the declining effectiveness of current public diplomacy efforts, and argues that the domestic dissemination ban hinders the U.S. State Department from implementing an effective and informative 21st century public diplomacy strategy. Finally, Part III discusses contemporary concerns with propaganda, against the backdrop of the willingness of the administration of President George W. Bush to engage in ethically-questionable media tactics, including using independent news analysts to promote his administration's foreign and defense policy positions.

Part IV argues, in response to these concerns, Congress should revise the Smith-Mundt Act and its dissemination ban. This Part discusses ideas Congress should consider if they anticipate writing new public diplomacy legislation. First, it argues that a simple repeal of the ban and the Smith-Mundt Act ignores components of the statute that remain worthwhile, and would also forgo an opportunity to remake U.S. public diplomacy efforts. Second, Part IV outlines how new legislation should be drafted to explicitly encourage Internet use and set out requirements for agencies to disclose these efforts. It argues that reform legislation should give some discretion to the individual agencies regarding information they determine should be withheld. Third, it argues that a new agency, like the former USIA, should be revived and discusses recently proposed legislation to that end.

The Comment concludes by examining further permanent provisions necessary to protect against domestic government propaganda efforts. This Comment offers a guide for what Congress needs to consider in revising an arcane law that does not meet the current foreign policy needs of the U.S.

II. THE DEVELOPMENT OF U.S. PUBLIC DIPLOMACY LEGISLATION

A. The Enactment of the Domestic Dissemination Ban

The development of the U.S. as a world power during the 20th century prompted the government to create new agencies and strategies for communicating to people in other countries.[30] In 1948, Congress enacted the Smith-Mundt Act, the first statute to address public diplomacy efforts.[31] The Act established an infrastructure for broadcasting accurate news and programming overseas, primarily into countries behind the Iron Curtain.[32] American politicians and military officials understood that propaganda would play a significant role in fighting the Cold War.[33] In the wake of World War II, the U.S. government sought to reach out to populations in Communist countries to explain American values and ideals.[34] The Act established the foundation for the United States Information Agency ("USIA") and enacted a prohibition on domestic dissemination of USIA materials, exempting members of Congress, members of the media, and academics who sought to examine such information.[35] Congress hoped the ban would quell concerns about a government me-

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[30] *See* Burton Paulu, *The Smith-Mundt Act: A Legislative History*, JOURNALISM QUARTERLY (Summer 1953), 300, 301.

[31] United States Information and Educational Exchange Programs Act, Pub. L. No. 80-402, 62 Stat. 6 (1948) (codified as amended at 22 U.S.C. § 1446 (2006)).

[32] *See* 22 U.S.C. §§ 1439—1461(a); Armstrong, *supra* note 18, at 2. Other provisions of the law called for increased educational exchanges between the United States and other countries "to increase mutual understanding between the people of the United States and the people of other countries." Pub. L. No. 80-402, §2, 62 Stat. 6.

[33] *See e.g.*, Armstrong, *supra* note 18, at 5. Congressman Mundt asked General Dwight Eisenhower and Secretary of State George Marshall to testify in front of Congress, and both men testified to the importance of creating awareness of the United States abroad, in contrast to the security of weapons. *Id. See also* Telegram from George Kennan, to George C. Marshall, Secretary of State, U.S. Department of State (Feb. 22, 1946), *available at* http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/6-3.pdf#zoom=100. Kennan argued that the United States needed to wage a propaganda war against the Soviet Union, stating that the United States must "formulate and put forward for other nations a much more positive and constructive picture of sort of world we like to see than we have put forward in past." *Id.*

[34] *See* Louise Harmon & Eileen Kaufman, *Innocents Abroad: Reflections on Summer Abroad Law Programs*, 30 T. JEFFERSON L. REV. 69, 99 (2007).

[35] Pub. L. No. 80-402 § 501, 62 Stat. 9 (codified as amended at 22 U.S.C. § 1461-1(a)).

dia service indoctrinating its own citizens.[36] USIA proved successful in broadcasting programs to those who lived in countries where freedom of the press was not recognized.[37] The Fulbright-Hays Act of 1961 further strengthened public diplomacy initiatives, in particular cultural and educational exchanges with other nations.[38]

B. Controversy Over a Loophole for Journalists and Scholars

In 1972, Senator James Buckley wanted to provide his New York constituents with the opportunity to view the USIA film, *Czechoslovakia 1968*, during one of his weekly television reports.[39] Senate Foreign Relations Committee Chairman J. William Fulbright objected that Buckley's actions violated the domestic dissemination ban under the Smith-Mundt Act.[40] Acting Attorney General Richard Kleindienst, however, argued that the law did not call for a complete ban on disclosure, but permitted such material to be distributed through members of Congress and the press.[41] Kleindienst also noted that Congress previously made exceptions to the Act—for instance, it permitted a 1965 domestic release of a USIA film about President Kennedy's life.[42] Fulbright disagreed with Kleindienst's interpretation of the law and successfully attached an amendment to the 1972 Foreign Relations Authorization Act that closed the

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36 *See* HILL, *supra* note 26, at 2.

37 Edwin J. Feulner, President of The Heritage Foundation, *Regaining America's Voice Overseas: A Conference on U.S. Public Diplomacy*, 817 HERITAGE LECTURES 1, 2 (Jan. 13, 2004), *available at* http://www.heritage.org/Research/GovernmentReform/hl817.cfm ("[T]he advent of international broadcasting with the Voice of America and then the surrogate radio outlets of Radio Free Europe and Radio Free Liberty, helped spread the news about democracy and free markets to captive peoples around the world.").

38 Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. § 2451 (2006). The purpose of the statute is to:

> enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries . . . to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations . . . .

Id.

39 S. REP. NO. 92-754, at 83 (1972).

40 *Id.* at 85. Senator Fulbright acknowledged that Congress had passed an exception to the law related to a film about President Kennedy, but contended that the amendment did not set a precedent for treatment of future exceptions. *Id.*

41 *Id.* at 83–85. Kleindienst referred to the second section of 501, which mandated the release of such information to the appropriate parties, and noted the difference between disseminating information and making such information available. *Id.* at 84-85.

42 *Id.* at 83–84.

loophole and made the ban complete.[43]

Fulbright's proposed amendment prompted debate on the Senate floor as Senator Edward Brooke argued that the USIA journal, *Problems of Communism*, helped educate the American public about the dangers of Communism.[44] Senator Brooke sought an exception to the amendment that would allow the government to continue distributing the journal.[45] He argued that the Government Printing Office already sold *Problems of Communism* and 5,000 copies were distributed annually in the U.S.[46] Other Senators noted that this journal and other materials were viewed as scholarly works, which the public could benefit from reading.[47] While the amendment passed by a wide margin,[48] the debate between Brooke and Fulbright on the Senate floor was a precursor to some of the later debate on whether Americans should be permitted to gain a better understanding of foreign policy by viewing the government's efforts in public diplomacy. A decade later, despite the impending decline of the U.S.S.R., Senator Edward Zorinsky felt compelled to issue a reiteration of the domestic dissemination ban, ensuring that the prohibition would remain intact.[49] However, international, technological, and political events would prove to make enforcement of the ban increasingly difficult.

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[43] The Foreign Relations Authorization Act of 1972, Pub. L. No. 92-352, 86 Stat. 489, 494 (amending 22 U.S.C. §501 to read, "Any such information . . . shall not be disseminated within the United States . . . ."). Fulbright used Kleindienst's interpretation of the Smith-Mundt Act in relation to the film about President John F. Kennedy as one of several reasons to object to his nomination as permanent Attorney General during his confirmation hearings a few months later. *See* 118 Cong. Rec. 19,809, 19,809–10 (1972) (statement of Sen. Fulbright).

[44] 118 Cong. Rec. 19,186-87 (1972) (statement of Sen. Brooke). A bimonthly journal published since the early 1950s, *Problems of Communism* offered analyses by various scholars and journalists regarding the different communist movements and societies around the world. *Id.*

[45] *Id.*

[46] *Id.* at 19,186.

[47] 118 CONG. REC. 19,188 (1972) (statement of Sen. Javits); 118 CONG. REC. 19,194 (1972) (statement of Sen. Schweiker). Senator Javits noted that the journal offered sophisticated analysis and discourse of the changes occurring in Communist societies at the time, and that the material would be particularly beneficial for the American people to read, especially after President Nixon's trips to China and the U.S.S.R. *Id.* at 19,188.

[48] 118 CONG. REC. 19194-95 (1972). The amendment passed 71 to 7 with 22 Senators not voting. *Id.*

[49] *See* Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 405. 421 (codified as amended at 22 U.S.C. § 1461-1(a)). *See also* 131 CONG. REC. 14,945 (1985) (statement of Sen. Zorinsky) ("By law, the USIA cannot engage in domestic propaganda . . . [t]he American taxpayer certainly does not need or want his tax dollars to support U.S. government propaganda directed at him or her.").

C. Public Diplomacy Shifts Due to the End of the Cold War

Events in the 1990s altered the ways the U.S. government conducted public diplomacy overseas.[50] USIA slowly began to release information that allowed for greater public access to its materials, as Congress passed legislation in 1990 allowing USIA materials to be made available within the U.S. twelve years after publication.[51] In 1994, Voice of America ("VoA") began to disseminate its broadcasts and post its transcripts on the then-burgeoning Internet.[52] The goal was to make it easier for people outside the U.S.—not the American public—to access such information.[53]

Additionally, current events prompted a shift in the goals of public diplomacy. The collapse of the U.S.S.R. in 1992 and the exponential increase in global trade in the remainder of that decade encouraged the United States to increase its visibility to countries previously behind the Iron Curtain, as well as to developing nations.[54] Public diplomacy became more focused on selling the benefits of a free-market economy with reduced trade barriers.[55] Democracy came to be viewed through the same prism as maintaining prosperity and sustainable economic growth.[56]

Finally, the newly-elected Republican majority in Congress sought to streamline government and spur major changes to the public diplomacy structure.[57] In 1999, under pressure from Senator Jesse Helms, the chairman of the Senate Foreign Relations Committee, President William J. Clinton signed legislation that abolished USIA and transferred its functions into the State De-

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[50] Nancy E. Snow, *United States Information Agency*, 2 FOREIGN POL'Y IN FOCUS 1 (1997). Snow discusses the foreign policy changes in the decade during the transition from the Cold War, including improvements to how USIA was run. *Id.* at 1–2.

[51] Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. 101-246, 104 Stat. 15 (codified at 22 U.S.C. § 1461(b)(1) (2006)).

[52] Bruce Gregory, *Should Smith-Mundt-Zorinsky Legislation Be Reformed and How?* (2002), *available at* http://mountainrunner.us/symposium/library/Gregory%20Smith-Mundt%20Issues_2002.pdf.

[53] Alvin A. Snyder, Annenberg Washington Program in Communications Policy Studies, *Is the Domestic Dissemination Media Ban Obsolete?*, http://www.annenberg.northwestern.edu/pubs/usfa/usfa4.htm (last visited Sept. 15, 2009).

[54] *Cf.* David E. Sanger, *War. Peace. Aid. All Issues Are Trade Issues*, N.Y. TIMES, Jan. 15, 1995, at 4-1 (noting the 1995 U.S. bailout of Mexico and commenting on how it represents the growing link between foreign policy and economic issues).

[55] *See* Snow, *supra* note 23, at 620. Snow offers evidence that the Clinton administration sought to turn USIA into an extension of the Commerce Department. This began with the passage of the North American Free Trade Act ("NAFTA") in 1993. *Id.* at 622. It was the policy of the Clinton administration to consistently link public diplomacy efforts as tools to promote free trade and global competitiveness. *Id.* at 621–23.

[56] *Id.* at 619–21.

[57] *See, e.g.*, Douglas Jehl, *Plan To Cut Foreign Aid Is Attacked*, N.Y. TIMES, Mar. 3, 1995, at A13.

partment.[58] Commentators continue to debate whether U.S. public diplomacy efforts benefited from the move.[59] Some, like Senator Helms, sought to streamline a government agency and give a larger platform for public diplomacy efforts by putting them directly under the auspices of the State Department.[60] Others argue that the new bureaucracy has little experience with the nuances of public diplomacy, and little control over their budget.[61] For its part, the State Department supported the move, arguing that the development of the Internet heightened the need for the U.S. foreign policy apparatus to speak with one voice.[62] That same year, the BBG—which was given responsibility for all government-sponsored, non-military international broadcasting in 1994[63]—became an independent autonomous entity that oversaw all programming.[64]

The attacks of September 11, 2001, U.S. military efforts in Iraq and Afghanistan, and the conflicts between Israel and the Palestinian forces in the past eight years have increased the importance of public diplomacy. However, the continuing growth of the Internet in the past decade has made the Smith-Mundt Act significantly less effective than it was in the early 1990s. YouTube, social networking sites, and online radio easily avoid the barriers to domestic dissemination of public diplomacy materials erected in the late 1940s. In addi-

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[58] Philip Shenon, *Two Foreign Affairs Agencies are Eliminated*, N.Y. TIMES, Oct. 23, 1998, at A11. The legislation also folded the Arms Control and Disarmament Agency into the State Department. *Id. See also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, 112 Stat. 2681-761 (codified at 22 U.S.C. §§ 6531–33).

[59] *See generally* Reforming U.S. Public Diplomacy and Strategic Communication: View from Congress, The Brookings Institution (Sept. 23, 2008) [hereinafter Reforming U.S. Public Diplomacy]. Senators Sam Brownback and Adam Smith debated the effect of abolishing the USIA and transferring its operations to the State Department. Senator Brownback, while noting that the State Department had performed well executing the former duties of the USIA, expressed doubt over deficiencies in winning "the battle of ideas in the War on Terrorism." *Id.* at 9–16. Senator Smith shared similar ideas, commending the Defense Department's cooperation with the State Department in strategic communications, while also lamenting the lack of coordination he felt was necessary to encourage better diplomacy abroad. *Id.* at 28–29.

[60] *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, subdiv. A, 112 Stat. 2681-765-66 (codified at 22 U.S.C. § 6501).

[61] *See* KLOPFENSTEIN, *supra* note 28, at 12–13.

[62] KLOPFENSTEIN, *supra* note 28, at 10. Klopfenstein argued that where beforehand, the press was reliant on the State Department to receive information, now, they could easily pull content from the Internet. *Id.*

[63] Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. 103-236, 108 Stat. 332 (1994).

[62] *See* Broadcasting Board of Governors, http://www.bbg.gov/about/documents/BBGFactsheet2-09.pdf (last visited Aug. 29, 2009). The Broadcasting Board of Governors is an independent federal agency that oversees all international broadcasts by federal agencies and government-funded broadcast organizations such as Voice of America, Radio Free Europe/Radio Liberty, and Radio Free Asia. The Board consists of eight members, all appointed by the President and confirmed by the Senate, and the Secretary of State is an *ex officio* member of the board. *Id.*

tion, both President Barack Obama and Secretary of State Hillary Clinton have advocated the use of "soft power" using an array of tools to restore America's standing with other foreign countries, which they claim were frayed during the previous administration.[65]

Some stations have simply ignored the Smith-Mundt Act outright for purpose of convenience. Recently, several stations in Florida began broadcasting Radio Marti, seeking to broadcast into Cuba, but VoA officials recognized that viewers in South Florida also would be able to hear the broadcasts.[66] The officials claimed that the domestic dissemination ban was moot in this instance, because the only way to broadcast Radio Marti into Cuba was to use South Florida as an outpost, since the Cuban government attempted to jam broadcast signals.[67] Before addressing the need for Congress to update the Smith-Mundt Act to reflect these realities, it is useful to examine the original purpose of the law when it was enacted in 1948.

III. EXAMINING THE ORIGINAL INTENT AND CONCERNS OF LAWMAKERS REGARDING SMITH-MUNDT

A. Dissemination Versus Disclosure

The interpretation of the domestic dissemination ban has shifted over time from a law against dissemination to a law against disclosure. The most recent case regarding the Smith-Mundt Act, *Essential Information v. United States Information Agency*,[68] did not reflect that evolution, and therefore raised several questions about the court's interpretation. Essential Information, a non-profit organization, attempted to use the Freedom of Information Act ("FOIA")

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[65] Senator Hillary Rodham Clinton, U.S. Sec'y of State Designate, Statement before the Senate Foreign Relations Comm., 111th Cong. (2009), at 4 ("I believe that American leadership has been wanting, but is still wanted. We must use what has been called 'smart power': the full range of tools at our disposal—diplomatic, economic, military, political, legal, and cultural—picking the right tool, or combination of tools, for each situation.").

[66] Voice of America News, *US-Funded Broadcasts for Cuba Airing in Florida*, VOANEWS.COM, Dec. 19, 2006, http://www.voanews.com/english/archive/2006-12/2006-12-19-voa35.cfm?.

[67] *Id.*

[68] Essential Info., Inc. v. U.S. Info. Agency, 134 F.3d 1165 (D.C. Cir. 1998). Essential Information is a non-profit organization that engages in progressive grassroots campaigns on such issues as corrupt business and fair trade. *See* Essential Information, About Essential Information, http://www.essential.org/about.html (last visited Sept. 15, 2009).

to obtain various Internet addresses and programming materials that belonged to USIA.[69] Essential Information argued that information covered under the Smith-Mundt Act was not exempt from FOIA because the Act prohibited dissemination of such information while allowing its disclosure.[70] Essential Information asserted that the intent of the Smith-Mundt Act was to prevent the distribution of such materials, commonly associated with the term "dissemination," in a way that could be seen as propaganda.[71] Accordingly, Essential Information argued the law did not preclude disclosure of USIA materials or a willingness to simply show the materials to interested individuals.[72] The concept of simply viewing the transcript was congruous with the original Act, which permitted access to media and scholars.[73]

The D.C. Circuit decided this case in favor of USIA, on the grounds that FOIA provided exemptions for materials that are exempted from disclosure by statute.[74] These exceptions are known as Exemption 3 statutes, and require two factors to qualify.[75] First, the law must be clear so "as to leave no discretion" that the matters covered under the statute were exempt.[76] Second, the law must establish clear criteria for withholding the matters from public view.[77] The court said that the domestic dissemination ban fell under the first factor because the law left no discretion on the disclosure of such material.[78]

In doing so, however, the court disregarded statutory language and legislative history that delineated a difference between the terms "disseminate" and

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69 *Essential Info.*, 134 F.3d at 1166.

70 *See* Brief for Appellants at 13–15, Essential Info., Inc. v. United States Info. Agency, 134 F.3d 1165 (D.C. Cir. 1998) (no. 97-5017). FOIA Exemption 3 prevents disclosure of government information allowed by statute if it requires that the matter be exempt leaving no issues of discretion, and also establishes criteria for withholding such information. 5 U.S.C. § 552(b)(3) (2006).

71 *See id.* at 13. The appellants wanted copies of the WIRELESS FILE, USIA's daily electronic news service, along with transcripts of Voice of America and Worldnet Television broadcasts from July 1, 1995 through February 9, 1996. *See Essential Info.*, 134 F.3d at 1166 n. 2.

72 *See* Brief for Appellants, *supra* note 70, at 13–15.

73 United States Information and Educational Exchange Programs Act, Pub. L. No. 80-402 § 501, 62 Stat. 10 (codified as amended at 22 U.S.C. § 1461(b)).

74 *Essential Info.*, 134 F.3d at 1166–67, 1169. The court found that the law's "prohibition of domestic dissemination by USIA is a reasonable means of minimizing such access." *Id.* at 1169.

75 *See* U.S. OFFICE OF SPEC. COUNSEL, ANNUAL REPORT ON FREEDOM OF INFORMATION ACT (FOIA) ACTIVITIES 2 (2008) (defining an Exemption 3 statute as "a federal statute that exempts information from disclosure and which the agency relies on to withhold information under subsection (b)(3) of the FOIA."). *See also* Amer. Jewish Cong. v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978) (noting that Exemption 3 statutes reflect Congressional concern about "sensitive material" becoming public).

76 134 F.3d at 1166 (citing 5 U.S.C. § 552(b)(3)(A)).

77 *Id.* (citing 5 U.S.C. 552(b)(3)(B)).

78 *Essential Info.*, 134 F.3d at 1167.

"disclosure."[79] The majority acknowledged that the statute only uses the word "disseminate," but also noted that it "plainly encompasses disclosure" with the mere rationale that "[i]t seems unlikely that the two terms were meant to bear different meanings . . . ."[80] The court added that under the 1990 amendment to the Smith-Mundt Act, the government could release the material after a twelve year period.[81] However, the majority did not address the issue noted by the dissent that the statute failed to exclude disclosure during the twelve year period when the material was not allowed to be disseminated.[82] The majority opinion failed to note previous court decisions, which provided a more detailed discussion on the differences between "dissemination" and "disclosure."[83] The court also noted that while some people might be able to gain access to the materials, the Act is a "reasonable means" of controlling domestic dissemination throughout the United States.[84]

Courts that upheld the legality of Exemption Three statutes usually required that a statute include an explicit ban on disclosure.[85] In *Central Intelligence Agency v. Sims*, Sidney Wolfe, the director of the Public Citizen Health Research Group, and attorney John Sims sought information regarding a 1950s and 1960s Central Intelligence Agency ("CIA") research project that counteracted Soviet and Chinese interrogation techniques.[86] The CIA released all the records except for the names of the individuals and twenty-one research institutions involved, citing the FOIA's Exemption 3 and the National Security Act of 1947, which forbid the disclosure of intelligence sources.[87]

The Court found the National Security Act of 1947 qualified as an Exemption 3 statute, because it established specific criteria for "particular types of

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79 *Essential Info.*, 134 F.3d at 1171 (Tatel, J. dissenting) (arguing that statutory language requiring the USIA to make available program materials is a "disclosure" requirement separate from the "dissemination" prohibition).

80 *Id.* at 1168.

81 *Id.*

82 *Id.* at 1171–72.

83 *Id.* (listing a number of cases that "have limited Exemption 3 to statutes that protect confidential, private, or proprietary information, such as patent applications . . . .").

84 *Id.* at 1168–69.

85 *See, e.g.*, *Essential Info.*, 134 F.3d at 1170 (citing Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice, 831 F.2d 730, 734 (D.C. Cir. 1987) (rejecting an Exemption 3 argument because 28 U.S.C. § 534 did not contain an explicit exemption from disclosure); Mudge Rose Guthrie Alexander & Ferndon v. U.S. Int'l Trade Comm'n, 846 F.2d 1527, 1529–31 (D.C. Cir. 1988) (finding that 19 U.S.C. § 1677(f) "is properly classified as an Exemption 3 withholding statute . . . ." since the statute "explicitly exempts from disclosure 'particular types of matters'-namely, matters designated as 'proprietary' . . . .").

86 Cent. Intelligence Agency v. Sims, 471 U.S. 159, 161 (1985). The CIA subcontracted almost 150 projects toward 80 various universities and research institutions, involving 185 researchers, and Wolfe and Sims wanted information about the grants, proposals, and the researchers involved. *Id.*

87 *Id.* at 165.

matter" to be withheld,[88] The Court noted that the language of the National Security Act, along with its legislative history, explicitly gave the CIA director broad authority to protect sources from disclosure.[89] The court looked at the plain meaning of the statute, and found no limiting language.[90] Here, the court relied on a statute that authorized the Director of the CIA to withhold documents from "unauthorized disclosure."[91] Furthermore, the court held that the statute's legislative history required it to be a withholding statute.[92]

The Smith-Mundt Act does not explicitly prohibit disclosure, and does not protect information that falls outside the "plain meaning" standard specified in the *Sims* case.[93] Additionally, the standard for Exemption 3 statutes is that they protect confidential or proprietary information.[94] The majority in *Essential Information* failed to uphold this standard when they decided USIA materials were exempt from the FOIA.[95] Eleven years later, *Essential Information* is even more outdated, since much of the information that the Smith-Mundt Act protects is now publically available on the Internet and through other sources.[96]

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88 *Id.* at 167.

89 *Id.* at 169–73.

90 *Id.* at 169–70.

91 *Sims,* 471 U.S. at 165 (citing section 102(d)(3) of the National Security Act of 1947).

92 *Id.* at 168.

93 *See Sims*, 471 U.S. at 167 (holding that the "plain meaning" of the National Security Act of 1947 "clearly" evinces an intent to restrict disclosure); *see also* Baldridge v. Shapiro, 455 U.S. 345, 355, 359 (1982) (holding that the "unambiguous" language regarding the confidentiality of Census information clearly establishes that Congress meant to protect proprietary data of individuals under 13 U.S.C. §§ 8(b), 9(a)).

94 *See* Iron & Sears v. Dann, 606 F.2d 1215, 1220–21 (D.C. Cir. 1979) (The court stated, "[W]e would in any event be extremely reluctant to impute to Congress an intent to eliminate the long-standing confidentiality accorded to patent applications absent rather unambiguous indications that this is what Congress really wanted." The court went on to hold that the "shall be kept in confidence" language satisfied FOIA exception 3. *Id.*); *see* Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) (upholding a statute allowing the CIA director to protect sources from "unauthorized disclosure").

95 *See* Essential Info., Inc. v. U.S. Info. Agency, 134 F.3d 1165, 1170 (Tatel, J., dissenting). Judge Tatel compared several different versions of "disseminate" and "disclose," and referred to past precedent, which showed that both terms were distinguishable. She also noted the "longstanding requirement that congressional intent to exempt matters from FOIA disclosure must appear in the 'actual words' of the statute." *Id.*

96 BBG affiliates such as Radio Sawa and Al-Hurra (Arabic language stations broadcasting to the Middle East), Radio Martí (Spanish language broadcasting to Cuba) and Radio Free Europe (multilingual broadcasts across 20 countries) each have Web sites featuring online access to their content from the United States. *See, e.g.,* Radio Sawa, http://radiosawa.com/english.aspx (last visited Nov. 16, 2009); Alhurra, http://alhurra.com/Index.aspx (last visited Nov. 16, 2009); Radio y Television Marti, http://www.martinoticias.com/index.aspx (last visited Nov. 19, 2009); RFE/RL Radio Free Europe, http://www.rferl.org/Howtolisten.aspx (last visited Nov. 16, 2009).

B. The Difference Between the "Propaganda" and "Information," and How the Negative Connotations of "Propaganda" Have Faded Over Time

Another contentious term in the Smith-Mundt Act debate is the term "propaganda," previously seen as a harmful word, but today viewed as having a more innocuous meaning. Conceptually, propaganda can be a double-edged sword when a government utilizes it in warfare.[97] Propaganda can prove to be a very useful tool in winning the hearts and minds of other populations.[98] However, a backlash in both the domestic country and the targeted population can occur if not used in a careful and precise manner.[99] While the Smith-Mundt Act did not define propaganda, concerns about propaganda were apparent immediately following World War II.[100] The drafters of the Smith-Mundt Act were very cautious about the term "propaganda," after learning how Adolf Hitler and Joseph Goebbels used the radio to build support in Nazi Germany and eventually start World War II.[101] Yet, over time, this historical aversion to "propaganda" became less significant than it was at the height of the Cold War.

In 1987, a case decided by the U.S. Supreme Court, *Meese v. Keene,* illustrated a more neutral view of the term "propaganda."[102] *Meese* involved a debate over the use of the term "political propaganda" in the Foreign Agents Registration Act of 1938.[103] Keene, a U.S. citizen, wanted to publicly show three Canadian films discussing nuclear war and the environment.[104] He objected to having to file paperwork that would result in the films being labeled as political propaganda, as required by the Foreign Agents Registration Act of 1938.[105] However, the Supreme Court found that the statute's definition of propaganda included even information that is "accurate" and "merit[s] the . . . highest respect."[106] The Court found that the term "political propaganda" is neutral in meaning, and that films legally classified as propaganda should not be perceived in a negative light that suggested they carried a stamp of govern-

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97 *See* Dennis M. Murphy & James F. White, *Propaganda: Can a Word Decide a War?*, 37 PARAMETERS 15, 15–16 (2007).

98 *Id.* at 24–25.

99 *Id.* at 23.

100 *See id.* at 21.

101 *See id.* at 20–22.

102 *See* Meese v. Keene, 481 U.S. 465, 477–78 (1987) (acknowledging that the term propaganda also encompasses works that "merit the closest attention and highest respect.").

103 *Id.* at 467.

104 *Id.* at 467–68. Keene was an attorney and a member of the California State Senate at the time. *Id.* at 467.

105 *Id.* at 467.

106 *Id.* at 477.

ment disapproval.[107] The Court added that the term "propaganda" does not place any additional limitations on the disclosure or access to such material.[108]

The Supreme Court reversed the District Court's injunction to enjoin the term "political propaganda," noting that such action hindered speech.[109] It held that such an interpretation wrongfully assumed that the public could not distinguish between different types of information.[110] The Court also decided that Keene's argument—that the public needed to be protected from too much information—violated the First Amendment.[111] The Court added that the term propaganda was merely identifying a type of speech, and not associating any negative connotation.[112] The Court's decision helped shift the implications of the term "propaganda," and move the government away from a "paternalistic approach"[113] designed to protect the public.

In addition, the connotations of the words, "information" and "propaganda" have evolved since the passage of the Smith-Mundt Act. Former USIA Director Frank Shakespeare noted in the early 1970s that the word "propaganda" received a negative connotation because of Nazi Germany and the U.S.S.R.[114] When asked by Senator Fulbright to clarify the purpose of USIA, Shakespeare said he interpreted propaganda more as leaning toward the definition of information.[115] Senator Fulbright clarified that "[t]he systematic propagation of a given doctrine or of allegations reflecting its views and interests is certainly not the same as the spreading of information."[116]

Foreign policy experts argue propaganda can be categorized as good or bad, depending on intention and perspective.[117] Today, propaganda is seen more as

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[107] Meese, 481 U.S. at 480–85.

[108] *Id.* at 480–85. The Court disagreed with the District Court, which decided that the term "political propaganda" attempts "a conscious attempt to place a whole category of materials beyond the pale of legitimate discourse." *Id.* at 480 (quoting Keene v. Meese, 619 F.Supp. 1111, 1126 (Cal. E.D. 1985)).

[109] *Id.* at 481–82, 485.

[110] *Id.* at 482.

[111] *Id.* at 481–82.

[112] *Id.* at 483–84.

[113] *Meese*, 481 U.S. at 483–84

[114] *USIA Appropriations Authorization Fiscal Year 1973: Hearing Before the S. Comm. On Foreign Relations*, 92d Cong. 8 (1972) (statement of Frank Shakespeare, Director of United States Information Agency).

[115] *Id.* at 7–8. Fulbright and Shakespeare were discussing the definitions of "information" and "propaganda" as they appeared in the American Heritage Dictionary, which defined "information" as "[t]he act of informing or the condition of being informed; communication of knowledge," or "[k]nowledge derived from study, experience, or instruction." *Id.* at 8. On the other hand, "propaganda" was defined as "the systematic propagation of a given doctrine or of allegations reflecting its views and interests," or "[m]aterial disseminated by the proselytizers of a doctrine." *Id.*

[116] *Id.* at 8.

[117] 2009 Smith-Mundt Symposium Panel 3: Rebuilding the Arsenal of Persuasion (Jan.

information used overseas to talk about the benefits of both domestic and foreign U.S. policy; in essence, the spreading of lawful information, as opposed to imposing indoctrination.[118] Concerns about the negative pejorative remain, as the U.S. government has been reluctant to use information in new ways overseas.[119] The term propaganda does not carry a harsh connotation as much anymore, more proof that the Smith-Mundt Act has become less relevant today.

IV. THE SMITH-MUNDT ACT HINDERS PUBLIC DIPLOMACY IN THE 21ST CENUTRY

While this Comment argues that the original intent and purpose behind the Smith-Mundt Act are inapplicable today, the statute remains a valid law and has been upheld by various district and appellate courts several times in the past two decades.[120] As a result, legal, public policy, and political problems still remain with the law, making it more difficult to conduct public diplomacy initiatives.

A. Information is More Readily Available Compared to When Congress Passed Smith-Mundt

In 1948, Americans communicated in much simpler methods than they do today. Most Americans still primarily received their news through radio broadcasts, and several more years would pass before television started to become a source of news.[121] It could take weeks to receive overseas mail, and computer usage was limited mostly to the military. Thus, information disseminated overseas was harder to obtain than it is today.

Today, the Internet contains a wealth of information on public diplomacy efforts overseas. The State Department Web site contains travel warnings, in-

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13, 2009), http://mountainrunner.us/symposium/transcripts/0113-smithmundtsymposium-panel3.pdf [hereinafter Symposium Panel 3].

[118] *See supra* Part III.B.

[119] *See* Murphy & White, *supra* note 97, at 22 (noting it was not until May 2007, when *National Strategy for Public Diplomacy and Strategic Communication* was published, that the idea to use information strategically in the war against terror was first discussed).

[120] *See, e.g.*, Gartner v. U.S. Info. Agency, 726 F. Supp. 1183, 1185 (S.D. Iowa 1989).

[121] In 1947, only 60,000 TV sets were in operation in the United States, two-thirds of them in New York City. William Boddy, *The Beginnings of American Television, in* TELEVISION: AN INTERNATIONAL HISTORY 35, 41 (Anthony Smith ed., 1995).

formation about various countries, transcripts of all State Department briefings and speeches made by the Secretary of State.[122] The Web site America.gov contains information about the United States, its policies on pertinent issues, and information about the federal government in general.[123] America.gov was designed for use by foreign citizens, but when the Web site was established, the State Department avoided the domestic dissemination ban by not advertising the new Web site.[124] However, according to a service that tracks Web site traffic, a recent study shows that 31.2 percent of all America.gov hits come from within the United States.[125] The Voice of America Web site now offers programs for all the countries it broadcasts in, including podcasts, RSS Newsfeeds, and webcasts.[126] Radio Free Europe offers a similar website including features such as photo galleries, most popular articles viewed, and video clips of various stories.[127] Most information broadcast overseas is now widely available and within reach to Americans with Internet access.[128] As access to broadband Internet improves, the federal government will find it increasingly difficult to restrict access to public diplomacy material from the American people.

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[122] U.S. Department of State, http://www.state.gov (last visited Sept. 22, 2009) (official Web site offering briefings on issues such as climate change and currency, as well as links to international press centers and the Web site for the United States Agency for International Development (USAID)).

[123] America.gov, http://www.america.gov (last visited Sept. 22, 2009) (offering links to translations in seven different languages).

[124] Posting of Steven R. Corman, *Two Agenda Items for Next Week's Smith-Mundt PowWow*, to COMOPS Journal: Analysis, Commentary, and News from the World of Strategic Communication, http://comops.org/journal/2009/01/07/two-agenda-items-for-next-weeks-smith-mundt-pow-wow/ (Jan. 7, 2009).

[125] Posting of Patricia H. Kushlis, *Smith-Mundt is a Moot Case – Except It's Not*, to WhirledView, http://whirledview.typepad.com/whirledview/2008/05/smith-mundt-is.html (May 7, 2008, 20:41 EST) (citing the Alexa Internet ranking service). The study also showed that following the United States, 12.2 percent of hits came from India, 4.5 percent from the United Kingdom, 3 percent form Germany, and 2.7 percent from Canada. *Id.*

[126] Voice of America - English News Homepage, http://www.voanews.com (last visited Sept. 22, 2009). The Web site is divided into sections for six regions of the world, and includes dedicated sections for topics including "Health and Science," and "American Life." *Id.* Additionally, the site offers content in transcript and livestream form. *Id.*

[127] Radio Free Europe/Radio Liberty, Free Media in Unfree Societies, http://www.rferl.org/ (last visited Sept. 23, 2009).

[128] *See* The Pew Research Center for the People & the Press, Internet Overtakes Newspapers as News Outlet, Pew Research Center Publications, Dec. 23, 2008, http://people-press.org/report/479/internet-overtakes-newspapers-as-news-source (noting that a survey from 2008 that showed 40 percent of Americans received their news from the Internet, and for Americans under the age of thirty, that number rose to 59 percent).

B. The Abundance of New Information has Created a First Amendment Issue Regarding the Rights of Media Access

The widespread global adoption of the Internet has made available significant amounts of information once previously unobtainable,[129] which has created significant First Amendment issues regarding the Smith-Mundt Act and the right of access by the media. The media plays an important role in reporting foreign policy issues and American involvement overseas.[130] Yet, under the Act, many news organizations face restrictions on the use of public diplomacy materials.[131] Case law in the past few decades has relied on the principle that State Department materials disseminated overseas are not generally available to the public.[132] However, this same case law has failed to take into account that, with the development of the Internet, the definition of what is "publicly available" has grown in that same time period.

In *Gartner v. U.S. Information Agency*, the plaintiff, a newspaper editor from Ames, Iowa, requested various copies of editorials from Voice of America the agency published in Russia and China.[133] Voice of America refused to send Gartner the materials but invited him to Washington, D.C. to examine the materials, with the caveat that Gartner would not be allowed to copy the materials or take notes verbatim.[134] Gartner refused the offer on the grounds that he had a right to receive the materials firsthand without the inconvenience of travel, and filed suit against USIA on First Amendment grounds.[135]

The federal district court ruled in favor of USIA, holding that the First Amendment does not create an obligation for the government to allow unfettered and unrestricted access to USIA material.[136] Judge O'Brien noted that the

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[129] *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 177–78 (2005).

[130] *See* Rear Admiral Greg Smith, Remarks at 2009 Smith-Mundt Symposium Panel 2: America's Bifurcated Engagement (Jan. 13, 2009) (on file with the COMMLAW CONSPECTUS) [hereinafter Symposium Panel 2]. Rear Admiral Greg Smith, Director of Communications for U.S. Central Command, acknowledged that the media is the best regulatory check on the government. *Id.*

[131] *See, e.g.*, Gartner v. U.S. Info. Agency, 726 F. Supp. 1183, 1185 (S.D. Iowa 1989).

[132] *See, e.g.*, Essential Info., Inc. v. U.S. Info. Agency, 134 F.3d 1165, 1167 (D.C. Cir. 1998) ("If the general citizenry were permitted to obtain the forbidden materials through FOIA . . . the purpose of the 1972 amendment would be thwarted.").

[133] Annenberg Washington Program in Communications Policy Studies, Is the Domestic Media Ban Obsolete?, http://www.annenberg.northwestern.edu/pubs/usfa/usfa4.htm (last visited Sept. 23, 2009) (explaining the circumstances behind Gartner v. USIA). Gartner thought his readers would benefit from the republishing of Voice of America editorials to see how the government was explaining United States policy to listeners overseas. *Id.*

[134] *Id.*

[135] *Id.*

[136] *Gartner*, 726 F. Supp. at 1189–90.

First Amendment does not grant a right of access to government files and to hold otherwise would essentially render the FOIA unnecessary.[137] Judge O'Brien concluded that questions of access to federal documents were best left to the legislative branch.[138]

However, the term "publicly available" has changed in the past twenty years, and Judge O'Brien's analysis would most likely be different now. Most BBG radio stations are now available online, and sometimes transcripts of various shows are also easily accessible.[139] Additionally, the 1990 amendments to the Smith-Mundt Act now entail that all material protected by the Act have only a twelve year window where it cannot be disseminated to the public.[140] Second, while several cases support the idea that the media is only entitled to access documents that are "publicly available,"[141] Judge O'Brien failed to discuss the key phrase "publicly available" found in prior media access cases.[142]

The Supreme Court in *Houchins v. KQED* provided the standard for a First Amendment right of access.[143] A California television station, KQED, requested to send reporters to tour a county correctional facility where a prisoner had recently committed suicide.[144] Although the sheriff alleged he had been planning a monthly tour program, he only announced the program after KQED

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[137] *Id.* (citing Smith v. USIA, No. C 76-483, at 3 (W.D. Wash. 1978) (unpublished)).

[138] *Gartner*, 726 F.Supp. at 1190; *see also* Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1167 (3d Cir. 1986).

[139] *See, e.g.*, Voice of America – English News Homepage, http://www.voanews.com (last visited Sept. 24, 2009); Radio Marti/Television Marti, http://www.martinoticias.com/ (last visited Sept. 24, 2009); Radio Farda, http://www.radiofarda.com, (last visited Sept. 24, 2009); Al Hurra, http://www.alhurra.com/index.aspx, (last visited Sept. 24, 2009); Radio Free Europe/Radio Liberty, http://www.rferl.org (last visited Oct. 14, 2009); Radio Free Asia, http://www.rfa.org/english (last visited Oct. 14, 2009).

[140] Pub. L. No. 101-246, § 202, 104 Stat. 15, 49 (codified as amended at 22 U.S.C. § 1461(b) (2000)).

[141] *See id.* at 1184, 1194–95; Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 392–93 (1979) (upholding a temporary ban on press and public access to pretrial hearing transcripts, noting that "[o]nce the danger of prejudice had dissipated, a transcript of the suppression hearing was made available . . . [and] [t]he press and the public then had a full opportunity to scrutinize the suppression hearing."); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1166–67, 1176–77.

[142] *See* Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972) (noting that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); Pell v. Procunier, 417 U.S. 817, 833–34 (1974) (stating that while the "government cannot restrain the publication of news emanating from [confidential sources] . . . [i]t is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."); Nixon v. Warner Commc'ns, Inc., 435 U.S. 588, 608–09 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public.").

[143] Houchins v. KQED, Inc., 438 U.S. 1, 15–16 (1978).

[144] *Id.* at 3.

filed suit, but the tours only provided limited access.[145] KQED argued that they had a constitutional right to gather news, and were entitled to see any part of the jail they desired.[146] The county argued that increased access by the media would violate rights of the inmates, and that no right to access was guaranteed under the Constitution.[147] The Court agreed with the county, and held that the First Amendment imposed no duty on the government to release information within their control.[148]

The distinction between that which is publically available and the media's broader First Amendment right is important because, while *Gartner* frequently cites *Houchins*, the *Gartner* court failed to discuss the phrase "publicly available." Since *Houchins*, courts have often decided freedom of the press access cases based on whether ongoing events or materials requested were publicly available.[149] Several cases have held that once a document or incident enters the public domain, it must be made available to all media outlets that request it.[150] The Second Circuit has stated that this level of openness prevents an entity from discriminating against particular media venues that have not given the entity fair media treatment.[151] Courts have also placed special emphasis on the openness of court proceedings.[152] Additionally, the courts have held that if one

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[145] *Id.* at 4–5. The respondent wanted to see portions of the jail where alleged beatings had taken place, but the county would not allow such areas to be part of the tour. Cameras and tape recorders were not permitted on the tour, inmates were removed from public view and not allowed to be interviewed. *Id.*

[146] *Id.* at 3–4.

[147] *Id.* at 5.

[148] *Houchins*, 438 U.S. at 9, 14–16.

[149] *See* Gartner v. U.S. Info. Agency, 726 F. Supp. 1183, 1188 (S.D. Iowa 1989). *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (holding that the public's right to attend criminal trials is implicit in the First Amendment, and an important aspect of freedom of the press); *In re* Globe Newspaper Co., 729 F.2d 47, 51 (1st Cir. 1984) (explaining the historical and political importance of the public and press rights of access); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1067–68 (3d Cir. 1984) (explaining the public's and press' right to information presented at criminal trials).

[150] *See, e.g.*, Am. Broad. Cos., Inc. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) ("[O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.")

[151] *Cuomo*, 570 F.2d at 1083.

[152] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975). The case involved a local TV station, which identified a deceased rape victim during the coverage of her trial. The Court stated that government censorship of public trials allows for "timidity and self-censorship" and could eventually allow for the suppression of other public events. *Id.* at 496. The Court held that the state cannot sanction the media for publishing information contained in records available to the public. *Id.* at 495–96. *See also* Worrell Newspapers of Ind. v. Westhafer, 739 F.2d 1219 (7th Cir. 1984). In *Westhafer*, a reporter had received information about a suspected arsonist whose name was sealed in a court document. The judge threatened the reporter with contempt if her newspaper published information regarding the suspected arsonist, who was not yet been arrested. The newspaper sued and won on a claim that the

media outlet is allowed into a public event, then other media cannot be denied access.[153]

Information that media outlets and the public seek today regarding overseas propaganda is for the most part, within public access, either through the Internet or accessing stations in other countries. As previously discussed, most BBG outlets contain a large amount of programming on their respective Web sites.[154] While courts have held USIA's refusal to affirmatively aid media entities by providing 'expedient' access to its programming materials was proper, common practice has seen no restrictions on widespread retransmission of these materials after they have been acquired through less convenient channels.[155] Similar to the discussion in *Essential Information*, it is futile to enforce a law if there are obvious backdoors that expose its wide loopholes.[156] The definition of "publicly available" has grown more expansive with the development and explosive growth of the Internet. With such a shift, the decision reached in *Gartner* would likely conclude with the opposite holding today.

Another significant consideration is the continuing importance of the media's role in our society. Courts have continuously recognized that the media holds an important place in our society and plays a critical role in reporting the news and holding the government accountable.[157] Furthermore, the Supreme Court has held that the media possess a limited right of access under the First Amendment even in cases where courts have ruled against the media from gaining certain access or asserting a privilege.[158] In *Houchins*, Justice Stewart,

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Indiana statute prohibiting the disclosure of sealed information about a suspect before his arrest was a prima facie violation of the First Amendment. *Id.* at 1221, 1225.

[153] *See, e.g.*, Cuomo, 570 F.2d at 1083 (holding that ABC News had right to access inside Mr. Cuomo's campaign headquarters during primary election night when other media outlets were already there); D'Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1548, 1543 (D. R.I. 1986) (noting that the press have a claim to access when government tries to selectively pick an audience and that the government cannot "arbitrarily shroud genuinely newsworthy events in secrecy").

[154] *See supra* note 96.

[155] *See* Gartner v. U.S. Info. Agency, 726 F. Supp. 1183, 1190 (S.D. Iowa 1989); *see also* Snyder, *supra* note 53 (quoting the General Counsel of C-SPAN as saying, "The Voice of America would not lift a finger to help us get hold of the signal . . . It was their interpretation [after *Gartner*] that, while we could do whatever we wanted with the information if we could get it, they weren't going to lift a finger to help us.").

[156] *See* Essential Info., Inc. v. U.S. Info. Agency, 134 F.3d 1165, 1170 (D.C. Cir. 1998) (Tatel, J., dissenting). Judge Tatel described this loophole in noting that:

> [r]esidents of southern Florida can receive Radio Marti and TV Marti broadcasts, owners of satellite dishes anywhere in the United States can receive Worldnet television, domestic computer users can find materials intended for foreign audiences on the agency's web pages, and people anywhere in the country can ask friends overseas to obtain USIA program materials for their own domestic use . . . .

Id.

[157] *Houchins*, 938 U.S. at 17 (citations omitted).

[158] *See* Branzburg v. Hayes 408, U.S. 665, 691–92 (1972). The Court held there was no

quoting the *Branzburg* decision, wrote in his concurring opinion that "enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised."[159] He argued that the media plays an important role in our society by educating the public, exposing corruption and discrimination, and raising awareness of current events.[160] Even officials at the Pentagon and State Department have acknowledged that they rely on the media to get their message out and hold them accountable for their actions.[161]

C. The State Department Needs Unfettered Access to the Internet to Improve Public Diplomacy

1. Problems in the World

The United States' global image has—for the most part—remained largely negative during the past six years partly because of the war in Iraq.[162] A recent Gallup poll shows 64 percent of the world is dissatisfied with the role of the U.S. in world affairs, and only 45 percent of the world has a favorable opinion of the United States.[163] Only 15 percent of residents in Middle Eastern coun-

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First Amendment claim where a journalist refused to testify in front of a grand jury about crimes he witnessed and reported. *Id.* at 690–91. However, the Court did acknowledge that "without some protection for seeking out the new, freedom of the press could be eviscerated." *Id* at 681. *See also* Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 840–41 (6th Cir. 2000) (denying a tabloid publisher the right to access electronic copies of parking ticket records while noting that "the collection of information is an important aspect of First Amendment freedoms").

159 *Houchins*, 438 U.S. at 17.

160 *Id.*

161 *See* Symposium Panel 2, *supra* note 130.

162 *See* Thomas Omestad, *A Small Improvement in U.S. Popularity Abroad*, U.S. NEWS & WORLD REPORT, Apr. 1, 2008, *available at* http://www.usnews.com/articles/news/world/2008/04/01/a-small-improvement-in-us-popularity-abroad.html. A 2008 BBC World Service poll did, however, show

> a bettering of views of the United States in 11 of the 23 countries that were surveyed a year earlier, with the average share of those taking a positive view of the United States rising from 31 percent last year to 35 percent now. By comparison, in 2005, 38 percent of people polled overseas had positive views; then the figure declined to 32 percent in 2006 and further to 28 percent in 2007.

Id.

163 *See* Julie Ray, *Opinion Briefing: U.S. Image in Middle East/North Africa*, GALLUP, Jan. 27, 2009, *available at* http://www.gallup.com/poll/114007/Opinion-Briefing-Image-Middle-East-North-Africa.aspx. The United States is viewed more negatively than North Korea by twenty-three countries. KRISTIN M. LORD, VOICES OF AMERICA, U.S. PUBLIC DI-

tries approve of the job performance of the United States government.[164] The war in Iraq and the recent controversy surrounding the activities at Guantanamo Bay Naval Station have affected the United States' relationships with traditional Middle East allies of the United States including Egypt, Jordan, and Saudi Arabia.[165] Even the general public in many countries considered long-standing U.S. allies outside of the Middle East have negative perceptions of the United States.[166]

President Barack Obama has worked hard during the past year to reach out to traditional allies who felt ignored during the Bush administration, and in June, the President gave a long anticipated speech in Cairo aimed at strengthening the U.S. relationship with the Muslim world.[167] Yet, rhetorical promises from our leaders and funding for public diplomacy programs have not always shown concrete results.[168] The United States needs to take full advantage of the technology and tools available to increase its standing in the world again.

2. The State Department's Public Diplomacy Efforts Have Not Kept Pace with Modern Technology

Some experts say the attention paid to public diplomacy declined with the merger of USIA into the State Department in 1999.[169] In 2003, the budget spent on public diplomacy efforts amounted to less than half of one percent of the

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PLOMACY FOR THE 21ST CENTURY 7 (Nov. 2008), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2008/11_public_diplomacy_lord/11_public_diplomacy_lord.pdf.

[164] *See, e.g.*, Ray, *supra* note 163. A large majority of people in Egypt, Pakistan Morocco, and Indonesia think that goal of the U.S. war on terror is to control the Middle East and weaken Islam. LORD, *supra* note 163, at 7.

[165] *See* Ray, *supra* note 163. Only 6 percent of Egyptians polled approve of the recent actions of the U.S. government. In Jordan, that number is 9 percent, showing a decline from 18 percent in 2007, and only twelve percent of Saudi Arabians approve of our leadership. *Id.*

[166] LORD, *supra* note 163, at 7. Sixty-two percent of Canada's population, 53 percent of Great Britain's population, 72 percent of Germany's population, and 58 percent of Australia's population believe America's influence in the world is negative. *Id.*

[167] President Barack Obama, U.S. President, Remarks by the President on a New Beginning (June 4, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09/.

[168] *See* ADVISORY GROUP ON PUBLIC DIPLOMACY FOR THE ARAB AND MUSLIM WORLD, CHANGING MINDS, WINNING PEACE, A NEW STRATEGIC DIRECTION FOR U.S. PUBLIC DIPLOMACY IN THE ARAB & MUSLIM WORLD 15 (2003) [hereinafter CHANGING MINDS] (discussing the importance of winning "a struggle of ideas" with terrorist and fundamental organizations).

[169] KLOPFENSTEIN, *supra* note 28, at 12.

annual Pentagon budget.[170] Additionally, the majority of the money went to various earmarked programs, as well as paying the administrative costs of embassy personnel.[171] Furthermore, a recent report showed that ninety percent of the tasks assigned to public diplomacy personnel involve administrative tasks, including planning conferences, coordinating programs, and supervising operations.[172] The report recommended that some of the key new responsibilities should include launching web chats, appearing on radio shows, and influencing public discourse.[173]

The political desire to make public diplomacy a focus is needed. When the State Department absorbed USIA, the position of Under Secretary for Public Diplomacy and Public Affairs was created.[174] However, the Clinton and Bush administrations relegated the position to the sidelines.[175] Not until President Bush appointed his long-time confidante Karen Hughes to head the office in 2005 did the position become a key focal point in diplomatic efforts to address the lackluster image of the United States abroad.[176] Hughes understood the role the Internet could play in reaching out to the populations of foreign countries, particularly younger generations.[177]

Public diplomacy results are difficult to analyze, but many foreign policy analysts believe it is an essential part of a nation's foreign policy.[178] Formal

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[170] CHANGING MINDS, *supra* note 168, at 25. In 2003, the State Department and Broadcasting Board of Governors spent $600 million and $540 million respectively. *Id.* Of the $600 million for the State Department, $150 million was spent on Muslim-majority countries. *Id.* at 25–26.

[171] *Id.* at 25–26. Out of $150 million sent to Muslim-majority countries, only $25 million went to funding outreach programs. *Id.*

[172] THE UNITED STATES ADVISORY COMMISSION ON PUBLIC DIPLOMACY, GETTING THE PEOPLE PART RIGHT: A REPORT ON THE HUMAN RESOURCES DIMENSION OF U.S. PUBLIC DIPLOMACY 22 (2008).

[173] *Id.* at 22–23.

[174] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, 112 Stat. 2681-761, 2681-776 (codified at 22 U.S.C. § 6532).

[175] *See* Editorial, *Selling America*, N.Y. TIMES, Nov. 4, 2007, at 13. The first person to hold the position of Undersecretary of State for Public Diplomacy was Evelyn Lieberman. Evelyn S. Lieberman, Director of Communications and Public Affairs, Mar. 2005, http://newsdesk.si.edu/admin/bios/lieberman.pdf. Although a former top official in the Clinton Administration, she had little State Department or diplomatic experience. *See id.* The first two Bush officials, Charlotte Beers, an advertising executive, and Margaret Tutwiler, a former State Department official did not last long in the job. *Id.*

[176] *See* Steven R. Weisman, *Bush Confidante Begins Task of Repairing America's Image Abroad*, N.Y. TIMES, Aug. 21, 2005, at 6 (noting that Hughes promised an aggressive agenda using educational and cultural efforts to repair the United State's image with the world, especially among students and clergy members).

[177] *See, e.g.*, Karen Hughes, *"Waging Peace:" A New Paradigm for Public Diplomacy*, 18 Mediterranean Quarterly, 18, 18–20 (2007); Press Release, State Department, Announcement of Nominations of Karen P. Hughes as Under Secretary of State for Public Diplomacy and Public Affairs . . . (Mar. 14, 2005).

[178] *See, e.g.*, Liam Kennedy, & Scott Lucas, *Enduring Freedom Public Diplomacy and*

talks and communications between heads of state are important, but are limited in the ability to increase positive impressions about the United States among the general population.[179] Those responsible for public diplomacy efforts must be ambassadors of American culture, not just foreign policy—a key distinction compared to official state diplomacy.[180] Additionally, public diplomacy officials must reach out to a wider array of sources, especially academics and journalists, to receive a more diverse opinion of a country than they can receive from government officials.[181] Former Secretary of State George Schultz once compared public diplomacy to weeding a garden: "You get the weeds out when they are small. You also build confidence and understanding. Then, when a crisis arises, you have a solid base from which to work."[182] Public diplomacy officials need more tools and a stronger creative focus in how they reach out to different cultures and age groups, and the Internet holds a promising solution.

3. The Internet Can Improve Public Diplomacy

The Internet can play a much more significant role in how the United States conducts public diplomacy than it currently does. First, the target demographic of public diplomacy efforts in many countries is the younger portion of the population who are more likely to be online.[183] A majority of the Muslim world population is 17 or younger.[184] Government Web sites that are technologically outdated need to be translated into more languages and made more user-

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U.S. Foreign Policy, 57 AMER. QUARTERLY 309, 332 (2005).

[179] *See* CHANGING MINDS, *supra* note 168, at 20 ("Government is only one player among many trying to influence the opinions of people in other countries, and state to state diplomacy alone will not improve negative attitudes of citizens.").

[180] William A. Rugh, *Enabling Public Diplomacy Field Officers to Do Their Jobs* 2, Dec. 2008, *available at* http://www.publicdiplomacycouncil.org/uploads/rugh.enablingpdfojobs.pdf.

[181] *See id.*

[182] Alan K. Henrikson, *What Can Public Diplomacy Achieve?*, Netherlands Inst. of Int'l Relations 'Clingendael,' 27 (2006), *available at* http://www.clingendael.nl/publications/2006/20060900_cdsp_paper_dip_b.pdf.

[183] *See* STRATEGIC COMM. AND PUBLIC DIPLOMACY, POLICY COORDINATING COMMITTEE, U.S. DEPT. OF STATE, U.S. NATIONAL STRATEGY FOR PUBLIC DIPLOMACY AND STRATEGIC COMM. 4, 18–19, 32 (2007), *available at* http://www.state.gov/documents/organization/87427.pdf (including youth among "vulnerable populations" to be addressed by strategic communications, and emphasizing the importance of "emerging media" to reach this target audience).

[184] CHANGING MINDS, *supra* note 168, at 41. Studies also note that there is a direct correlation between Internet skills and favorability toward the United States, especially among those under the age of seventeen. *Id.*

friendly for various constituencies, especially those from Muslim countries.[185] In addition, the State Department must look to video streaming, IP telephony, and video conferencing.[186] As of November 2008, 1.5 billion Internet users existed worldwide, and eighty-three percent have watched an online video.[187] The United States must take advantage of these emerging technologies to diplomatically engage people online.

Social networking services and applications can also serve as an effective tool of American public diplomacy.[188] For instance, Facebook, the popular online social networking site, recently reached 150 million users online in 170 different countries or territories, and is available in 35 different languages.[189] Public interest organizations and foreign issue advocacy groups are prevalent on Facebook, providing an outlet for people to create groups, quickly gain members, and create forums for discussion.[190] YouTube, the video-sharing site, has contributed to the defeat of incumbent American politicians,[191] and now hosts more than 100 million videos per day, with approximately 184 million comments posted on these videos.[192] State Department officials have proposed creating embassy and consulate Facebook pages.[193] Former Assistant Secretary of State Colleen Graffy embraced the micro-blogging service Twitter and routinely sent "tweets" on her diplomatic trips abroad.[194] Many American politi-

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185 *See id.* at 42.

186 *Id.* at 43–44.

187 *See* LORD, *supra* note 163, at 15.

188 *See* Symposium Panel 3, *supra* note 117.

189 Caroline McCarthy, *Zuckerberg: New Year, 150 Million Facebook Users*, CNET NEWS, Jan. 7, 2009, http://news.cnet.com/8301-13577_3-10134266-36.html; *see also* Posting of Mark Zuckerberg, A Great Start to 2009, to The Facebook Blog, http://blog.facebook.com/blog.php?post=46881667130 (Jan. 7, 2009, 04:37 EST). As of November 2008, Egypt was ranked third for the number of Facebook users it has in its country. *See* LORD, *supra* note 163, at 10.

190 Among Facebook groups and organizations that have gained quick following is one that supports the monks in Burma, which boasts more than 400,000 fans. Facebook, Support the Monks' Protest in Burma, http://www.facebook.com/pages/SUPPORT-THE-MONKS-PROTEST-IN-BURMA/29132528736?ref=ts (last visited Nov. 14, 2009). A group that advocates for action in Darfur currently numbers more than 45,000 members, and has posted more than 160 different discussion topics since 2006. Facebook, Save Darfur!, http://www.facebook.com/group.php?sid=9b837ddb3bf80fef9889be03d360fa80&gid=2207096591 (last visited Sept. 24, 2009).

191 *See* Tim Dickinson, *The First YouTube Election: George Allen and "Macaca,"* ROLLINGSTONE.COM, Aug. 15, 2006, http://www.rollingstone.com/nationalaffairs/?p=426; *see also* Paul Steinhauser, *YouTube Effect Felt Beyond Debates*, CNN.COM, Nov. 26, 2007, http://www.cnn.com/2007/POLITICS/11/26/youtube.debate/index.html..

192 *See* LORD, *supra* note 163, at 10. President Obama has also utilized YouTube to disseminate video copies of his weekly radio address. Howard Kurtz, *Obama Meets The Press, But Cautiously; Events Sometimes Undercut Efforts at Message Control*, WASH. POST., Feb. 9, 2009, at C1.

193 *See* Symposium Panel 3, *supra* note 117.

194 *See id.*; *see also* Colleen P. Graffy, *A Tweet in Foggy Bottom*, WASH. POST, Dec. 24,

cians are now using Twitter to communicate with their constituencies.[195] Several government agencies including the State Department now use blogs and Facebook to communicate with the public.[196] Public diplomacy officials should do the same. Public officials need to use the tools necessary to both communicate with foreign countries and inform the American public about their diplomatic efforts.

In the age of the 24/7 news cycle, rapid reaction to current events and news reports that reflect negatively upon the United States is critical. Former Secretary of Defense Donald Rumsfeld said, "[A] single news story handled skillfully can be as damaging to our cause and helpful to theirs as any other method of military attack."[197] In the last few years, several examples have shown how the Internet can spread and inflame a negative story within hours if the United States did not immediately respond in an effective manner. The Abu Ghraib scandal beamed pictures of tortured Iraqis around the world,[198] and the alleged 2005 scandal of a Koran being flushed down the toilet at Guantanamo Bay was discussed on numerous blogs within hours of the story breaking.[199] The State Department needs a better rapid-response network to fight back against potentially inaccurate charges and present the United States' positions in the best possible light.[200]

In addition, terrorist and fringe groups possess the ability to act in a nimble and coordinated manner to get their message disseminated quickly—a distinct

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2008, at A11.

[195] James Oliphant, *Pols All A-Twitter Over ... Anything*, CHI. TRIB., Mar. 3, 2009, at A3.

[196] Posting of Amanda Ruggeri, *Government Agencies Use Twitter to Reach Citizens*, to Washington Whispers (July 7, 2009, 15:26 EST), http://www.usnews.com/blogs/washington-whispers/2009/07/07/government-agencies-use-twitter-to-reach-citizens.html

[197] Donald H. Rumsfeld, U.S. Sec'y of Defense, New Realities in the Media Age: A Conversation with Donald Rumsfeld, Address Before Council on Foreign Relations (Feb. 17, 2006), *available at* http:www.cfr.org/publication/9900/new-_realitites_in_the_media_age.html. Secretary Rumsfeld's successor, Robert Gates, gave a speech two years ago expressing concerns about the United States' ability to communicate, opining that "[w]e are miserable at communicating to the rest of world what we are about as a society and a culture, about freedom and democracy, about our policies and our goals. It is just plain embarrassing that al-Qaeda is better at communicating its message on the internet than America." *See* Pilon, *supra* note 26 at 6.

[198] Thom Shanker & Jacques Steinberg, *Bush Voices 'Disgust' at Abuse of Iraqi Prisoners*, N.Y. TIMES, May 1, 2004, at A1.; James Risen, *G.I.'s are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15.

[199] Posting of Juan Cole, *American Blasphemy Against Koran Sparks Riot, Protests in Afghanistan, Pakistan*, to Informed Comment: Thoughts on the Middle East, History, and Religion, http://www.juancole.com/2005/05/american-blasphemy-against-koran.html (May 12, 2005, 00:30 EST); Posting of Robert, *"Death to America" in Afghanistan over Gitmo Qur'an Rumor*, to Jihad Watch, http://www.jihadwatch.org/2005/05/death-to-america-in-afghanistan-over-gitmo-quran-rumor.html (May 11, 2005, 08:39 EST).

[200] CHANGING MINDS, *supra* note 168, at 63.

advantage over how the U.S. government public diplomacy structure responds.[201] The State Department should be able to use these same resources and act in a similar way to rapidly communicate with a large and varied audience at any given time.[202] Some political strategists have advocated that public diplomacy rapid response should resemble political campaign war rooms because, in essence, the United States is attempting to make the case for their policies and positions in a debate between ideologies.[203]

D. Concerns About Propaganda Remain in the United States

Given the open society in the United States today and the abundance of information available, the idea that the federal government could wage a propaganda campaign against the American people may appear far-fetched. Americans live in a far more open society than sixty years ago, with an abundance of media sources: satellite, radio, newspapers, the Internet, cable television, and mobile devices.

However, there are many examples of the U.S. government misleading the media and the general public to build support for controversial policy positions. Lyndon Johnson manipulated the Gulf of Tonkin evidence to gain congressional and public support for the Vietnam War.[204] Ronald Reagan's administration created the Office of Public Diplomacy for Latin America and the Caribbean within the State Department, with the official goal to tell the public in Latin American about various U.S. policies,[205] but instead engaged in secret

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[201] *See The Propaganda Advantage: Why the Terrorists Still Have It*, SERVIAM MAGAZINE, Nov/Dec. 2007, *available at* http://www.serviammagazine.com/mag/NovDec2007/1207_threat_assessment.htm.

[202] Symposium Panel 3, *supra* note 117.

[203] *See* Weisman, *supra* note 176 (advocating installation of "'rapid response' teams"); *see also* Tony Blankley, *Public Diplomacy: Reinvigorating America's Strategic Communications Policy*, 1065 HERITAGE LECTURES 1, 12 (Mar. 14, 2008), *available at* http://www.heritage.org/Research/GovernmentReform/hl817.cfm (noting the comments of Tony Blankley, former advisor to Newt Gingrich, as saying he would like to see an individual similar to Karl Rove or James Carville build a war room for the State Department).

[204] *See* Jeff Cohen & Norman Solomon, *30th Anniversary: Tonkin Gulf Lie Launched Vietnam War*, FAIR, July 27, 1994, *available at* http://www.fair.org/index.php?page=2261. The Johnson administration manipulated evidence in order to show that the North Vietnamese attacked U.S. destroyers in the Gulf of Tonkin, when in fact the United States had provoked these maneuvers. The incident resulted in the Gulf of Tonkin resolution, which greatly expanded the President's power to fight in Vietnam. *Id.*

[205] Raymond Bonner & Christopher Marquis, *In Filling Latin Post, Bush May Reignite Feuds*, N.Y. TIMES, Mar. 9, 2009, at A6 (noting that the Office of Public Diplomacy was "set up by President Reagan to counter the heavy criticism of the administration's policies in Central America.").

propaganda activities, including encouraging neutral journalists to prepare editorial materials in favor of the administration's policies.[206] The 1998 movie "Wag the Dog," depicted a President who tried to start a war in Albania to distract the American people from a presidential sex scandal.[207] Later that year, some commentators would say the American people witnessed their own "Wag the Dog" moment when President Clinton ordered air strikes on Iraq around the time the House of Representatives was voting to impeach him.[208]

The George W. Bush administration used many propaganda techniques to masquerade policies and viewpoints as legitimate news. For example, the Department of Education paid conservative commentator Armstrong Williams $240,000 to promote the No Child Let Behind Act on his syndicated television show without disclosure of the arrangement.[209] In 2004, the Drug Enforcement Agency was discovered to have released video news releases touting the administration's policies without announcing the origin of the video.[210] Many of these video news releases aired on television news stations throughout the country.[211]

The most egregious example of the Bush Administration implementing propaganda techniques in the United States was the Pentagon's television military analyst program.[212] In 2002, in order to sell the war in Iraq to the public, the Pentagon decided to start hosting elaborate briefings at the Pentagon for television military analysts to provide them with appropriate talking points.[213] The analysts then provided Pentagon talking points on their respective networks, proving to be significant assets in helping the Pentagon promote the war.[214] The briefings eventually included trips to the Middle East and flights to

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206 Antonella Aloma Castro, Comment, *Truth in Broadcasting Act: Can It Move the Media Away from Indoctrinating and Back to Informing?*, 27 LOY. L.A. ENT. L. REV. 127, 130–31 (2007).

207 WAG THE DOG (New Line Cinema 1997).

208 Frank Bruni, *Wagging Tongues in 'Incredibly Cynical Times,'* N.Y. TIMES, Aug. 21, 1998, at A12.

209 *See* David D. Kirkpatrick, *TV Host Says U.S. Paid Him to Back Policy*, N.Y. TIMES, Jan. 8, 2005, at A1. The No Child Left Behind Act created new standards for public schools, and part of the agreement required Williams to allow Bush administration officials on his program on an occasional basis. *Id.*

210 *See* Kirkpatrick, *supra* note 209.

211 *Id.*

212 David Barstow, *Behind TV Analysts, Pentagon's Hidden Hand: Courting Ex-Officers Tied to Military Contractors*, N.Y. TIMES, Apr. 20, 2008, at 1.

213 *Id.* The Pentagon would take great care in assembling these briefings. They would often include military escorts to the Secretary's office, hefty PowerPoint presentations listing the Department's talking points, and fine food and beverages laid out. The Pentagon eventually recruited more than seventy-five retired officers, mostly affiliated with various cable networks, but also those who frequently wrote op-ed articles or were quoted in print media sources. *Id.*

214 *Id.*

Guantanamo Bay providing the analysts with first-hand material to counter the negative news coming from other sources.[215] If one of the analysts skewed from the official talking points, the Pentagon would swiftly revoke the access they previously enjoyed.[216] Over time, Pentagon officials noticed a positive correlation between the analysts' appearances on television and media coverage of the Administration's conduct of the war in Iraq.[217]

Television networks and cable news stations were apparently unaware of the Defense Department's influence over the military analysts and the fact that many of the commentators lobbied for the defense industry or held a financial interest in companies with contracts to provide services for the military.[218] Some networks refused to comment on their disclosure and conflict of interest policies, although many acknowledged that they needed tightening.[219] After the controversy broke, many of the analysts revealed the networks had done scant investigation into the outside interests when they negotiated contracts with commentators.[220]

Congress and executive branch agencies reacted quickly to the report. Congressman Paul Hodes successfully attached a rider to the 2009 Defense Appropriations Bill, prohibiting the Department of Defense from using federal funds for propaganda not authorized by law.[221] However, Hodes' amendment only applies to the current fiscal year,[222] and permanent legislation is needed to ensure this activity does not occur again. In addition, two independent inquiries were launched by the Pentagon's Inspector General's office and the Government Accountability Office ("GAO"). [223] However, several days before President Bush left office, the Pentagon's Inspector General released a report that

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[215] *Id.* The overseas trips proved fruitful for those military analysts who also served as consultants or advisors to defense industry corporations. On these trips, they had access to senior military and civilian officials, and often lobbied these officials to provide contracts for their companies. William V. Cowan, a Fox analyst and chief executive of a new military firm called wvc3 Group, attempted to win reconstruction contracts from the Coalitional Provisional Authority. *Id.*

[216] *Id.* The analysts knew that information was instrumental to conducting successful TV appearances, and would often hold back from offering their actual opinions on TV for fear of the Pentagon cutting them off. *Id.*

[217] *Id.*

[218] Barstow, *supra* note 212.

[219] *Id.* A spokesman for CNN noted that they were unaware that General Marks, one of their main military analysts sought government contracts related to the war in Iraq, including a $4.6 billion deal negotiated in 2006 to provide translators for US forces in Iraq. *Id.*

[220] *Id.*

[221] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1056, 122 Stat. 4356, 4610-11 (Oct. 14, 2008); H.R. 6398, 110th Cong. (2008).

[222] Pub. L. No. 110-417, 122 Stat. 4356, 4356.

[223] David Barstow, *2 Inquires Set on Pentagon Publicity Effort*, N.Y. TIMES, May 24, 2008, at A16.

found insufficient evidence to show the military analyst program was improper or illegal.[224] The GAO report was released in July and also absolved the Pentagon of concealing the program from the public.[225] Yet, several media outlets have ignored the report, and Fox News continues to use one of the analysts mentioned in the New York Times article that broke the story.[226]

The American public should be able to rely on the media to provide day-to-day accurate news regarding governmental policies. Additionally, a government announcement puts extra weight on the news release and easily affects how viewers interpret that news.[227] Moreover, the media has an obligation to provide truthful coverage of current events and public issues.[228]

Few legal remedies exist to stem government activities that involve speech. Courts have not found a First Amendment remedy to enjoin government speech, but have suggested that citizens should use methods such as voting and protesting to petition the government.[229] The types of government speech that could violate the First Amendment include the aforementioned video news

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[224] *See* Dept. of Defense, Office of Inspector General, EXAMINATION OF ALLEGATIONS INVOLVING DoD OFFICE OF PUBLIC AFFAIRS OUTREACH PROGRAM i (Jan. 14, 2009). The Office of the Inspector General reviewed over 12,000 pages of document and interviewed more than 30 witnesses to compile information for the report. *Id.* Congressman Hodes denounced the report as a farewell present from the Bush administration. David Barstow, *Inspector General Sees No Misdeeds in Pentagon's Effort to Make Use of TV Analysts*, N.Y. TIMES, Jan. 17, 2009, at A15 (quoting Rep. Hodes as saying, "To say there are factual inaccuracies in this report is the understatement of the century. I think it is a whitewash. It appears to be the parting gift of the Pentagon to the president.").

[225] U.S. Gov. Accountability Office, Department of Defense-Retired Military Officers as Media Analysts 2 (2009), http://www.gao.gov/decisions/appro/316443.pdf.

[226] Alexandra J. DiBranco, Review, 8 DARTMOUTH FREE PRESS (Mass.), May 9, 2008, *available at* http://www.dartmouth.edu/~thepress/read.php?id=1590 (reviewing David Barstow, *Inspector General Sees No Misdeeds in Pentagon's Effort to Make Use of TV Analysts*, N.Y. TIMES, Jan. 17, 2009). The only place where the subject has gotten much media attention and outrage is in the blogosphere. *Id.*

[227] *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 594 (2008) ("[W]here the government seems an expert, objective, or otherwise trustworthy source, its endorsement gives the ideas it trumpets . . . more acceptance than they would otherwise enjoy."). However, according to a September 2008 Gallup Poll, only 42% of the American public had a "great deal or fair amount of trust in the executive branch" at the time. Jeffrey M. Jones, *Trust in Government Remains Low*, Gallup Poll, Sept. 18, 2008, http://www.gallup.com/poll/110458/Trust-Government-Remains-Low.aspx. However, according to another Gallup poll conducted in September 2009, 61% of the American public now has a great deal or fair amount of trust in the executive branch. Frank Newport, *Americans' Trust in Legislative Branch at Record Low*, Gallup Poll, Sept. 10, 2009, http://www.gallup.com/poll/122897/Americans-Trust-Legislative-Branch-Record-Low.aspx.

[228] *See* Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 785–86 (2009).

[229] Norton, *supra* note 227, at 589.

releases.[230] Accordingly, the government has an enhanced obligation to provide trustworthy information and a violation of that obligation could affect how the public trusts the government. While the Hodes amendment was a strong first step, any new public diplomacy legislation must include further language that can protect the public from purposeful government misinformation.

V. A REVISED PUBLIC DIPLOMACY FOR THE 21ST CENTURY

Numerous suggestions have been put forth to resolve the problems created by the Smith-Mundt Act. Some observers argue that the domestic dissemination clause should be repealed outright,[231] but these arguments do not give much explanation of potential consequences or how to handle certain sensitive diplomatic information that should be kept secret. Others assert that the Act is irrelevant to the functioning of public diplomacy efforts, and the government should not press for new legislation.[232] In addition, Foreign Service officers overseas confront precarious situations on a daily basis and must respond quickly, ignoring Smith-Mundt Act regulations, especially since Foreign Service officers are rarely punished for violating the Act, in any case.[233] Other commentators have made the argument that State Department officials who are worried about the Smith-Mundt Act are lazy bureaucrats looking for an excuse not to perform their duties.[234]

Potential changes to the domestic dissemination ban in 2010 are not out of the question,[235] as several members of Congress have advocated repealing the

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[230] *See* Castro, *supra* note 206, at 127–28 (noting that "the fact that the press silently serves as a distributor for government propaganda can be viewed as a violation of Americans' First Amendment rights of free speech and freedom of the press.").

[231] Pilon, *supra* note 26, at 3, 8. Other commentators have suggested minor modifications that would have significant impacts. HILL, *supra* note 26, at 4 ("Making these changes does not require reinventing the wheel. The alteration of a few mere sentences would affect a seismic positive shift in the way public diplomacy, strategic communications, and information operations are conducted by the U.S. government.").

[232] THE REPORT ON THE SMITH-MUNDT SYMPOSIUM OF JANUARY 13, 2009 7 (Mar. 12, 2009).

[233] *See* Symposium Panel 2, *supra* note 130. Jeff Grieco, Assistant Administrator of USAID, said, "I don't worry every day, in managing our domestic outreach campaigns and activities, about whether Smith-Mundt is going to stop us because we're very structured in what we do . . . . On the overseas side, Smith-Mundt for us is not an issue." *Id.*

[234] *See* Symposium Panel 3, *supra* note 117. Bill Kiehl, President and CEO of PD Worldwide, noted that people who constantly cite Smith-Mundt as a reason not to take an action are "people who don't want to do something and it's a convenient excuse." *Id.*

[235] Fawzia Sheikh, *Smith-Mundt Act Causes Confusion for DOD, Prompts Talk of Revision*, INSIDE THE PENTAGON, June 5, 2008, *available at* Lexis News & Business Library.

ban.[236] For those who want changes to the Smith-Mundt Act, questions remain about the scope of new legislation, and the creation and structure of a new agency.

Congress should consider the following principles when contemplating new legislation. First, Congress cannot simply repeal the Smith-Mundt Act without consequences. Some Foreign Service officers and military personnel support components of the Act because they believe it insulates them from government interference in the performance of their job.[237] Second, new legislation needs to do more than just repeal the ban. Guidelines should be given to agencies involved in public diplomacy on how they can use the Internet, what activities they can engage in, and how they can coordinate with other entities. Third, the legislation should create a new agency similar to the old USIA. Given the number of executive branch departments now involved in foreign policy, a new entity is needed to make sure that the United States speaks with one voice in public diplomacy efforts. A new entity can also provide critical coordination between the different agencies and departments to ensure that their efforts are targeted and have the most positive impact. Fourth, the legislation should address concerns about propaganda in the U.S. Congress should enact the Hodes amendment and provide new clarification on what the government can or cannot do in terms of issuing video news releases and influencing media analysts.

A. Why Simply Repealing The Domestic Dissemination Ban Is Not an Adequate Solution

Some commentators argue that the domestic dissemination ban should be repealed,[238] and that the government must allow "free and unfettered dissemination of information."[239] But those who advocate for a complete repeal of the

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[236] *See* 2009 Smith-Mundt Symposium Panel 4: The View from the Hill (Jan. 13, 2009), http://mountainrunner.us/symposium/transcripts/0113-smithmundtsymposium-panel4.pdf; Fawzia Sheikh, *Bill Would Amend Smith-Mundt Act, Let Al-Hurra Broadcast in U.S.*, INSIDE THE PENTAGON, July 17, 2008, *available at* Lexis News & Business Library.

[237] *See* Symposium Panel 3, *supra* note 117. Joe Milata, a Foreign Service officer, said

> If you're focusing on international audiences with broadcasting and you can rely on . . . a law that says that should be your focus, then you're not cast with trying to turn that broadcasting effort into a domestic outreach effort, which . . . is going to be a huge drain on resources.

Id.

[238] Pilon, *supra* note 26, at 3. *Cf.* Daya Gamage, *U.S. Public Diplomacy and Smith-Mundt Act*, ASIAN TRIBUNE, Nov. 16, 2008, *available at* http://www.asiantribune.com/?q=node/14217.

[239] Pilon, *supra* note 26, at 3.

Smith-Mundt Act fail to realize that the law provided the foundation for the cultural and educational exchanges that were so instrumental during the Cold War.[240] These solutions fail to look at some of the benefits of the domestic dissemination ban and how these benefits should be incorporated into new legislation.

First, the domestic dissemination ban is still necessary for certain types of activities that the U.S. military and Department of State conduct around the world. The military routinely conducts psychological operations in hostile countries, where the sole intent is to influence a hostile audience.[241] The domestic dissemination of materials used in "psy-ops" abroad would not make sense to many people and could have a negative effect as a whole if they were to somehow be broadcast domestically.[242] The Department of Defense has advocated for an updated law that would provide more clarity on what public affairs officials can release to different populations.[243] Some military officials have called the restrictions artificial because public affairs officers are required to speak in vague terms to the American people about what operations they are undertaking overseas.[244] Any new legislation that repeals the ban must recognize that certain activities—like psychological operations meant for foreign

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[240] *See* Tony Blankley et al., *Reforming U.S. Public Diplomacy for the 21st Century,* BACKGROUNDER, Nov. 20, 2008, at 1, 3.

[241] U.S. Army Civil Affairs & Psychological Operations Command (Airborne), Fact Sheet: Psychological Operations, http://www.usacapoc.army.mil/facts-psyop.html (last visited Sept. 26, 2009). The Web site details the purpose of psy-ops:

> Used during peacetime, contingencies and declared war, these activities are not forms of force, but are force multipliers that use nonviolent means in often violent environments. Persuading rather than compelling physically, they rely on logic, fear, desire or other mental factors to promote specific emotions, attitudes or behaviors. The ultimate objective of U.S. military psychological operations is to convince enemy, neutral, and friendly nations and forces to take action favorable to the U.S. and its allies.

Id.

[242] *See* Symposium Panel 2, *supra* note 130. Rear Admiral Greg Smith, Director of Communications for U.S. Central command noted that psychological operations are not targeted for domestic audiences and could have an awkward effect on the American public. *Id. See also* Stephen C. Johnson, *Improving U.S. Public Diplomacy Toward the Middle East*, 838 HERITAGE LECTURES 1, 4–5 (May 24, 2004), *available at* http://www.heritage.org/Research/NationalSecurity/upload/63886_1.pdf ("Public affairs officers are supposed to tell the American public and U.S. troops the truth all of the time, while *psyops* units try to influence the behavior of foreign populations to support certain battlefield objectives."). *Id.*

[243] Fawzia Sheikh, *Draft DOD Strategic Communication Concept Eyes Smith-Mundt Act*, INSIDE THE PENTAGON, May 29, 2008, *available at* Lexis News & Business Library. Various Pentagon agencies have been working on a new document that outlines new public diplomacy strategies for the military, deeming the current domestic dissemination ban "an outdated model of global communication." *Id. See also* Sheikh, *supra* note 252 (finding that releases of new information products often require intense discussions on what materials can be released to each population, without breaking the law).

[244] Sheikh, *supra* note 243.

consumption—should be tailored overseas, without worrying about legal concerns if such material is somehow disseminated in the United States. Some commentators argue that the Smith-Mundt Act does not even apply to the Defense Department,[245] while others claim the Defense Department has hidden behind the law in the past to prevent exposure of their more sensitive operations.[246] New legislation should clarify how public diplomacy laws apply to the military and in what circumstances they can claim exemptions.

The law should not be completely repealed because the Smith-Mundt Act also serves to insulate many Foreign Service officers from political pressure.[247] As discussed before, the events of the past depict how presidential administrations manipulated government agencies to get their own biased message through unsavory practices.[248] Foreign Service officers need to engage in their public diplomacy efforts without undue interference by Congress, the media, and the American people.[249] Any legislation needs to take account the concerns of Foreign Service officers who want little domestic interference in their day-to-day work.[250] As a result, simply repealing the ban is not enough. New legislation needs to ensure the people out in the field get protected, and still enjoy the security they feel the domestic dissemination ban currently gives them from political pressure back in the United States.

B. Comprehensive New Legislation is Needed

The Obama administration faces many foreign policy challenges that provide the U.S. government a fresh opportunity to update our public diplomacy strategies. Congress now has an opportunity to enact a new statutory framework for 21st century public diplomacy efforts, and the biggest change in how the United States communicates with other countries since the original Smith-Mundt Act. Some scholars and experts have called for the tweaking of the Smith-Mundt Act, to modify the domestic dissemination ban and allow certain

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[245] *See* Symposium Panel 2, *supra* note 130.

[246] Maj. K. Brogan Farren, Information Engagement to Garner Public Support: TTPs from World War II 25-26 (2009), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA505020&Location=U2&doc=GetTRDoc.pdf.

[247] James Glassman, U.S. Undersec'y of State for Pub. Diplomacy & Pub. Affairs, Keynote Address at the 2009 Symposium on the Smith-Mundt Act of 1948 6-7 (Jan. 13, 2009).

[248] *See* discussion *supra* pp. 30–34.

[249] KLOPFENSTEIN, *supra* note 28, at 12–13.

[250] *See* Symposium Panel 3, *supra* note 117. Foreign Service officer Joe Milata noted that "our focus is on foreign audiences" and "if we have to turn our attention as well to talking to domestic audiences in the United States continuously, that's a drain on resources, and resources we don't have." *Id.*

entities to domestically disseminate public diplomacy materials.[251] Members of Congress have exhibited caution while discussing amendments to the Act.[252] While a simple modification would certainly solve part of the problem with the domestic dissemination ban, Congress would forgo a tremendous opportunity to remake public diplomacy legislation: public diplomacy needs to be retooled for a 21st century world.

This comprehensive legislation should set out a number of requirements for U.S. agencies involved in public diplomacy efforts overseas. First, a new law should require government contractors and grantees to disclose their activities overseas, providing discretion for various security scenarios.[253] Second, a new bill should require all agencies to post transcripts of programs and copies of publications on the Internet to promote accountability and keep the American people informed about what actions each agency is taking overseas. Third, the legislation should explicitly encourage the use of the Internet to reach out to other countries and engage them with information regarding the policies and values of the United States. However, it should not set out explicit rules for each agency, but instead should set guidelines for those agencies engaged in public diplomacy efforts to set up their own rules and guidelines. Finally, new legislation also needs to ensure accountability in the system that prevents government abuse of its pulpit power as discussed previously with the Bush administration's actions. Accountability also ensures that agency action is coordinated, and the rules are appropriately applied as necessary. The reinstatement of a single agency to coordinate public diplomacy, like the former USIA, would also increase accountability and further the public diplomacy mission.

C. A New Agency Modeled on the USIA Could Benefit Public Diplomacy

The modernization of public diplomacy requires a structural reorganization and the creation of a new governmental agency to coordinate public diplomacy.[254] For fifty years, USIA handled most of the coordination and management of the government's public diplomacy efforts.[255] The absorption of USIA

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[251] Glassman, *supra* note 247, at 7 ("I would like to see Congress consider small tweaks in Smith-Mundt that would allow dissemination of foreign-language programming by taxpayer-funded international broadcasting e[sic] entities.").

[252] Fawzia Sheikh, *Bill Would Amend Smith-Mundt Act, Let Al-Hurra Broadcast in U.S.*, INSIDE THE PENTAGON (July 17, 2008). Congressman Adam Smith discussed the possibility of amending the law, but said, "any revision should be scrutinized carefully." *Id.*

[253] Pilon, *supra* note 26, at 8.

[254] Blankley et al., *supra* note 240, at 10.

[255] USIA Factsheet, http://dosfan.lib.uic.edu/usia/usiahome/factshe.htm (last visited Sept.

into the State Department was prompted by Congressional politics and the end of the Cold War.[256] In 2008, Senator Sam Brownback introduced legislation to establish a National Center for Strategic Communications, an agency that would be "similar to the now defunct U.S. Information Agency." [257] Senator Brownback's legislation would have repealed the domestic dissemination ban and eliminated both the Undersecretary for Public Diplomacy and the Broadcasting Board of Governors.[258] Senator Brownback believed the U.S. government was not effectively utilizing all of the modern resources available in the 21st century for public diplomacy efforts.[259] His legislation provided for a single director to oversee public diplomacy initiatives among all government agencies, as well as to encourage the private sector to assist with these initiatives.[260] Senator Brownback's legislation deserves applause, not only because it calls for the repeal of the domestic dissemination ban, but also because it recognizes that the United States needs to completely rework its public diplomacy structure.

Despite concerns about creating a new bureaucracy, a government agency focused solely on public diplomacy will solve the problems in our current public diplomacy efforts. First, such an agency could ensure consistency across different agencies, unlike today where confusion exists as to what materials the Smith-Mundt applies.[261] Second, and more importantly, it could ensure that public diplomacy gets the attention it needs in today's world. Former USIA employees have complained that many within the State Department do not fully comprehend "mutual understanding programs" and the distinction between public diplomacy and traditional nation-state diplomacy.[262] A new agency would heighten the importance of public diplomacy and also gain new power as a coordinator of all public diplomacy policy, especially if given direct access to the president.

26, 2009).

256 *See supra* Part II.C.

257 Press Release, Sen. Sam Brownback, Brownback Introduces Public Diplomacy Legislation: Bill Would Create National Center for Strategic Communications (Sept. 23, 2008).

258 Strategic Communications Act of 2008, S. 3546, 110th Cong. (2008).

259 Reforming U.S. Public Diplomacy, *supra* note 58, at 11 (quoting Sen. Brownback as saying, "[W]e've got to get a stronger communication line up and down here in the entity to be able to communicate that; that at times, we've been very effective in the past in that battle of ideas.").

260 S. 3546, § 5.

261 *See* Press Release, *supra* note 257 (quoting Sen. Brownback as saying, "America needs a single national strategy overseen by an official who is accountable for making strategic communications work."); Armstrong, *supra* note 18, at 3.

262 KLOPFENSTEIN, *supra* note 28, at 12–13.

D. Stronger Limits are Necessary to Protect the United States from Internal Propaganda

New legislation would also represent a good opportunity to solidify the ban on government agencies releasing propaganda materials. The propaganda activities of the Department of Education and Pentagon during the Bush administration have affected the debate on whether the Smith-Mundt Act should be revised.[263] The law should set clear guidelines for each agency on how to maintain public affairs operations without creating the perception that they are using analysts to promote their message without full disclosure of potential conflicts of interest. It is both commonplace and legal for government agencies to rely on a public information dissemination program that assists them in getting their message out to the public, and is also typical for many of these departments to rely on surrogates accustomed to talking to the media.[264] However, government agencies need to ensure they have established procedures for conducting these programs that are transparent and abide by ethical guidelines.

The government also needs to ensure that everything released domestically discloses its origin. Video news releases without attribution and government activists posing as White House beat reporters do not reflect a country that prides itself on the freedoms of speech and press. These activities increase the amount of distrust between the government and its people and make it more difficult to believe information from government agencies. The law needs to extend to all government agencies regarding video news releases or propaganda items they put out. Strict controls are needed for the release of propaganda videos in the United States that are not clearly labeled as government messages. Any legislation should provide stricter controls on "independent news analysts," require the disclosure of financial interests they hold and the government access they have been provided.

VI. CONCLUSION

The United States victory during World War II cemented its status as a world leader. In the aftermath of World War II, the federal government increased its national security apparatus and passed legislation such as the Na-

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[263] 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, 30 (2006).

[264] *See supra* notes 214–28 and accompanying text (discussing Pentagon's use of analysts on television news programs).

tional Security Act of 1947 and the Smith-Mundt Act. This legislation guided our public diplomacy strategies for half a century during the Cold War. However, after the attacks of September 11, 2001 and with the increasing connectedness of the global economy, and the Internet, the U.S. government needs to update the Smith-Mundt Act and our public diplomacy infrastructure to reflect these realities. While Congress passed the Patriot Act[265] to update surveillance laws and created the Department of Homeland Security[266] to better coordinate efforts to protect the United States, the U.S. remains hamstrung by the Smith-Mundt Act to wage modern public diplomacy initiatives. The Obama administration has embraced social media more than its predecessor, but remains hampered by the Smith-Mundt Act. As the 20th anniversary of the fall of the Berlin Wall passes, the U.S. government now needs to break down another wall by revising the Smith-Mundt Act and creating a new national policy on how it can effectively use social media in foreign affairs.

[265] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).
[266] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).