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Unmasking Uncle Sam: A Legal Test for Defining and Identifying State Media

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In December 2018, the Chair of the House Foreign Affairs Committee published a report detailing how the U.S. Agency for Global Media, the central federal state media agency, illegally targeted social media ads at Americans at least 860 times from 2016 to 2018. The U.S. Agency for Global Media and other U.S. state media agencies have enormous resources, and if left unchecked, could unduly influence public opinion, threaten the free and independent press, and subvert democratic accountability. To address this growing concern, this Article proposes a new, comprehensive legal test for defining and identifying state media that incorporates existing approaches for analyzing government publications employed by the federal government and independent media platforms.

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INTRODUCTION

The U.S. government has become one of the leading media outlets in the world, with funding and personnel comparable to the largest American news networks.¹ This development has gone largely unnoticed by Americans because Congress instituted a federal ban on the dissemination of U.S. state media² within the United States shortly after World War II.³ Sixty-five years later, in 2013, Congress repealed the ban, allowing the U.S. government to distribute its materials domestically—so long as the U.S. government did not directly target Americans with its state media or attempt to cultivate a domestic audience.⁴

Since the discontinuation of the domestic dissemination ban there have been a spate of controversies surrounding U.S. state media agencies.⁵ For example, on July 19, 2018, the *New York Times* published an article⁶ on academic research

1. See *infra* Section I.D.

2. For purposes of this Article, the term “state media” encompasses “propaganda,” “public diplomacy,” and similar terms. See generally MARTIN MANNING & HERBERT ROMERSTEIN, HISTORICAL DICTIONARY OF AMERICAN PROPAGANDA (2004) (providing definitions). This Article also puts forth a comprehensive legal test for defining and identifying “state media.” See *infra* Part V.

3. 22 U.S.C. §§ 1461(b), 1461-1a(a).

4. See *id.* § 1461-1(a).

5. See *infra* Part II.

6. Kevin Roose, *U.S.-Funded Broadcaster Directed Ads to Americans*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/technology/facebook-ads-propaganda.html> [<https://perma.cc/W3KY-MT35>].

detailing how the U.S. Agency for Global Media (the USAGM⁷), the central U.S. state media agency, was illegally targeting Americans with Facebook ads that linked to articles produced by USAGM agency Radio Free Europe/Radio Liberty (RFE/RL).⁸ These pieces contained favorable depictions of the Trump administration's foreign policy objectives, including a flattering portrayal of Russia as the World Cup host while the Trump administration was fighting allegations about Russian election meddling, as well as a RFE/RL-commissioned poll headlined, "The majority of people surveyed in Greece and Turkey have unfavorable views of NATO," while President Donald Trump was attending a contentious NATO summit.⁹ When confronted by the *New York Times*, a USAGM representative acknowledged wrongdoing and stated, "None of the [USAGM] networks should be distributing or promoting our content domestically in order to develop or grow domestic audiences."¹⁰

The *New York Times* report spurred inquiries from the U.S. Senate Committee on Foreign Relations and the U.S. House of Representatives Committee on Foreign Affairs.¹¹ Sen. Bob Menendez (D-NJ), Ranking Member of the Senate Foreign Relations Committee, was the first congressional member to address the issue.¹² On July 27, 2018, Senator Menendez sent a letter to John Lansing, Chief Executive Officer and Director of the Broadcasting Board of Governors (predecessor to the

7. The United States Information Agency (the USIA), the Board for International Broadcasting (the BIB), the International Communication Agency (the ICA), and the Broadcasting Board of Governors (the BBG) were, at various times, the predominant organizations overseeing civilian U.S. state media efforts from the end of World War II onward. Weston R. Sager, *Apple Pie Propaganda? The Smith-Mundt Act Before and After the Repeal of the Domestic Dissemination Ban*, 109 NW. U. L. REV. 511, 518, 523 n.78, 524 (2015); MANNING & ROMERSTEIN, *supra* note 2, at xlvi–xlvi, 298. In August 2018, the federal government renamed the agency responsible for overseeing civilian state media the "United States Agency for Global Media" (the USAGM) as part of a rebranding of state media agencies. Broad. Bd. of Governors, *U.S. Government Media Agency Rebrands*, PR NEWSWIRE (Aug. 22, 2018, 2:52 PM), <https://www.prnewswire.com/news-releases/us-government-media-agency-rebrands-300701142.html> [<https://perma.cc/U4SC-M8JJ>].

8. Roose, *supra* note 6.

9. *Id.*

10. *Id.*; see also 22 U.S.C. §§ 1461, 1461-1a. RFE/RL's president Thomas Kent subsequently wrote a letter to the editor of the *New York Times* defending the state media outlet. Thomas Kent, Letter to the Editor, *Radio Free Europe/Radio Liberty Defends Itself*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/opinion/letters/radio-free-europe.html> [<https://perma.cc/7BDU-A49C>]. This letter stated that "Radio Free Europe/Radio Liberty rejects any suggestion that our journalists are engaged in propaganda" and that their "intent is not to target a United States domestic audience." *Id.* Thomas Kent resigned from his post at RFE/RL a few months later, possibly owing to the *New York Times* article and the subsequent congressional investigations. Press Release, Radio Free Eur./Radio Liberty, RFE/RL President Ends Tenure with High Marks for Innovation and Impact (Oct. 1, 2018), <https://www.pressroom.rferl.org/a/rferl-president-ends-tenure-with-high-marks-for-innovation-impact/29519871.html> [<https://perma.cc/9GKB-EJNS>].

11. Press Release, Bob Menendez, Ranking Member, U.S. Senate Comm. on Foreign Rels., Menendez Calls on BBG to Clarify Domestic Ads on Facebook (July 27, 2018) [hereinafter Menendez], <https://www.foreign.senate.gov/press/ranking/release/menendez-calls-on-bbg-to-clarify-domestic-ads-on-facebook> [<https://perma.cc/P9PE-PTZ5>].

12. *Id.*

USAGM), regarding the allegations in the *New York Times* report.¹³ Senator Menendez inquired about whether U.S. state media outlets were complying with federal laws prohibiting U.S. state media agencies from targeting Americans with their materials.¹⁴ In a response letter dated August 6, 2018, Lansing confirmed that, based on an internal investigation, RFE/RL had improperly targeted as many as 576,600 Americans with social media advertisements.¹⁵

In December 2018, Rep. Edward Royce (R-CA), Chair of the House Foreign Affairs Committee, published a comprehensive oversight investigation report (the Royce Report) regarding violations of federal law by U.S. state media outlets.¹⁶ This report detailed U.S. state media violations not only by RFE/RL, but also by Voice of America (VOA)—the flagship U.S. state media outlet. The Royce Report concluded that USAGM outlets RFE/RL and VOA violated federal law at least 860 times from 2016 to 2018 by intentionally and negligently targeting Americans with social media advertisements.¹⁷

The *New York Times* article, the Senate Foreign Relations Committee inquiry, and the Royce Report provide valuable insight into the prevalence of domestic U.S. state media.¹⁸ But even with this information, it remains difficult to ascertain

13. *Id.*

14. *Id.*

15. Letter from John F. Lansing, Chief Exec. Officer & Dir., Broad. Bd. of Governors, to Bob Menendez, Ranking Member, U.S. Senate Comm. on Foreign Rels. (Aug. 6, 2018) (on file with authors) (received via email from Senate Foreign Relations Committee staff). Lansing assured Senator Menendez that no other U.S. state media outlets had violated the law, stating, “Through an after-action review, we have not found that any of the other RFE/RL language services had engaged in boosting to users within the United States, nor does it appear to be a practice within any of the other four BBG networks.” *Id.* This statement was later contradicted by the Royce Report. *See infra* notes 16–17 and accompanying text.

16. STAFF OF H.R. COMM. ON FOREIGN AFFS., 115TH CONG., U.S. INT’L BROADCASTING IN THE DIGITAL AGE: GETTING ADVERTISING RIGHT (2018) [hereinafter ROYCE], <https://www.foreignaffairs.house.gov/wp-content/uploads/2018/12/US-International-Broadcasting-in-the-Digital-Age-Getting-Advertising-Right.pdf> [<https://web.archive.org/web/20190102235134/https://foreignaffairs.house.gov/wp-content/uploads/2018/12/US-International-Broadcasting-in-the-Digital-Age-Getting-Advertising-Right.pdf>] (Report by Edward R. Royce about the December 2018 Oversight Investigation); *see also* House Foreign Affs. Comm. Republicans, FACEBOOK (Dec. 21, 2018, 10:31 AM), <https://www.facebook.com/HouseForeign/posts/2884468844911995> [<https://perma.cc/N4DQ-KA5Q>] (press release).

17. ROYCE, *supra* note 16, at 3; House Foreign Affs. Comm. Republicans, *supra* note 16. The Royce Report also noted how U.S. state media agencies continued to illegally target Americans even after agency staff had acknowledged wrongdoing. *Id.* Among these violations were instances of VOA targeting Iranian-Americans with VOA Persian content. ROYCE, *supra* note 16, at 10; *Voice of America Persian Service Targeted Americans with Illegal Facebook Ads*, BBG-USAGM WATCH (Dec. 22, 2018), <http://www.bbgwatch.com/bbgwatch/voice-of-america-persian-service-targeted-americans-with-illegal-facebook-ads/> [<https://perma.cc/WP7E-W5AW>]. There is, however, little detail on most of the 860 violations in the Royce Report.

18. *See* Raya Koreh, Opinion, *Congress Should Strengthen Laws Outlawing Domestic Government Propaganda*, HILL (Oct. 20, 2019, 5:00 PM), <https://www.thehill.com/opinion/technology/466647-congress-should-strengthen-laws-outlawing-domestic-government-propaganda> [<https://perma.cc/YTW2-QKL3>]. The 2016 U.S. presidential election and its allegations of Russian interference is an

the true extent of domestic U.S. state media activity because there are few legal restrictions—under either statutory or common law—that require the U.S. government to attribute their programming or disclose their distribution methods.¹⁹ Perhaps more concerning, there are no meaningful legal consequences when the U.S. government is found to have committed a violation.²⁰ With massive resources and inherent incentives to promote its policies, the U.S. government could exert enormous power over free public discourse if left unchecked and unmonitored.²¹

Effective oversight is inhibited by the absence of a generally accepted test for defining and identifying U.S. state media.²² Without such guidance, government

example of how social media allowed influential state media to rapidly spread information on a global scale.

19. *See id.*

20. Independent social media platforms have begun implementing measures to document state media advertisements, but these are in their nascent stages and are of limited effectiveness. Hadas Gold, *YouTube to Start Labeling Videos Posted by State-Funded Media*, CNN: BUS. (Feb. 3, 2018, 5:25 PM), <https://www.money.cnn.com/2018/02/02/media/youtube-state-funded-media-label/index.html> [<https://perma.cc/XZ3R-49Q2>]. If not for Facebook’s advertising database that allowed users to view the details behind organizations’ Facebook ads, RFE/RL’s illegal practices likely would have gone unnoticed. Facebook has since altered this feature to make it more difficult, and in some instances impossible, to access prior ads—such as the RFE/RL Facebook ads that were screencaptured from the advertising database and featured in the *New York Times*. *See infra* Section IV.B; *Radio Free Europe/Radio Liberty*, FACEBOOK, <http://www.facebook.com/ads/library> [<https://perma.cc/VA79-PB9L>] (search for “Radio Free Europe/Radio Liberty” and select the @rferl account) (last visited Nov. 24, 2020); Matthew Rosenberg, *Ad Tool Facebook Built to Fight Disinformation Doesn’t Work as Advertised*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/technology/facebook-ad-library.html> [<https://perma.cc/QG6A-FV6X>].

21. U.S. state media is being marketed as a counter to foreign disinformation campaigns from Russia, China, and elsewhere, and support for enhancing domestic U.S. state media is growing. *See, e.g.*, Gary D. Brown, *The Cyber Longbow & Other Information Strategies: U.S. National Security and Cyberspace*, 5 PENN ST. J.L. & INT’L AFFS. 1, 16 (2017); Ariel Victoria Lieberman, Note, *Terrorism, the Internet, and Propaganda: A Deadly Combination*, 9 J. NAT’L SEC. L. & POL’Y 95, 109 (2017). If this trend continues, it could compromise the freedom and independence that defines the free press in the United States. *See* ROYCE, *supra* note 16, at 1; Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 111 (2006).

22. Courtney Radsch, *Tech Platforms Struggle to Label State-controlled Media*, COMM. TO PROTECT JOURNALISTS (Aug. 12, 2020, 11:45 AM), <https://www.cpj.org/2020/08/tech-platforms-struggle-to-label-state-controlled-media/> [<https://perma.cc/GUU3-RELT>]; *see also, e.g.*, Dep’t of Educ., B-304228, 2005 WL 2416338, at *3–4, *10 (Comp. Gen. Sept. 30, 2005) (discussing “covert propaganda”); Kevin R. Kosar, *“The Law”: The Executive Branch and Propaganda: The Limits of Legal Restrictions*, 35 PRESIDENTIAL STUD. Q. 784, 792 (2005) (“[S]ystematic propagation of information or ideas by an interested party, especially in a tendentious way in order to encourage or instill a particular attitude or response.”); *id.* at 784 (“[G]overnment communications that selectively employ facts to persuade members of the public of a particular viewpoint.”); MANNING & ROMERSTEIN, *supra* note 2, at xxi (defining propaganda as a “one-sided communication designed to influence people’s thinking and actions”); *id.* at 231 (“[T]he cause and effect of public attitudes and opinions which influence the formation and execution of foreign policy.”); Donna Marie Vincent, Worldnet: Propaganda and Public Diplomacy 10–11 (Aug. 1993) (Ph.D. dissertation, University of Southern Mississippi) (on file with authors and University of Southern Mississippi Dissertation Archive) (“Propaganda, as defined by Webster’s Ninth New Collegiate Dictionary (1989) is 1) the spreading of ideas, information, or rumor

supervisory agencies and independent media companies alike cannot consistently identify, regulate, or manage state media. This is particularly so in the modern media climate, where state media can arise in print,²³ radio and television broadcasts,²⁴ and the Internet and social media,²⁵ and can emanate from the government itself²⁶ and from ostensibly independent individuals and organizations.²⁷

This Article presents a new and comprehensive legal test for defining and identifying state media that integrates approaches currently used by the federal government and independent media platforms for analyzing government publications. This legal test is designed for use in both the public and private sectors so that state media can be identified consistently, accurately, and effectively.

This Article consists of five parts. Part I provides a concise historical overview of U.S. state media from World War I through the present day. Part II discusses U.S. state media controversies and violations. Part III advances arguments for why additional oversight of U.S. state media is necessary and prudent. Part IV analyzes various approaches to identifying U.S. state media employed by the federal government and independent media platforms. Part V proposes a new comprehensive legal test for defining and identifying state media. This Article then concludes.

for the purpose of helping or injuring an institution, cause, or a person, and 2) ideas, facts, or allegations spread deliberately to further one's cause or to damage an opposing cause."); *id.* at 11 ("Hansen (1984) defined public diplomacy as 'international communication, cultural, and educational activities in which the public is involved' or 'the influence of public attitudes on the formation and execution of foreign policies going beyond traditional diplomacy"); Twitter, Inc., *Updating Our Advertising Policies on State Media*, TWITTER: CO. BLOG (Aug. 19, 2019), https://blog.twitter.com/en_us/topics/company/2019/advertising_policies_on_state_media.html [<https://perma.cc/5C8E-23ZR>] ("[E]ither financially or editorially controlled by the state.").

23. *E.g.*, Dep't of State's Off. of Pub. Dipl. for Latin Am. & the Caribbean, 66 Comp. Gen. 707 (1987).

24. *E.g.*, Dep't of Educ., 2005 WL 2416338, at *5; Off. of Nat'l Drug Control Pol'y, B-303495, 2005 WL 21443, at *10 (Comp. Gen. Jan. 4, 2005) (holding that the Office of National Drug Control Policy's use of "prepackaged news stories contained in video news releases" constituted "covert propaganda").

25. *E.g.*, *Roose*, *supra* note 6; Env't Prot. Agency, B-326944, 2015 WL 8618591 (Comp. Gen. Dec. 14, 2015) (holding the Environmental Protection Agency's use of social media during rulemaking procedure aimed at defining "Waters of the United States" under the Clean Water Act violated propaganda provisions in appropriations acts).

26. *E.g.*, ROYCE, *supra* note 16, at 1.

27. *E.g.*, Dep't of Def., B-316443, 2009 WL 2152305, at *1-2 (Comp. Gen. July 21, 2009) (holding that the Department of Defense's offer of "special access to prominent persons in the private sector who serve as media analysts" did not violate appropriation prohibitions on propaganda); Dep't of State's Off. of Pub. Dipl. for Latin Am. & the Caribbean, 66 Comp. Gen. 707.

I. A CONCISE HISTORY OF MODERN U.S. STATE MEDIA

A. World War I–World War II: The Origins of Modern U.S. State Media

Legal scholarship traces modern U.S. state media to the early 1900s.²⁸ Leading up to the United States' entry into World War I, President Woodrow Wilson began constructing a “propaganda machine” to sway American public opinion in favor of the war effort.²⁹ Just one week after the United States officially entered the global conflict, President Wilson formed the Committee on Public Information (the CPI) by executive order to coordinate state media efforts.³⁰ The CPI's mission was to “rally moral and domestic support on the home front’ and to make ‘the geographically remote struggle in Europe of immediate ideological relevance to the majority of the American people.’”³¹ The CPI was chaired by George Creel, an American journalist and outspoken Wilson supporter.³²

The CPI saturated the United States with state media.³³ Newspapers received six pounds of CPI material per day,³⁴ which generated “at least 20,000 columns of CPI material” per week nationwide.³⁵ Creel also used “spoken word, films, letters, wireless news services, balloons, and planes” and even employed painters, sculptors, designers, and cartoonists to further the CPI's mission.³⁶

Under Creel, the CPI “changed the United States from [an] anti-militaristic democracy to an organized war machine.”³⁷ Without the CPI, it is uncertain whether the American people would have supported the war through its conclusion in 1918.³⁸ But the CPI was not without controversy: Some accused the agency of routinely promulgating inaccurate and misleading information,³⁹ and of “chok[ing]

28. MANNING & ROMERSTEIN, *supra* note 2, at xxviii (“World War I, the first total war involving not just the military but populations as a whole, should be considered modern propaganda’s launching pad.”).

29. Jodie Morse, Note, *Managing the News: The History and Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843, 850 (2006).

30. MANNING & ROMERSTEIN, *supra* note 2, at 65.

31. Vincent, *supra* note 22, at 18 (quoting GEORGE VIERECK, SPREADING GERMS OF HATE 169 (1930)); FILM AND RADIO PROPAGANDA IN WORLD WAR II 26 (Kenneth R. M. Short ed., 1983).

32. MANNING & ROMERSTEIN, *supra* note 2, at 65. Other members included the Secretary of War and the Secretary of the Navy. Vincent, *supra* note 22, at 18.

33. Morse, *supra* note 29, at 850; Vincent, *supra* note 22, at 19.

34. Morse, *supra* note 29, at 850.

35. *Id.*; STEPHEN VAUGHN, HOLDING FAST THE INNER LINES: DEMOCRACY, NATIONALISM AND THE COMMITTEE ON PUBLIC INFORMATION 194–95 (1980).

36. Vincent, *supra* note 22, at 19 (citations omitted).

37. *Id.* at 21 (quoting JAMES R. MOCK & CEDRIC LARSON, WORDS THAT WON THE WAR: THE STORY OF THE COMMITTEE ON PUBLIC INFORMATION, 1917–1919, at 4 (1939)).

38. See MANNING & ROMERSTEIN, *supra* note 2, at xxviii.

39. Morse, *supra* note 29, at 850–51; VAUGHN, *supra* note 35, at 200; Vincent, *supra* note 22, at 20. Creel disagreed with these assessments, stating that the CPI only “present[ed] the facts without the slightest trace or color of bias, either in the selection of news or the manner in which it was presented.” Morse, *supra* note 29, at 850.

the channels of communication with official news and opinions” as a “backhanded attempt at censorship of the domestic press.”⁴⁰

The U.S. government would continue to employ state media following World War I,⁴¹ albeit on a lesser scale. Federal press officials disseminated news releases and prepared articles for widespread public circulation—such as promotional materials in support of President Franklin Roosevelt’s New Deal—to cultivate popular support for government policies.⁴²

The outbreak of World War II saw another spike in U.S. state media at home and abroad. In 1941, President Franklin Roosevelt founded a number of specialized agencies to counteract foreign propaganda and to spread American ideals overseas⁴³ before consolidating them under the newly formed Office of War Information (the OWI).⁴⁴ The OWI was responsible for countering Axis propaganda and for providing “information programs designed to facilitate the intelligent understanding . . . of the war policies, activities, and aims of the Government.”⁴⁵

Voice of America (VOA), a recently established government-funded shortwave radio service, was incorporated into the OWI⁴⁶ to broadcast pro-American state media around the world.⁴⁷ The OWI turned to top independent U.S. news outlets, such as ABC, CBS, and others, to augment broadcasting operations.⁴⁸ The OWI also absorbed select private commercial shortwave facilities in Europe and elsewhere to bolster the reach of U.S. state media broadcasts.⁴⁹ In addition to its radio programming, the OWI collaborated with U.S. media companies in Hollywood, California, to develop propaganda films—many of which were broadcast within the United States.⁵⁰

40. Vincent, *supra* note 22, at 20.

41. *Id.* at 48.

42. Morse, *supra* note 29, at 851–52; MANNING & ROMERSTEIN, *supra* note 2, at 196, 252–53 (calling President Franklin Roosevelt a “master propagandist”); STAFF OF H.R. COMM. ON OVERSIGHT & GOV’T REFORM, 111TH CONG., ANALYSIS OF THE FIRST YEAR OF THE OBAMA ADMINISTRATION: PUBLIC RELATIONS AND PROPAGANDA INITIATIVES 5 (2010), https://republicans-oversight.house.gov/wp-content/uploads/2012/02/8-16-2010_Propaganda_Report.pdf [<https://perma.cc/J5PC-TTGL>] (Staff Report by Darrell Issa). President Herbert Hoover also employed U.S. state media domestically during his presidency to change public perception of the government during the Great Depression. MANNING & ROMERSTEIN, *supra* note 2, at 39.

43. Vincent, *supra* note 22, at 21–24; MANNING & ROMERSTEIN, *supra* note 2, at xxxviii–xxxix.

44. Sager, *supra* note 7, at 515–16.

45. ALLAN M. WINKLER, THE POLITICS OF PROPAGANDA: THE OFFICE OF WAR INFORMATION, 1942–1945, at 34 (1978).

46. Sager, *supra* note 7, at 516; Vincent, *supra* note 22, at 24.

47. Sager, *supra* note 7, at 516.

48. Vincent, *supra* note 22, at 25.

49. *Id.*

50. Sager, *supra* note 7, at 516. The movie industry was considered a particularly important component for establishing and maintaining domestic public support for World War II. *Id.* (“OWI Director Elmer Davis once remarked, ‘The easiest way to inject a propaganda idea into most people’s minds is to let it go in through the medium of an entertainment picture when they do not realize that they are being propagandized.’”); MANNING & ROMERSTEIN, *supra* note 2, at 189–90. Hollywood’s

As World War II subsided, so too did U.S. state media operations⁵¹: The U.S. government disbanded the OWI, substantially defunded U.S. state media programs, and foisted what little state media broadcasting remained onto the shoulders of the State Department.⁵²

B. The Cold War: The Battle for International Information Supremacy

The reduction of U.S. state media operations did not last long. In 1947—roughly two years after the conclusion of World War II—congressional representatives traveled abroad to find a “deplorable state of misunderstanding and misrepresentation of the United States and its policies” as a result of Soviet state media broadcasts.⁵³ Upon return to the United States, these representatives began advocating for an international peacetime U.S. state media system for promoting U.S. ideals and counteracting Soviet messaging.⁵⁴ This effort culminated in the introduction of legislation entitled the “Information and Educational Exchange Act of 1948”—more commonly known as the “Smith-Mundt Act” after two of the bill’s sponsors.⁵⁵

Passage of the Smith-Mundt Act proved difficult as congressional members quarreled over how to implement the proposed peacetime U.S. state media program, including what role, if any, independent broadcasters would have in producing and disseminating U.S. state media.⁵⁶ It was eventually decided that the State Department would head U.S. state media operations, and, in an attempt to protect the free press, the U.S. government would be prohibited from duplicating

ability to influence public opinion remains an important consideration for the U.S. government. In 2016, for example, then-Secretary of State John Kerry met with high-ranking Hollywood executives to discuss how to counter the ISIS terrorist organization through motion pictures. Brown, *supra* note 21, at 10; Ryan Faughnder, *John Kerry Meets with Hollywood Studio Executives to Talk Islamic State*, L.A. TIMES (Feb. 16, 2016, 6:45 PM), <https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-john-kerry-hollywood-isis-20160216-story.html> [https://web.archive.org/web/20191012105046/https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-john-kerry-hollywood-isis-20160216-story.html]. The meeting was organized by Jeff Shell, former chairman of the Broadcasting Board of Governors (predecessor to the USAGM). *See id.*

51. Sager, *supra* note 7, at 516.

52. *Id.* at 520; Vincent, *supra* note 22, at 28; 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’N L. & POL’Y 1, 6 (2006); Burton Paulu, *The Smith-Mundt Act: A Legislative History*, 30 JOURNALISM Q. 300, 300 (1953). This was due in large part because American people had developed a “strong dislike of propaganda” after nearly a half-century of targeted U.S. state media campaigns and because Nazi and Soviet state media was considered “brutal,” “undemocratic,” and “dangerous.” Vincent, *supra* note 22, at 27; Sager, *supra* note 7, at 520; Palmer & Carter, *supra*, at 6; Paulu, *supra*, at 300; MANNING & ROMERSTEIN, *supra* note 2, at xxvi (noting that “few words in the English language evoke more disdain than propaganda”).

53. Vincent, *supra* note 22, at 30.

54. *See id.*

55. *See id.* at 30–31; Sager, *supra* note 7, at 518 & n.43. In 1945, Congress considered a bill that would have established a state media broadcast system in foreign countries, but this legislation failed to gain the necessary support. *Id.* at 516–18.

56. Morse, *supra* note 29, at 852–53; Sager, *supra* note 7, at 517.

the publications of independent broadcasters.⁵⁷ The revised Smith-Mundt Act easily passed in both the House and Senate.⁵⁸

U.S. state media quickly became a pillar of U.S. foreign policy.⁵⁹ In 1953, the United States Information Agency (the USIA) was formed to promote nonmilitary U.S. state media abroad⁶⁰ with VOA being the newly formed agency's "single largest element."⁶¹ In the 1960s and 1970s, the USIA sought to make VOA one of the world's leading international broadcasters.⁶² To bolster its ranks, the USIA often recruited people from independent American television and radio stations—just as the OWI had done during World War II.⁶³

Throughout the Cold War, the U.S. government used state media to bolster the reputation of the United States abroad and to counter the "big lie" promulgated by the Soviet Union.⁶⁴ In regions that had fallen under authoritarian rule (such as parts of Eastern Europe), VOA and other U.S. state media radio broadcasts provided alternative viewpoints that were otherwise inaccessible.⁶⁵ Unlike much Soviet state media,⁶⁶ U.S. state media emphasized truthfulness, the free flow of information, and "creating a positive climate of opinion necessary for accomplishment of U.S. policies."⁶⁷ VOA, along with other U.S. state media entities Radio Free Europe (RFE) and Radio Liberty (RL),⁶⁸ strived to produce trustworthy media content based on facts. The overarching strategy was to "build credibility and authenticity so that the enemy could be persuaded to trust the messenger, even if

57. United States Information and Educational Exchange Act of 1948, Pub. L. No. 80-402, § 502, 62 Stat. 6, 10 ("[T]he Secretary [of State] shall reduce such Government information activities whenever corresponding private information dissemination is found to be adequate . . .").

58. 22 U.S.C. § 1431; Sager, *supra* note 7, at 518.

59. See *VOA Through the Years*, VOA (Apr. 3, 2017), <https://www.insidevoa.com/a/3794247.html> [<https://perma.cc/H55H-BZWH>]; Vincent, *supra* note 22, at 31.

60. MANNING & ROMERSTEIN, *supra* note 2, at xli; *VOA Through the Years*, *supra* note 59.

61. *VOA Through the Years*, *supra* note 59.

62. *Id.*

63. *Id.*

64. Palmer & Carter, *supra* note 52, at 7; Vincent, *supra* note 22, at 32–33. In response, the Soviet Union increased its state media programming and jammed U.S. state media radio transmissions. Palmer & Carter, *supra* note 52, at 7; Vincent, *supra* note 22, at 32–33.

65. The legislation also contained cultural and academic exchanges like those of the Fulbright Program enacted two years prior. United States Information and Educational Exchange Act of 1948, Pub. L. No. 80-402, § 201, 62 Stat. 6, 7 ("The Secretary is authorized to provide for interchanges on a reciprocal basis between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill . . ."); MANNING & ROMERSTEIN, *supra* note 2, at xl; *About Us*, COUNCIL FOR INT'L EXCH. SCHOLARS, <https://www.cies.org/about-us> [<https://perma.cc/6H2P-FENW>] (last visited July 29, 2019).

66. For example, the Soviet government falsely accused the U.S. government of using South American children for organ transplants and of creating the AIDS virus to kill Africans. Vincent, *supra* note 22, at 96 n.36; MANNING & ROMERSTEIN, *supra* note 2, at xlv, 6.

67. Vincent, *supra* note 22, at 35, 39, 42, 44.

68. MANNING & ROMERSTEIN, *supra* note 2, at xli; A. Ross Johnson & Martins Zvaners, *History*, RADIO FREE EUR./RADIO LIBERTY, <https://www.pressroom.rferl.org/history> [<https://perma.cc/VQB5-AASK>] (last visited July 29, 2019). These two agencies were founded in the early 1950s and merged to form one agency in 1976. *Id.*

that messenger was the enemy.”⁶⁹ Although VOA and RFE/RL stories typically did not contain falsehoods, they would not always address facts unfavorable to U.S. policy and sometimes purposely emphasized certain events to promote American interests.⁷⁰

The U.S. government did not direct VOA and RFE/RL radio broadcasts and other U.S. state media at Americans because doing so was impermissible under the Smith-Mundt Act.⁷¹ Although the original 1948 legislation did not contain an explicit prohibition on the domestic dissemination of U.S. state media, the law restricted the “examination” of U.S. state media at the State Department to specific times by specific people.⁷² In 1965, the existence of the implicit domestic dissemination ban was confirmed when Congress felt compelled to pass a special joint resolution to show a VOA-produced movie about the life of John F. Kennedy

69. Vincent, *supra* note 22, at 45.

70. See, e.g., KEVIN R. KOSAR, CONG. RSCH. SERV., RL32750, PUBLIC RELATIONS AND PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES 9 (2005), <https://www.fas.org/sgp/crs/misc/RL32750.pdf> [<https://perma.cc/34RN-PXZ6>]. The State Department was not the only government agency that engaged in U.S. state media operations. The Central Intelligence Agency (CIA) covertly provided financial support for RFE/RL broadcasts in Eastern Europe from the early 1950s through the 1970s. *A Look Back . . . The National Committee for Free Europe, 1949*, CENT. INTEL. AGENCY, <https://www.cia.gov/news-information/featured-story-archive/2007-featured-story-archive/a-look-back.html> [<https://perma.cc/6BCB-FHIT>] (May 25, 2017, 3:14 PM). During this period, the CIA also employed surreptitious “black propaganda” to influence current events and cultural developments at home and abroad. MANNING & ROMERSTEIN, *supra* note 2, at 27–28 (defining black propaganda as “falsely attributed propaganda” and noting that its results are “quite ingenious and rather intriguing”); Vincent, *supra* note 22, at 44. These efforts included secretly compensating American journalists to cover select news stories, collaborating with established news outlets such as the *New York Times* and CBS, publishing books and magazines that contained viewpoints consistent with U.S. policy objectives, and even financing the burgeoning abstract expressionist art movement. Jon M. Garon, *Hidden Hands that Shaped the Marketplace of Ideas: Television’s Early Transformation from Medium to Genre*, 19 U. DENV. SPORTS & ENT. L.J. 29, 74–81 (2016); MANNING & ROMERSTEIN, *supra* note 2, at xliii (describing the findings of the Church Commission). This two-agency organizational structure ran parallel to the U.S. government’s World War II state media operations, which placed one organization—the OWI—in charge of overt state media, and a different organization—the Office of Strategic Services (predecessor to the CIA)—in charge of covert state media. See MANNING & ROMERSTEIN, *supra* note 2, at 51, 206, 325. Yet, the most effective American media during the Cold War may not have been U.S. state media, but rather independent radio stations that broadcast American music and other entertainment. Brown, *supra* note 21, at 8–9 (noting that American soft power has been “a happy byproduct of American business success rather than planned government activity”).

71. *VOA Through the Years*, *supra* note 59; Morse, *supra* note 29, at 853; MANNING & ROMERSTEIN, *supra* note 2, at xl, 88–89 (“Section 501 [of the Smith–Mundt Act] forb[ade] domestic dissemination of program materials in the United States.”). Congress also includes language in its appropriation bills that prohibit federal money being used for “publicity or propaganda purposes within the United States . . .” See, e.g., Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7055, 125 Stat. 786, 1243–44 (2011) (U.S. State Department); Vincent, *supra* note 22, at 31.

72. United States Information and Educational Exchange Act of 1948, Pub. L. No. 80-402, § 501, 62 Stat. 6, 10 (“Any such press release or radio script, on request, shall be available in the English language at the Department of State, at all reasonable times following its release as information abroad, for examination by representatives of United States press associations, newspapers, magazines, radio systems, and stations, and, on request, shall be made available to Members of Congress.”).

within the United States.⁷³ The implicit domestic dissemination ban became explicit in 1972 when Sen. J. William Fulbright (D-AR) spearheaded legislation that inserted a “blanket prohibition” on the domestic dissemination of U.S. state media into federal law after a New York senator attempted to rebroadcast USIA programming on American television.⁷⁴

As the Cold War dragged into the 1980s, U.S. state media operations continued to grow. In 1983, the budget approved by Congress for state media operations equaled \$578 million⁷⁵—a 16.5% increase from the year before.⁷⁶ The U.S. government distributed its state media to more markets, and it allocated more funds to target countries of particular strategic importance such as Cuba.⁷⁷ In 1985, Worldnet, an international U.S. government television system, began its first official broadcasts in Europe.⁷⁸ Early Worldnet programming was of inconsistent quality and aired for only a few hours each day, but television offerings improved as the USIA budget ballooned to \$837 million in 1986—a 68.8% increase from 1982.⁷⁹ Although congressional investigations, internal strife, and technological

73. Joint Resolution: To Allow the Showing in the United States of the United States Information Agency Film “John F. Kennedy—Years of Lightning, Day of Drums,” Pub. L. No. 89-274, 79 Stat. 1009 (1965); JOHN F. KENNEDY: YEARS OF LIGHTNING/DAY OF DRUMS (Embassy Pictures 1966), <https://www.youtube.com/watch?v=PvN5ecqCFk0> [https://perma.cc/CQZ8-AB9G].

74. Act of July 13, 1972, Pub. L. No. 92-352, § 204, 86 Stat. 489, 494; Palmer & Carter, *supra* note 52, at 9; Sager, *supra* note 7, at 522–23. Senator Fulbright’s prohibition was reinforced thirteen years later when Senator Edward Zorinsky (D-NE) successfully lobbied for another amendment to the Smith-Mundt Act further prohibiting the dissemination of U.S. state media within the United States. Act of Aug. 16, 1985, Pub. L. No. 99-93, § 208, 99 Stat. 405, 431 (“[N]o funds authorized to be appropriated to the [USIA] shall be used to influence public opinion in the United States, and no program material prepared by the [USIA] shall be distributed within the United States.”); Sager, *supra* note 7, at 523–24. In support of this amendment, Senator Zorinsky remarked: “The American taxpayer certainly does not need or want his tax dollars used to support U.S. Government propaganda directed at him or her.” 131 CONG. REC. 14,945 (1985).

75. In 2020 dollars, this equals approximately \$1.5 billion. *Value of \$1.00 by Year*, SAVING.ORG, <https://www.saving.org/inflation/inflation.php> [https://perma.cc/AVS8-94ZR] (last visited Aug. 7, 2019).

76. Vincent, *supra* note 22, at 65 n.20. Despite the increase, those involved with U.S. state media efforts bemoaned that funding remained below its post-World War II peak. *Id.* at 66.

77. MANNING & ROMERSTEIN, *supra* note 2, at xlv, 242–44; *VOA Through the Years*, *supra* note 59.

78. Vincent, *supra* note 22, at 90–91. The U.S. government had maintained a limited state media television service starting in 1951. MANNING & ROMERSTEIN, *supra* note 2, at 273. Worldnet itself was a collection of satellites that had been operational since 1964. Vincent, *supra* note 22, at 68, 72–73; MANNING & ROMERSTEIN, *supra* note 2, at 274, 327–28. Worldnet first rose to prominence in 1983 when it was used by the U.S. government to coordinate a global counter-messaging campaign for the controversial U.S. invasion of Grenada. Vincent, *supra* note 22, at 68, 72–73. It was estimated that this event stimulated more media coverage for Worldnet than it had received in all its previous years of existence. *Id.* at 75.

79. Vincent, *supra* note 22, at 90–99. Programming consisted of a mixture of independently produced news and original USIA programming. *Id.* Worldnet also offered video programming that had the capability of two-way audio. *Id.* at 76. This communicative feature allowed Worldnet to employ so-called interactive programming, providing a venue for foreign journalists to pose questions of

obstacles stunted Worldnet's ascent,⁸⁰ by the late 1980s, it had become a cornerstone of a well-funded and multifaceted U.S. state media system.

C. Post-Cold War: Reorganization and Reform

After the dissolution of the Soviet Union in 1991, debate ensued within the federal government about whether U.S. state media was still needed abroad. Rather than halt U.S. state media broadcasts altogether, the U.S. government implemented a series of reorganizations and restructurings of its state media agencies and operations. In 1994, Congress passed the U.S. International Broadcasting Act, which streamlined U.S. state media broadcasting in an attempt to cut federal spending.⁸¹ U.S. civilian state media agencies were placed under the Broadcasting Board of Governors (the BBG)—a newly created subdivision of the USIA.⁸² Four years later, in 1998, the USIA was abolished and its responsibilities assigned to the BBG, which shortly thereafter became a government-funded, independent agency⁸³ in charge of overseeing all U.S. civilian international broadcasting.⁸⁴ Despite these changes, the BBG remained under the control of the U.S. government's executive branch, and the function and purpose of U.S. state media remained substantially the same.⁸⁵

During the 1990s, U.S. state media radio broadcasts expanded into the Middle East and Central Asia where anti-American sentiment was escalating.⁸⁶ The U.S. government also employed VOA and RFE/RL radio broadcasts to counter Slobodan Milosevic's state media campaigns during the NATO-Yugoslav conflict.⁸⁷ But with radio falling out of favor worldwide, U.S. state media agencies began to devote additional resources to more modern forms of communication. These agencies increasingly allocated funds to satellite television programming and the

U.S. officials in real time from anywhere in the world. *Id.* Although these "interactives" were not widely broadcast in the early days of Worldnet, they proved to be an effective means of directing information to foreign press corps about U.S. foreign policy and developments. *Id.*

80. *Id.* at 100, 150, 164–65.

81. United States International Broadcasting Act of 1994, Pub. L. No. 103-236, §§ 301–315, 108 Stat. 382, 428–45; MANNING & ROMERSTEIN, *supra* note 2, at 219–20, 236–37.

82. United States International Broadcasting Act of 1994 § 304.

83. Act of Oct. 21, 1998, Pub. L. No. 105-277, § 13111, 112 Stat. 2681, 2681–776; Sager, *supra* note 7, at 525.

84. OFF. OF INSPECTOR GEN., U.S. DEP'T OF STATE & THE BROAD. BD. OF GOVERNORS, ISP-IB-13-07, INSPECTION OF THE BROADCASTING BOARD OF GOVERNORS 3 (2013), <https://www.stateoig.gov/system/files/203193.pdf> [<https://perma.cc/9P6G-LWT6>].

85. *Id.* at 7.

86. Johnson & Zvaners, *supra* note 68; United States International Broadcasting Act of 1994, Pub. L. No. 103-236, §§ 301–305, 108 Stat. 382, 432–45 (codified as amended in scattered sections of 22 U.S.C.).

87. Lyombe Eko, *Bombs and Bombast in the NATO/Yugoslav War of 1999: The Attack on Radio Television Serbia and the Laws of War*, 24 COMM'N & L. 1, 16, 22 (2002).

Internet,⁸⁸ culminating with the establishment of VOA's official website—www.voanews.com⁸⁹—in 2000.⁹⁰

Domestic dissemination restrictions on U.S. state media began to deteriorate during this post-Cold War period. In 1990, Congress passed legislation allowing media produced by the USIA and the State Department to be available for domestic distribution so long as the material was at least twelve years old.⁹¹ Contemporary U.S. state media also became increasingly accessible to Americans via the Internet despite the Smith-Mundt Act's longstanding domestic dissemination ban.⁹²

During this period, some began to question the merits of the domestic dissemination ban on U.S. state media. The ban's critics argued that the advent of seamless, instantaneous communication through the Internet and other electronic communication (e.g., cell phones and satellite television) made prohibitions on domestic state media impractical.⁹³ In 2010, congressional representatives introduced legislation to repeal the Smith-Mundt Act's ban altogether,⁹⁴ citing not only the alleged unenforceability of the domestic dissemination ban but also the

88. *VOA Through the Years*, *supra* note 59. Some within VOA questioned whether this practice complied with the Smith-Mundt Act's domestic dissemination ban on U.S. state media. *Id.*

89. VOA, <https://www.voanews.com> [<https://perma.cc/56AS-V4HM>] (last visited Aug. 7, 2019). It is unclear why VOA uses ".com" instead of ".gov" for its website. This may be an attempt to make VOA seem more like independent media outlet rather than a government media entity. RFE/RL has a similar commercial-looking website that uses ".org" for its web address. RADIO FREE EUR./RADIO LIBERTY, <https://www.rferl.org/> [<https://perma.cc/U4QV-P3AF>] (last visited Aug. 7, 2019). In contrast, the USAGM website uses ".gov" and clearly states that it is an official website of the U.S. government. U.S. AGENCY FOR GLOB. MEDIA, <https://www.usagm.gov/> [<https://perma.cc/UG4E-87GT>] (last visited Aug. 7, 2019).

90. *VOA Through the Years*, *supra* note 59. Four years later, in 2004, Worldnet was incorporated into VOA. *Id.* In order to keep up with the growing popularity of the medium, VOA began constructing new TV studios and transitioning its equipment from analog to digital. *Id.*

91. Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, § 202, 104 Stat. 15, 49 (1990). Publications over twelve years old were thought to have lost their ability to influence public opinion. Sager, *supra* note 7, at 524 n.84.

92. See BROAD. BD. OF GOVERNORS, IMPACT THROUGH INNOVATION AND INTEGRATION: BBG STRATEGIC PLAN 2012–2016, at 8 (2011) [hereinafter BBG STRATEGIC PLAN 2012–2016], https://www.usagm.gov/wp-content/uploads/2012/02/BBGStrategicPlan_2012-2016_OMB_Final.pdf [<https://perma.cc/Z89K-R72K>]; *supra* note 88 and accompanying text.

93. Charles F. Gormly, Note, *The United States Information Agency Domestic Dissemination Ban: Arguments for Repeal*, 9 ADMIN. L.J. AM. U. 191, 202–04 (1995); Press Release, Mac Thornberry, Congressman, U.S. House of Reps., Thornberry and Smith Introduce Bill to Help Counter Threats in Information Age (May 15, 2012) [hereinafter Thornberry], <https://thornberry.house.gov/news/documentsingle.aspx?DocumentID=296108> [<https://perma.cc/FNW7-QR8S>]; Glenn Greenwald, *Rep. Smith on His Controversial Bills*, SALON (May 22, 2012, 9:05 PM), https://www.salon.com/2012/05/22/rep_smith_on_his_controversial_bills/ [<https://perma.cc/8RWS-C3E4>]. It should be noted that other countries have implemented effective Internet firewalls, albeit to inhibit, rather than promote, free public discourse. John Leonard, *China's Great Firewall: How It Works and What It Reveals About China's Plans*, V3 (Apr. 23, 2018), <https://www.v3.co.uk/v3-uk/analysis/3030741/chinas-great-firewall-how-it-works-and-what-it-reveals-about-chinas-plans> [<https://web.archive.org/web/20180527074355/https://www.v3.co.uk/v3-uk/analysis/3030741/chinas-great-firewall-how-it-works-and-what-it-reveals-about-chinas-plans>].

94. The Smith-Mundt Modernization Act of 2010, H.R. 5729, 111th Cong. (2010).

perceived need to provide more countermessaging within the United States to help prevent domestic terrorism.⁹⁵

The 2010 campaign to discontinue the domestic dissemination ban failed to gain traction in Congress.⁹⁶ But push for repeal continued. In its 2012–2016 strategic plan published on October 14, 2011,⁹⁷ the BBG publicized its support⁹⁸ for ending the domestic dissemination ban:

We [the BBG] will seek the repeal of a decades-long ban on domestic dissemination contained in the 1948 U.S. Information and Educational Exchange Act (“Smith-Mundt” Act). Adopted in the age of cross-border communication via radio, this Act did not envision either the Internet or satellite broadcasting, which do not honor national boundaries. With all of the BBG’s 59 languages available via the web, the agency cannot comply with this outdated statute.⁹⁹ In addition, to the extent that BBG-sponsored programming should be available to significant expatriate communities in the United States,¹⁰⁰ we are unable to do so without acting counter to the

95. Thornberry, *supra* note 93; Greenwald, *supra* note 93; Sager, *supra* note 7, at 525–28. This was a marked change from previous U.S. state media dissemination goals. *Id.* at 525–28. After the September 11, 2001 attacks, elected officials in the United States were under pressure to address potential terrorist threats arising at home and abroad. *Id.* Supporters also argued that lifting the ban would allow greater access to U.S. state media for academic research. Palmer & Carter, *supra* note 52, at 11.

96. H.R. 5729 (111th): *Smith-Mundt Modernization Act of 2010*, GOVTRACK, <https://www.govtrack.us/congress/bills/111/hr5729> [<https://perma.cc/52HS-XV7X>] (last visited Aug. 7, 2019).

97. *BBG Announces New Strategic Plan*, U.S. AGENCY FOR GLOB. MEDIA (Oct. 14, 2011), <https://www.usagm.gov/2011/10/14/bbg-announces-new-strategic-plan/> [<https://perma.cc/BX8Z-D4ZM>].

98. BBG STRATEGIC PLAN 2012–2016, *supra* note 92, at 8. Similar language was included in the BBG’s 2013 fiscal year budget request. BROAD. BD. OF GOVERNORS, BROADCASTING BOARD OF GOVERNORS FY 2013 BUDGET REQUEST 147 (2012).

99. It is unclear why the BBG claims it was incapable of complying with the Smith-Mundt Act’s domestic dissemination ban. There is no indication that the BBG ever attempted to prevent the viewing of online materials by people living within the United States. *See supra* note 88 and accompanying text. If it did, the agency may have found ways to prevent access to these materials as other countries have done. *See, e.g.*, Leonard, *supra* note 93; *see also Target Geographical Locations of Delivery*, GOOGLE AD MANAGER HELP, <https://www.support.google.com/admanager/answer/1260290?hl=en> [<https://perma.cc/R3UJ-XYFT>] (last visited Aug. 10, 2019) (describing means of targeting and excluding certain regions for websites). It is also unclear why the BBG believed that the principles of the Smith-Mundt Act domestic dissemination ban were “outdated”; lawmakers repeatedly reinforced the domestic dissemination ban since the Smith-Mundt Act was first passed in 1948. *See* *Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1167 (D.C. Cir. 1998). The 1985 reaffirmation of the ban is particularly notable because it was enacted at the same time U.S. state media agencies began employing modern forms of international mass communication such as satellite television broadcasting. *See supra* notes 75–80 and accompanying text.

100. This language suggests that the BBG was intending to promote its state media to certain “expatriate communities” living within the United States even before the 2013 repeal came into effect. *See also* INT’L BROAD. BUREAU, BROAD. BD. OF GOVERNORS, IBB-13-01, II BAM 160 – DOMESTIC DISSEMINATION OF PROGRAM MATERIALS 1 (2013), <https://www.bbg.gov/wp-content/media/2013/11/2-160-Domestic-Distribution-of-Program-Materials.pdf> [<https://perma.cc/>

limitation. To remedy this disconnect, the BBG has proposed, and the Administration approved, draft legislation to repeal the Smith-Mundt domestic dissemination ban as it applies to the BBG.¹⁰¹

The BBG's wish was soon granted. Legislators introduced substantially similar language from the failed 2010 bill into the voluminous National Defense Authorization Act for Fiscal Year 2013, which passed both houses of Congress in late 2012 and was signed into law on January 2, 2013 by President Barack Obama.¹⁰²

EA5X-B7ZR] (“The Agency may provide program materials, prepared for dissemination abroad, to domestic broadcasters aimed at foreign diaspora communities as part of the Agency’s foreign policy mission.”). The BBG (now the USAGM) has denied and continues to deny its intentions to target diaspora communities living within the United States, *see Legislation: Facts About Smith-Mundt Modernization*, U.S. AGENCY FOR GLOB. MEDIA, <https://www.usagm.gov/who-we-are/oversight/legislation/smith-mundt-faqs/#q5> [<https://perma.cc/6N8Z-72HZ>] (last visited Aug. 8, 2019), even though the agency was reprimanded for targeting such communities through social media from 2016 through 2018, *see ROYCE, supra* note 16.

101. BBG STRATEGIC PLAN 2012–2016, *supra* note 92, at 8. The BBG’s desire to repeal the domestic dissemination ban and subject the American people to U.S. state media is also reflected in changes to its mission statement:

2001 mission statement: “To promote and sustain freedom and democracy by broadcasting accurate and objective news and information about the United States and the world to audiences *overseas*.” BROAD. BD. OF GOVERNORS, MARRYING THE MISSION TO THE MARKET: STRATEGIC PLAN 2002–2007, at 4 (2001) [hereinafter STRATEGIC PLAN 2002–2007], https://www.webharvest.gov/peth04/20041015081012/http://www.bbg.gov/reports/BBG_Strategic_Plan.pdf [<https://perma.cc/TJP8-XTGN>] (emphasis added).

2007 mission statement: “To promote freedom and democracy and to enhance understanding through multi-media communication of accurate, objective, and balanced news, information, and other programming about America and the world to audiences *overseas*.” BROAD. BD. OF GOVERNORS, 2008–2013 STRATEGIC PLAN 4 (2007) [hereinafter 2008–2013 STRATEGIC PLAN], https://www.usagm.gov/wp-content/uploads/2011/12/bbg_strategic_plan_2008-2013.pdf [<https://perma.cc/VD2A-BNCU>] (emphasis added).

2011 mission statement: “To inform, engage, and connect people *around the world* in support of freedom and democracy.” BBG STRATEGIC PLAN 2012–2016, *supra* note 92, at 1 (emphasis added).

In the 2001 and 2007 mission statements, the BBG stated that its focus was on “audiences overseas.” STRATEGIC PLAN 2002–2007, *supra*, at 4; 2008–2013 STRATEGIC PLAN, *supra*, at 4. The 2011 mission statement changed the BBG’s focus to “people around the world.” BBG STRATEGIC PLAN 2012–2016, *supra* note 92, at 1. This subtle difference suggests that, starting in 2011, the BBG was intending to target everyone with state media—including those living in the United States. The BBG’s aim to target specific *groups*, rather than specific *countries*, is reflected elsewhere in its publications once it began to advocate for the repeal of the Smith-Mundt Act’s domestic dissemination ban. *See, e.g.*, BROAD. BD. OF GOVERNORS, BBG STRATEGIC PLAN 2014–2018: ACHIEVING STRATEGIC IMPACT 12 (2013) [hereinafter BBG STRATEGIC PLAN 2014–2018] (“Strategic Objective 2: Reach the information-denied, underserved, and targets of extremist rhetoric and violence.”); *id.* at 15 (“Currents of anti-Americanism still run strong in some parts of the world, necessitating deft outreach on our part that stresses dialogue not monologue.”).

102. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1078, 126 Stat. 1632, 1957–59; EMILY T. METZGAR, SEVENTY YEARS OF THE SMITH-MUNDT ACT AND U.S. INTERNATIONAL BROADCASTING: BACK TO THE FUTURE? 28 (Vivian S. Walker ed., 2008). The repeal of the domestic dissemination ban went into effect six months later. National Defense Authorization Act for Fiscal Year 2013 § 208 (codified as amended at 22 U.S.C. §§ 1461, 1461-1a).

For the first time in sixty-five years, the U.S. government could, subject to certain surviving limitations,¹⁰³ legally distribute its state media within the United States.¹⁰⁴

The repeal of the Smith-Mundt Act's domestic dissemination ban opened the door for U.S. state media agencies to distribute their materials within the United States, but it did not mean that they were prepared to do so.¹⁰⁵ In January 2013, the Office of Inspector General (the OIG) for the State Department found systematic shortcomings with the BBG's structure.¹⁰⁶ In particular, the OIG questioned whether the BBG's nine-person part-time oversight board¹⁰⁷ could supervise and coordinate U.S. state media agencies,¹⁰⁸ especially because the BBG board experienced "[c]hronic vacancies and absences [that] . . . threaten[ed] the quorum required for the Board to act, limit[ed] the diversity of perspectives brought to discussion, and put at risk the bipartisan nature of the Board."¹⁰⁹

The OIG recommended appointing a single chief executive officer who would singularly coordinate the BBG's day-to-day operations, leaving the BBG board to address high-level issues about the agency's mission and trajectory.¹¹⁰ The BBG agreed with the OIG's recommendation, and, in 2013, asked Congress for the authority to appoint a CEO with broad legal powers over the agency and its subordinate state media outlets¹¹¹ with the BBG board retaining the ability to remove the CEO by a two-thirds majority vote.¹¹²

The National Defense Authorization Act for Fiscal Year 2017 (the 2017 NDAA) partially implemented the BBG's proposal.¹¹³ As requested, Congress

103. See *infra* Section IV.D.

104. National Defense Authorization Act for Fiscal Year 2013 § 208 (codified as amended at 22 U.S.C. §§ 1461, 1461-1a).

105. OFF. OF INSPECTOR GEN., *supra* note 84, at 5.

106. *Id.* at 1, 5; Joe Davidson, *Report Blasts Foreign Broadcasting Board as 'Dysfunctional' and 'Ineffectual,'* WASH. POST (Jan. 22, 2013), https://www.washingtonpost.com/national/report-blasts-foreign-broadcasting-board-as-dysfunctional-and-ineffectual/2013/01/22/1f3b1a84-64cd-11e2-9e1b-07db1d2ccd5b_story.html [<https://perma.cc/R63G-K2HR>].

107. The BBG's nine-member board consisted of eight private citizens and the Secretary of State as *ex officio*. OFF. OF INSPECTOR GEN., *supra* note 84, at 1.

108. *Id.*

109. *Id.* The OIG also reported that Board members who concurrently served on one or more BBG affiliate boards would sometimes unduly favor these subordinate organizations over the BBG itself. *Id.* Additionally, due largely to one member's "personal attacks on colleagues and staff," the OIG reported that the Board meetings had developed "an unprofessional and unproductive atmosphere." *Id.*

110. OFF. OF INSPECTOR GEN., U.S. DEPT OF STATE, MA-15-01, MANAGEMENT ALERT: BROADCASTING BOARD OF GOVERNORS SIGNIFICANT MANAGEMENT WEAKNESSES 2 (2015), <https://www.stateoig.gov/system/files/ma-15-01.pdf> [<https://perma.cc/2VJA-ZCNL>].

111. BROAD. BD. OF GOVERNORS, FISCAL YEAR 2014 CONGRESSIONAL BUDGET REQUEST 18 (2013) [hereinafter BBG FISCAL YEAR 2014 CONGRESSIONAL BUDGET REQUEST], <https://www.bbg.gov/wp-content/media/2013/09/Corrected-FY-2014-CBJ-Internet-Version-rs.pdf> [<https://web.archive.org/web/20161222023008/https://www.bbg.gov/wp-content/media/2013/09/Corrected-FY-2014-CBJ-Internet-Version-rs.pdf>].

112. *Id.*

113. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1288, 130 Stat. 2548, 2548-54 (2016); see also 22 U.S.C. §§ 6203-6205, 6209.

authorized the appointment of a BBG CEO with broad executive powers—which included the ability to appoint and remove the leadership of the BBG’s subordinate media outlets such as RFE/RL.¹¹⁴ But this legislation *also* dissolved the existing nine-member BBG board and replaced it with a five-member International Broadcasting Advisory Board.¹¹⁵ This new advisory board was stripped of its authority to hire or fire the CEO; instead, the CEO was to be appointed by the President (with confirmation by the Senate) and to serve at the pleasure of the President.¹¹⁶

By consolidating power in a single CEO, the BBG became capable of making and implementing decisions more nimbly.¹¹⁷ But by changing the BBG leadership from a nine-member bipartisan board to a singular presidentially appointed CEO, the 2017 NDAA endowed the President with far greater sway over U.S. state media agencies than before.¹¹⁸ Perhaps to reflect this overhaul to the BBG’s governance

114. National Defense Authorization Act for Fiscal Year 2017 § 1288; 22 U.S.C. §§ 6204, 6209; BBG STRATEGIC PLAN 2012–2016, *supra* note 92, at 2–3.

115. National Defense Authorization Act for Fiscal Year 2017 § 1288; 22 U.S.C. § 6205. The President was empowered to select the members of the International Broadcasting Advisory Board. National Defense Authorization Act for Fiscal Year 2017 § 1288; 22 U.S.C. § 6205. According to this legislation, the President “should” select candidates from lists submitted by certain congressional committees. National Defense Authorization Act for Fiscal Year 2017 § 1288; 22 U.S.C. § 6205.

116. National Defense Authorization Act for Fiscal Year 2017 § 1288; 22 U.S.C. §§ 6203–6205, 6209. These attempts to improve U.S. state media operations appear to be working. For example, in a 2017 report on RFE/RL, the OIG highlighted RFE/RL’s successful outreach in countries near Russia, including the formation of the Russia-centric “Current Time” network, which drove increased traffic to U.S. state media websites and was cited by independent news agencies and services such as CNN and Reuters. OFF. OF INSPECTOR GEN., U.S. DEP’T OF STATE, ISP-IB-17-21, INSPECTION OF RADIO FREE EUROPE/RADIO LIBERTY 4 (2017), <https://www.stateoig.gov/system/files/isp-ib-17-21.pdf> [<https://perma.cc/ZL7T-VDB7>]. Although U.S. state media agencies are not without shortcomings and scandals, *see, e.g.*, Issie Lapowsky, *The State Department’s Fumbled Fight Against Russian Propaganda*, WIRED (Nov. 22, 2017, 6:00 AM), <https://www.wired.com/story/the-state-departments-fumbled-fight-against-russian-propaganda/> [<https://perma.cc/99FY-ZGLD>]; Gardiner Harris, *State Dept. Was Granted \$120 Million to Fight Russian Meddling. It Has Spent \$0.*, N.Y. TIMES (Mar. 4, 2018), <https://www.nytimes.com/2018/03/04/world/europe/state-department-russia-global-engagement-center.html> [<https://perma.cc/U5HM-MDL8>], the overall trajectory points to U.S. state media operations being more effective and better managed than in years prior, *see, e.g.*, U.S. AGENCY FOR GLOB. MEDIA, 2019 CONGRESSIONAL BUDGET JUSTIFICATION (2018), https://www.usagm.gov/wp-content/uploads/2018/02/BBGBudget_FY19_CBJ_2-7-18_Final.pdf [<https://perma.cc/986G-3RWM>].

117. BROAD. BD. OF GOVERNORS, BBG STRATEGIC PLAN 2018–2022, at 7 (2017) [hereinafter BBG STRATEGIC PLAN 2018–2022], https://www.usagm.gov/wp-content/uploads/2018/02/BBG-Strategic-Plan-2018-2022_FINAL.pdf [<https://perma.cc/4RCT-FH89>] (noting that the creation of a CEO made the BBG “more effective and efficient”).

118. *E.g.*, Susan Crabtree, *Trump Sticks with Pack for Broadcasting Chief*, WASH. FREE BEACON (Jan. 17, 2019, 11:25 AM), <https://www.freebeacon.com/politics/trump-sticks-with-pack-for-broadcasting-chief/> [<https://perma.cc/G5EZ-59QJ>]; *Open Tech. Fund v. Pack*, No. 1:20-cv-01710-BAH, 2020 WL 3605935, at *2 (D.D.C. July 2, 2020) (calling the restructuring a “profound structural change[] in the management of the agency tasked with overseeing the funding and operations of the affected Networks”).

structure, in August 2018, the federal government rebranded the BBG as the “United States Agency of Global Media” (the USAGM).¹¹⁹

In 2019, the OIG conducted a targeted inspection of the USAGM’s governance structure and reported that USAGM senior staff expressed concern that the restructuring made the agency more susceptible to governmental interference.¹²⁰ Yet U.S. state media agencies continued to assert that they were “independent” organizations.¹²¹ Some members of the independent media questioned these claims following President Trump’s appointment of filmmaker Michael Pack to head U.S. state media operations in June 2020.¹²² Within days of Pack taking office, U.S. state media agency heads resigned or were terminated, and the editorial independence “firewall” regulation was dismantled a few months later.¹²³ Despite

119. See U.S. *Government Media Agency Rebrands*, *supra* note 7.

120. OFF. OF INSPECTOR GEN., U.S. DEP’T OF STATE, ISP-IB-19-22, TARGETED INSPECTION OF THE GOVERNANCE OF THE UNITED STATES AGENCY FOR GLOBAL MEDIA 5 (2019), https://www.stateoig.gov/system/files/isp-ib-19-22_0.pdf [<https://perma.cc/3MM3-VR6R>].

121. U.S. AGENCY FOR GLOB. MEDIA, FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION 6 (2019) [hereinafter FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION], https://www.usagm.gov/wp-content/uploads/2019/03/USAGMBudget_FY20_CB_3-15-19.pdf [<https://perma.cc/TA9S-64MU>]; see also, e.g., 22 U.S.C. § 6209a (“The Inspector General of the Department of State and the Foreign Service shall respect the journalistic integrity of all the broadcasters covered by this [Act] and may not evaluate the philosophical or political perspectives reflected in the content of broadcasts.”); VOICE OF AM., VOA AND THE FIREWALL—LAW FOR MORE THAN 40 YEARS (2019), <https://docs.voaews.eu/en-US-INSIDE/2019/07/02/a2cdade1-ffb3-41b5-a086-2a09861ae452.pdf> [<https://perma.cc/42GL-M9KV>]. These contentions were not supported by the agencies’ enabling legislation, statements by the Trump administration suggesting a worldwide television network to compete with independent news broadcasters, and a track record of advancing the sitting President’s policy objectives. See 22 U.S.C. § 1431 (“The Congress declares that the objectives of this chapter are to enable the Government of the United States to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries.”); Brett Samuels, *Trump Suggests Government Start Its Own Worldwide Television Network*, HILL (Nov. 26, 2018, 2:55 PM), <https://www.thehill.com/homenews/administration/418284-trump-suggests-government-start-its-own-worldwide-television-network> [<https://perma.cc/G9BK-62YY>]; see *supra* Sections I.A–C.

122. See, e.g., Catie Edmondson, *Senate Confirms Conservative Filmmaker to Lead U.S. Media Agency*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/us/politics/senate-confirms-michael-pack-voa.html> [<https://perma.cc/4D7R-SQBD>]. Prior the appointment of Pack, the Trump administration criticized VOA for their coverage of the 2020 coronavirus crisis. See, e.g., Caitlin Oprysko, *White House Rips U.S.-Funded Outlet Voice of America in Daily Newsletter*, POLITICO (Apr. 10, 2020, 2:16 PM), <https://www.politico.com/news/2020/04/10/white-house-attacks-voice-of-america-daily-newsletter-179191> [<https://perma.cc/6X2N-5KTE>].

123. See, e.g., Brian Stelter & Jim Acosta, *Voice of America Top Officials Resign as Trump-Appointed CEO Takes over International Network*, CNN: BUS. (June 16, 2020, 3:09 PM), <https://www.cnn.com/2020/06/15/media/voice-of-america-top-officials-resign/index.html> [<https://perma.cc/U33V-4ATE>]; Susan Crabtree, *Michael Pack Stands His Ground Amid D.C. Firestorm*, REAL CLEAR POL. (July 2, 2020), https://www.realclearpolitics.com/articles/2020/07/02/michael_pack_stands_his_ground_amid_dc_firestorm.html [<https://perma.cc/RJN7-LER9>]. One former government official dubbed the mass firings the “Wednesday night massacre.” Jennifer Hansler & Brian Stelter, *‘Wednesday Night Massacre’ as Trump Appointee Takes over at Global Media Agency*, CNN: BUS. (June 18, 2020, 12:20 PM), <https://www.cnn.com/2020/06/17/media/us-agency-for-global-media-michael-pack/index.html> [<https://perma.cc/N2Y7-PP93>]. Dan De Luce, *Trump Admin*

attempts to maintain the appearance of editorial independence,¹²⁴ these sweeping changes show that the sitting President now possesses substantial control over U.S. state media agencies.¹²⁵

D. Current Day: The U.S. State Media Leviathan

The USAGM now manages five major state media broadcasting outlets: two federal media outlets (VOA and the Office of Cuba Broadcasting (the OCB), the latter of which oversees Radio Martí), and three “surrogate” media outlets (RFE/RL,¹²⁶ Radio Free Asia (RFA), and the Middle East Broadcasting Networks (the MBN)).¹²⁷ Similar to the two federal media outlets, the three surrogate media

Dismantles 'Firewall' for Editorial Independence at U.S.-funded Media Outlets, NBC NEWS (Oct. 27, 2020, 2:47 AM), <https://www.nbcnews.com/news/us-news/trump-admin-dismantles-firewall-editorial-independence-u-s-funded-media-n1244885> [<https://perma.cc/6X24-R2AH>].

124. See, e.g., 22 CFR §§ 531.1, .3 (2020) (clarifying “Firewall and Highest Standards of Professional Journalism” and stating that “[t]he firewall is not meant to discourage journalists from interviewing U.S. Government officials or to discourage such officials from appearing on USAGM-funded programs”); *Open Tech. Fund v. Pack*, No. 1:20-cv-01710-BAH, 2020 WL 3605935, at *3 (D.D.C. July 2, 2020) (challenging Pack’s ability to remove officers or directors of the Open Technology Fund, an affiliate of the USAGM); *Open Tech. Fund v. Pack*, No. 20-5195 (D.C. Cir. July 21, 2020) (per curiam), [https://www.cadc.uscourts.gov/internet/orders.nsf/DB799292B762A2F0852585AC00474C8F/\\$file/20-5195LDSN5.pdf](https://www.cadc.uscourts.gov/internet/orders.nsf/DB799292B762A2F0852585AC00474C8F/$file/20-5195LDSN5.pdf) [<https://perma.cc/V33C-Z5BP>] (issuing temporary injunction preventing Pack from removing or replacing officers or directors of the Open Technology Fund during the appeal process).

125. See, e.g., Margaret Brennan & Camilla Schick, *Trump Administration Purges News Execs from U.S. Agency Meant to Counter Disinformation, Leaving Staff Fearing More to Come*, CBS NEWS (June 18, 2020, 7:49 PM), <https://www.cbsnews.com/news/michael-pack-steve-bannon-trump-administration-purges-news-execs-from-u-s-agency-meant-to-counter-disinformation/> [<https://perma.cc/9AHD-LXPX>] (“The overnight purge of top news organization officials at the US Agency for Global Media (USAGM) has raised concern among its federal government employees and reporters that their jobs, immigration status, and editorial independence may soon be at risk following the arrival of new CEO Michael Pack.”). But see Nicky Robertson, *Judge Rules Voice of America Head Curbed First Amendment Rights of Its Journalists*, CNN (Nov. 21, 2020, 8:59 PM), <https://www.cnn.com/2020/11/21/business/voice-of-america-violated-journalists-rights/index.html> [<https://perma.cc/DK5K-NH36>] (describing court ruling granting in part preliminary injunction against Pack for “interference” with USAGM employees).

126. RFE/RL receives an annual grant from the USAGM. In 2017, the grant amount equaled approximately \$109.9 million. BROAD. BD. OF GOVERNORS, FY 2018 CONGRESSIONAL BUDGET JUSTIFICATION 3 (2017) [hereinafter FY 2018 CONGRESSIONAL BUDGET JUSTIFICATION], https://www.bbg.gov/wp-content/media/2017/05/FY2018Budget_CBJ_05-23-17.pdf [https://web.archive.org/web/20190612044112/https://www.bbg.gov/wp-content/media/2017/05/FY2018Budget_CBJ_05-23-17.pdf]. Although RFE/RL is classified as a Section 501(c)(3) nonprofit organization for tax purposes, it is funded, overseen, and controlled by the USAGM. *Frequently Asked Questions*, RADIO FREE EUR./RADIO LIBERTY, <https://www.pressroom.rferl.org/frequently-asked-questions> [<https://perma.cc/MU2T-WKS2>] (last visited Aug. 8, 2019).

127. *Structure*, U.S. AGENCY FOR GLOB. MEDIA, <https://www.usagm.gov/who-we-are/organizational-chart/> [<https://perma.cc/W33J-J6YY>] (last visited Aug. 8, 2019).

outlets receive all, or substantially all, of their funding from the federal government through the USAGM.¹²⁸

The USAGM describes itself as one of the “largest media organizations in the world” and boasts that it provides content in “58 languages to [345]¹²⁹ million people in more than 100 countries on a wide range of broadcast and digital media platforms with some 4,000 employees, 1,500 stringer reporters, and 50 news bureaus.”¹³⁰ In the 2017 fiscal year, the USAGM had an actual budget of approximately \$794 million,¹³¹ and despite rumors of substantial budget cuts,¹³² the USAGM received \$803 million for the 2018 fiscal year.¹³³ The USAGM’s audience figures have soared in the 2010s despite relatively level funding appropriations. The USAGM’s self-reported global weekly audience in 2004 was 130 million;¹³⁴ by 2019, that figure reached 345 million¹³⁵—a 265.4% increase in just fifteen years.¹³⁶

128. *Id.*; see also, e.g., *Frequently Asked Questions*, *supra* note 126. The USAGM sometimes claims that the surrogate outlets are “independent,” but for all intents and purposes, the USAGM controls these outlets. Compare BBG STRATEGIC PLAN 2012–2016, *supra* note 92, at 4 (calling the USAGM “fully independent editorially”), with *Structure*, *supra* note 127 (“The USAGM staff carry out Board decisions and oversight for all of U.S. international broadcasting.”), and BBG STRATEGIC PLAN 2014–2018, *supra* note 101, at 8 (noting that the USAGM provides “strategic direction” to the surrogate outlets).

129. FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 121, at 3.

130. BBG STRATEGIC PLAN 2018–2022, *supra* note 117, at 11. The audience numbers are global and do not provide reach within the United States. *See id.*

131. *Hit with \$24M Cut, BBG Not Even Mentioned in FY 2019 White House Budget Summary*, BBG-USAGM WATCH (Feb. 12, 2018), <https://www.bbgwatch.com/bbgwatch/hit-with-24m-cut-bbg-not-even-mentioned-in-fy-2019-white-house-budget-summary/> [<https://perma.cc/3NDN-5L77>]; FY 2018 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 126, at 3. The USAGM has in recent years requested less funding, but Congress has consistently appropriated more funds to the agency than requested. *Propaganda Isn’t Cheap: US Congress Constantly Gives USAGM More Funding than It Actually Requests*, SOUTHFRONT (July 17, 2019), <https://maps.southfront.org/propaganda-isnt-cheap-us-congress-constantly-gives-usagm-more-funding-than-it-actually-requests/> [<https://perma.cc/XN2W-D3L4>].

132. *Hit with \$24M Cut, BBG Not Even Mentioned in FY 2019 White House Budget Summary*, *supra* note 131.

133. FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 121, at 1. For context, Fox News, CNN, and MSNBC combined had newsroom spending of \$2.3 billion in 2017, and there were a combined 2,940 newsroom employees across the entire cable news sector in 2017. *Cable News Fact Sheet*, PEW RSCH. CTR. (June 25, 2019), <http://www.journalism.org/fact-sheet/cable-news/> [<https://perma.cc/ZF9Y-A44F>]. This means that the USAGM has funding roughly equivalent to that of CNN or MSNBC and the work force of CNN and MSNBC combined.

134. 2008–2013 STRATEGIC PLAN, *supra* note 101, at 3.

135. FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 121, at 3.

136. VOA was the largest of the USAGM’s media outlets by this metric, accounting for 275.2 million (79.8%) of the USAGM’s global audience in 2019. *Id.* at 17. The USAGM continues to pursue a wider audience. BBG STRATEGIC PLAN 2018–2022, *supra* note 117, at 25 (stating that the USAGM “is committed to leapfrogging others in the media landscape to reach new audiences”). CNN International, which claims to globally have had “the most widely distributed news channel, reaching over 373 million households,” had over 17.45 million followers, while VOA had over 10.95 million in October 2018. 2018 Archive of CNN *Worldwide Fact Sheet*, CNN PRESS ROOM (Jan. 2018), <http://cnnpressroom.blogs.cnn.com/cnn-fact-sheet/> [<http://web.archive.org/web/20181114143508/http://cnnpressroom.blogs.cnn.com/cnn-fact-sheet/>] (Jan. 2018); 2018 Archive of CNN *International*, FACEBOOK, <https://www.facebook.com/cnninternational/> [<http://web.archive.org/>].

To augment the already substantial capabilities and funding of the USAGM, President Obama issued an executive order in 2016 to form a new state media agency—the Global Engagement Center (the GEC)—specifically to counter foreign propaganda.¹³⁷ Congress ratified the creation of the GEC as part of the 2017 NDAA and authorized \$60–\$80 million in funding for 2017 and 2018.¹³⁸ Congress intended the GEC to serve a similar purpose to the USAGM:

The purpose of the [Global Engagement] Center shall be to lead, synchronize, and coordinate efforts of the Federal Government to recognize, understand, expose, and counter foreign state and non-state propaganda and disinformation efforts aimed at undermining United States national security interests . . . [and to] support the development and dissemination of fact-based narratives and analysis to counter propaganda and disinformation directed at the United States and United States allies and partner nations.¹³⁹

org/web/20181107121120/https://www.facebook.com/cnninternational/] (last visited Nov. 7, 2018); 2018 Archive of *Voice of America*, FACEBOOK, <https://www.facebook.com/voiceofamerica/> [http://web.archive.org/web/20181030083657/https://www.facebook.com/voiceofamerica] (last visited Oct. 30, 2018). However, the audience growth rate for VOA (13.64%) was more than twice that of CNN's (5.09%) in 2018. U.S. AGENCY OF GLOB. MEDIA, AUDIENCE AND IMPACT: OVERVIEW FOR 2018 (2018), <https://www.usagm.gov/wp-content/uploads/2018/11/2018-Audience-and-Impact-Report.pdf> [https://perma.cc/VR24-X5BK]; 2017 Archive of *CNN Worldwide Fact Sheet*, CNN PRESS ROOM, <http://cnnpressroom.blogs.cnn.com/cnn-fact-sheet/> [http://web.archive.org/web/20171019213503/http://cnnpressroom.blogs.cnn.com/cnn-fact-sheet/] (July 2017); 2018 Archive of *CNN Worldwide Fact Sheet*, *supra*.

137. Exec. Order No. 13,721, 81 Fed. Reg. 14,685 (Mar. 17, 2016), <https://www.federalregister.gov/documents/2016/03/17/2016-06250/developing-an-integrated-global-engagement-center-to-support-government-wide-counterterrorism> [https://perma.cc/H5AL-JWPC]; *Global Engagement Center*, U.S. DEP'T ST., <https://2009-2017.state.gov/r/gec/> [https://perma.cc/7K5T-XZE9] (last visited Aug. 8, 2019); Lapowsky, *supra* note 116; Patrick Tucker, *Facebook Just Blocked This Cambridge Analytica Affiliate. Why Does It Still Have a State Department Contract?*, DEF. ONE (Mar. 19, 2018), <http://www.defenseone.com/technology/2018/03/facebook-just-blocked-cambridge-analytica-affiliate-why-does-it-still-have-state-department-contract/146784/> [https://perma.cc/K8VU-2DE6].

138. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1287, 130 Stat. 2000, 2546–47 (2016). The State Department was allocated \$120 million, but had not spent this money as of March 4, 2018. Harris, *supra* note 116.

139. National Defense Authorization Act for Fiscal Year 2017 § 1287. Although the USAGM and the GEC have similar purposes, and both are audited by the same federal agency, the GEC is a distinct entity from the USAGM. 22 U.S.C. § 1435; *id.* § 6209b (“Role of the Secretary of State in foreign policy guidance”); *id.* § 6209a; *About OIG*, OFF. INSPECTOR GEN., U.S. DEP'T ST., <https://www.stateoig.gov/about> [https://perma.cc/57HW-FFKW] (last visited Aug. 8, 2019); *Global Engagement Center*, U.S. DEP'T ST., <https://www.state.gov/bureaus-offices/under-secretary-for-public-diplomacy-and-public-affairs/global-engagement-center/> [https://perma.cc/8H3B-XETG] (last visited Aug. 8, 2019). It is unclear whether the U.S. government is marketing state media to U.S. residents through the GEC. Adam H. Johnson, *US Officials Won't Say if a New Anti-Russia Propaganda Project Is Targeting Americans*, NATION (Mar. 9, 2017), <https://www.thenation.com/article/us-officials-wont-say-if-a-new-anti-russia-propaganda-project-is-targeting-americans/> [http://web.archive.org/web/20170310180022/https://www.thenation.com/article/us-officials-wont-say-if-a-new-anti-russia-propaganda-project-is-targeting-americans/].

As a comparatively new agency, the GEC does not yet have the same global reach or impact as the USAGM.¹⁴⁰ The GEC, though, has been active in funding media outlets that espouse viewpoints consistent with U.S. foreign policy objectives.¹⁴¹

With thousands of employees, approximately \$1 billion in annual funding, and a global weekly audience in the hundreds of millions, the USAGM and the GEC provide the U.S. government with enormous capability to influence public opinion the world over. As one scholar summarized, “[t]oday the federal government, more than any Madison Avenue advertising firm or corporate entity, is perhaps the single greatest [media] machine in the United States.”¹⁴²

II. U.S. GOVERNMENT NONCOMPLIANCE WITH FEDERAL STATE MEDIA LAWS AND REGULATIONS

The repeal of the Smith-Mundt Act’s domestic dissemination ban, the restructuring of the USAGM, and the formation of the GEC have coincided with a series of high-profile scandals and controversies surrounding U.S. state media agencies. In May 2018, for example, USAGM agency Radio Martí published a fifteen-minute segment that contained anti-Semitic comments about George Soros, a prominent Hungarian-American investor and philanthropist.¹⁴³ Months later, the GEC came under fire when Iran Disinformation Project, a recipient of GEC

140. See, e.g., Harris, *supra* note 116; Lapowsky, *supra* note 116.

141. See, e.g., Alex Marquardt, *State Department Suspends Funding of Anti-Iran Group Which Targeted Journalists and Activists*, CNN: POL. (June 5, 2019, 7:29 PM), <https://www.cnn.com/2019/06/05/politics/us-suspends-funding-anti-iran-group/index.html> [<https://perma.cc/3VZ7-MUEF>]. A substantial portion of the GEC’s annual budget is allocated for the GEC’s Information Access Fund. National Defense Authorization Act for Fiscal Year 2017 § 1287; Morgan Chalfant, *State Dept. Launches \$40M Offensive Against Foreign Propaganda*, HILL (Feb. 26, 2018, 10:55 AM), <http://www.thehill.com/policy/cybersecurity/375589-state-dept-launches-40m-offensive-against-foreign-propaganda> [<https://perma.cc/CNP3-STVW>]. This fund is intended to “support public and private partners working to expose and counter propaganda and disinformation from foreign nations.” Press Release, U.S. Dep’t of State, *State-Defense Cooperation on Global Engagement Center Programs and Creation of the Information Access Fund to Counter State-Sponsored Disinformation* (Feb. 26, 2018), <https://www.state.gov/state-defense-cooperation-on-global-engagement-center-programs-and-creation-of-the-information-access-fund-to-counter-state-sponsored-disinformation/> [<https://perma.cc/AA95-VTE2>]. “Under the Information Access Fund, civil society groups, media content providers, nongovernmental organizations, federally funded research and development centers, private companies, and academic institutions [are] eligible to [apply] for grants from the GEC to [counter foreign] propaganda and disinformation.” *Id.*

142. MANNING & ROMERSTEIN, *supra* note 2, at 294. This quote was published in 2004, well before many of the reforms that made the U.S. government an even more capable state media broadcaster. See *id.*

143. Nora Gámez Torres, *More Firings at TV and Radio Martí over Controversial George Soros Report*, MIA. HERALD (Mar. 1, 2019, 2:26 PM), <https://www.miamiherald.com/latest-news/article226975224.html> [<https://web.archive.org/web/20200624191020/https://www.miamiherald.com/latest-news/article226975224.html>].

funding,¹⁴⁴ used social media to target American journalists, academics, and activists who were not considered “tough enough on Tehran.”¹⁴⁵ The Iran Disinformation Project even went so far as to attack affiliated USAGM outlet Radio Farda by promoting viewpoints critical of the outlet on social media.¹⁴⁶ The GEC claimed that it subsequently suspended funding this organization.¹⁴⁷ However, the State Department reportedly continued to collaborate with the Iranian Disinformation Project’s staff and parent organization on other projects to promote U.S. foreign policy objectives regarding Iran.¹⁴⁸

But perhaps the most notable U.S. state media scandal arose in July 2018, when the *New York Times* reported on research from Syracuse University that revealed RFE/RL was targeting Americans with Facebook ads that reinforced Trump administration opinions and policies.¹⁴⁹ A spokesperson from the USAGM acknowledged that the practice was impermissible under federal law, stating that “[n]one of the [USAGM] networks should be distributing or promoting our content domestically in order to develop or grow domestic audiences.”¹⁵⁰ The spokesperson also ensured that the USAGM would direct RFE/RL to immediately discontinue its targeted social media advertising.¹⁵¹

144. *About Us*, IRAN DISINFORMATION PROJECT, <https://www.irandisinfo.org/about-us/> [<https://perma.cc/DXZ9-H439>] (last visited Aug. 9, 2019); Julia Borger, *US Cuts Funds for ‘Anti-Propaganda’ Iran Group that Trolled Activists*, GUARDIAN (May 31, 2019, 5:04 PM), <https://www.theguardian.com/us-news/2019/may/31/us-cuts-funds-for-anti-propaganda-group-that-trolled-activists> [<https://perma.cc/H37F-Z2ND>].

145. Marquardt, *supra* note 141.

146. *E.g.*, Iran Disinformation Project (@IranDisinfo), TWITTER (Mar. 5, 2019, 1:46 PM), <https://twitter.com/IranDisinfo/status/1103049142522298368> [http://web.archive.org/web/20200115201802if_/https://twitter.com/IranDisinfo/status/1103049142522298368] (“Iranian Instagram users strongly objected to a new report by USG-funded @RadioFarda_ about the murder of Jamal Khashoggi based on a documentary recently aired on @AJArabic. Some users have called Farda the ‘Radio-Khashoggi’ and many believe Farda is following #IranDisinformation.”); Iran Disinformation Project (@IranDisinfo), TWITTER (Jan. 27, 2019, 3:43 PM), <https://www.twitter.com/IranDisinfo/status/1089670281692700673> [<http://web.archive.org/web/20200115205940/https://twitter.com/IranDisinfo/status/1089670281692700673>] (“An Iranian asks @StateDept: Why are @VOA & @RadioFarda that you pay for, still recognizing a Russia-backed dictator as the legitimate president of Venezuela while the U.S has recognized Juan Guaido as the legitimate interim president?”).

147. Marquardt, *supra* note 141.

148. Negar Mortazavi & Murtaza Hussain, *State Department Cut Funding for Controversial ‘Iran Disinfo’ Project—but Kept Working with Its Creators*, INTERCEPT (Sept. 22, 2020, 5:00 AM), <https://www.theintercept.com/2020/09/22/iran-disinfo-trump-state-department/> [<https://perma.cc/Z7EF-XK8X>].

149. Roose, *supra* note 6; Mary Papenfuss, *U.S.-Funded Radio Free Europe Aimed Stealth Facebook Ads at Americans: Report*, HUFF POST (July 23, 2018, 2:39 AM), https://www.huffingtonpost.com/entry/radio-free-europe-posted-stealth-us-facebook-ads_us_5b5538e8e4b0fd5c73c6ae4e [<https://perma.cc/PMQ2-YKF4>]; ROYCE, *supra* note 16.

150. Roose, *supra* note 6; *see infra* Section IV.D (discussing the Smith-Mundt Act’s ban on distributing USAGM materials to audiences in the United States unless the material has been requested to be disseminated in the United States and approved for that purpose).

151. Roose, *supra* note 6.

Following this discovery, the U.S. legislature launched investigations into the USAGM and its subordinate state media outlets.¹⁵² On July 27, 2018, Sen. Bob Menendez (D-NJ), Ranking Member of the Senate Foreign Relations Committee, asked the head of U.S. state media broadcasting whether U.S. state media agencies were complying with the Smith-Mundt Act's surviving restrictions against broadcasting U.S. state media to Americans directly and against cultivating a domestic audience.¹⁵³ After conducting an internal investigation, the head of U.S. state media confirmed on August 6, 2018, that RFE/RL had improperly targeted as many as 576,600 Americans with social media advertisements.¹⁵⁴

In December 2018, House Foreign Affairs Committee Chair Edward Royce published an oversight investigation report (the Royce Report) detailing recent misconduct by U.S. state media agencies.¹⁵⁵ This report described how RFE/RL and VOA intentionally and negligently targeted Americans with U.S. state media advertisements in violation of the Smith-Mundt Act.¹⁵⁶ The Royce Report catalogued the largest number of violations of federal law to date—at least 860 from 2016 to 2018.¹⁵⁷ In response to the Royce Report, the USAGM instituted several reforms, including creating an internal Smith-Mundt “task force,” issuing a directive to RFE/RL to stop targeting Americans with ads for RFE/RL content, and updating USAGM social media policies to prohibit targeting Americans with social media advertisements.¹⁵⁸

These violations of federal state media laws and regulations are not unprecedented—the U.S. government has a history of noncompliance dating back to the 1980s. For example, in 1987, the Government Accountability Office (the GAO), a federal oversight body acting at the behest of Congress, found that the State Department paid private citizens to submit newspaper op-eds under their own names to support the Reagan administration's controversial Latin American

152. See ROYCE, *supra* note 16. Despite a formal investigation by the Senate Committee on Foreign Relations, at the time of this writing, no formal action has been taken by the Senate against RFE/RL or the USAGM for violating federal law by targeting Americans with Facebook ads. Press Release, Bob Menendez, *supra* note 11. However, the president of RFE/RL stepped down several months after the Senate investigation was announced, possibly in response to the July 2018 *New York Times* report. Press Release, Radio Free Eur./Radio Liberty, *supra* note 10.

153. ROYCE, *supra* note 16, at 3.

154. Letter from John Lansing to Robert Menendez, *supra* note 15.

155. ROYCE, *supra* note 16, at 3.

156. *Id.*

157. *Id.* The Royce Report also noted how U.S. state media agencies continued to illegally target Americans after agency staff had acknowledged wrongdoing in the July 2018 *New York Times* story. *Id.* at 6, 8, 10. Among these violations were instances of VOA targeting Iranian-Americans with U.S. state media written in Farsi. *Id.* at 8; *Voice of America Persian Service Targeted Americans with Illegal Facebook Ads*, *supra* note 17.

158. ROYCE, *supra* note 16, at 8, 18 app. II. Verifying USAGM compliance with these new initiatives is challenging. Changes to the Facebook advertisements archive have resulted in the removal of the illegal RFE/RL advertisements that were featured in the July 2018 *New York Times* article, which has made documenting and monitoring U.S. state media practices more difficult. Rosenberg, *supra* note 20; *Radio Free Europe/Radio Liberty*, *supra* note 20.

policies.¹⁵⁹ The GAO determined that the State Department engaged in illegal “covert propaganda” because the readers were likely to misattribute the source of the op-eds to private citizens, rather than to the U.S. government.¹⁶⁰

Another violation of the “covert propaganda” prohibition occurred in 2015, when the GAO held that the Environmental Protection Agency (the EPA) improperly used the “Thunderclap” crowd speaking platform to disseminate a message for expanding pollution regulations via a social media marketing campaign.¹⁶¹ Because of the way the EPA Thunderclap campaign functioned, the EPA’s message appeared to be originating organically from members unaffiliated with the EPA.¹⁶² The GAO deemed this advocacy campaign “covert”—a violation of federal law.¹⁶³

The State Department and EPA are not the only government organizations to violate the covert propaganda prohibition. The GAO has found violations of the covert propaganda prohibition by various other federal agencies and departments, including the Small Business Administration for the distribution of “suggested editorials” without proper attribution;¹⁶⁴ the Department of Health and Human Services for the distribution of unattributed video news releases (VNRs) concerning the Medicare Prescription Drug, Improvement, and Modernization Act of 2003;¹⁶⁵ the Office of National Drug Control Policy for the distribution of unattributed VNRs regarding the Office of National Drug Control Policy’s antidrug campaign;¹⁶⁶ the Department of Education for the distribution of unattributed VNRs regarding the No Child Left Behind Act;¹⁶⁷ and the Department of Education for contracting with a prominent media figure to write columns under his own name supporting the No Child Left Behind Act.¹⁶⁸

159. Dep’t of State’s Off. of Pub. Dipl. for Latin Am. & the Caribbean, 66 Comp. Gen. 707, 708 (1987).

160. *Id.* at 707.

161. Env’t Prot. Agency, B-326944, 2015 WL 8618591, at *6–11 (Comp. Gen. Dec. 14, 2015).

162. *Id.*

163. *Id.*

164. Lowell Weicker, Jr., Chairman, Comm. on Small Bus., U.S. Senate, B-223098 et al., 1986 WL 64325, at *1 (Comp. Gen. Oct. 10, 1986).

165. Dep’t of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs., B-302710, 2004 WL 1114403, at *11 (Comp. Gen. May 19, 2004).

166. Off. of Nat’l Drug Control Pol’y, B-303495, 2005 WL 21443, at *10 (Comp. Gen. Jan. 4, 2005).

167. Dep’t of Educ., B-304228, 2005 WL 2416338, at *1, *10 (Comp. Gen. Sept. 30, 2005).

168. Dep’t of Educ.—Contract to Obtain Services of Armstrong Williams, B-305368, 2005 WL 2416671, at *10 (Comp. Gen. Sept. 30, 2005). The GAO has also posited that the Department of Health and Human Services engaged in illegal covert propaganda in 1999 when it released unattributed VNRs supporting the Clinton administration’s position on prescription drug and preventative health benefits, but it did not make an official finding. Dep’t of Health & Hum. Servs., 2004 WL 1114403, at *11.

Despite this lengthy list of violations, the GAO has traditionally interpreted the “covert propaganda” prohibition narrowly. For example, in 2009, the GAO found no violation of the covert propaganda prohibition when the Department of Defense provided exclusive inside information and free travel to retired military officers who spoke in favor of the George W. Bush administration’s

The true number of covert propaganda violations may be much greater because the GAO's power to investigate and discipline federal agencies is limited. The GAO cannot initiate investigations of federal agencies; it can only do so with Congress's permission.¹⁶⁹ Additionally, there is an ongoing dispute within the federal government about whether the GAO, a legislative branch agency, has jurisdiction over executive branch agencies such as the State Department and the USAGM.¹⁷⁰ Perhaps most crucially, because the GAO lacks direct enforcement powers, no meaningful remedial action has been taken against a federal agency for violating the covert propaganda prohibition.¹⁷¹

III. THE ARGUMENT FOR INCREASED OVERSIGHT OF U.S. STATE MEDIA

Calls for more stringent legal regulation and oversight of U.S. state media are not new. Although much attention has been paid to state media produced by the USAGM, legislators have also considered taking broader action to address domestic media abuse by the federal government.¹⁷²

policies on nationally televised news programs. Dep't of Def., B-316443, 2009 WL 2152305, at *1 (Comp. Gen. July 21, 2009). Even though this arrangement was not public knowledge, the GAO found the Department of Defense did not violate the covert propaganda prohibition because the military agency did not compensate the retired military officers directly and because it did not actively conceal its involvement. *Id.* at *1–2.

169. Morse, *supra* note 29, at 859; Jennifer Pierce, Note, *A Fish Out of Water: Why the GAO's Approach to Finding Agency Propaganda Is Inadequate in the Social Media Age*, 40 CARDOZO L. REV. 425, 434 (2018).

170. Whether Appropriations May Be Used for Informational Video News Releases, 29 Op. O.L.C. 74 (2005); *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/about/index.html> [<https://perma.cc/X7Q3-V3S7>] (last visited Apr. 13, 2020); Pierce, *supra* note 169, at 434. Other government agencies besides the GAO could possess enforcement powers over U.S. state media agencies. The Office of Legal Counsel (OLC), an affiliate of the Department of Justice, has jurisdiction to regulate the conduct of executive agencies. Whether Appropriations May Be Used for Informational Video News Releases, 29 Op. O.L.C. at 74. But under OLC guidelines, covert propaganda exists only when the government's identity is undisclosed *and* the content of the media advocates a particular viewpoint. *Id.* Establishing a violation under this standard would be difficult for USAGM materials. For example, VOA's charter states that it must remain "objective," and if the agency follows journalism ethics standards regarding impartiality, the content produced could be considered viewpoint neutral. *The VOA Charter*, VOA (Oct. 30, 2009, 2:21 PM), <https://www.voanews.com/archive/voa-charter-0> [<https://perma.cc/SAD2-VB6C>]; Tom Kent, *Impartial or Point-of-View*, ONA ETHICS, <https://ethics.journalists.org/what-is-the-nature-of-your-journalism/impartial-or-point-of-view/> [<https://perma.cc/N9GP-73G4>] (last visited Aug. 9, 2019).

The second government agency that could potentially play a greater role in overseeing U.S. state media is the Federal Communications Commission (FCC). See Kosar, *supra* note 22. Since 1960, this agency has been responsible for preventing advertisers from covertly influencing radio content. Morse, *supra* note 29, at 860–61. Under its "[anti-]payola law," the FCC can require broadcasters to identify material that has been paid for by an advertiser, contains "political" content, or deals with "controversial issues." *Id.*; Sager, *supra* note 7, at 539 n.178; see also, e.g., Roose, *supra* note 6. USAGM materials could fall under one or more of these categories, making U.S. state media subject to FCC attribution regulations. However, the FCC has been unwilling to enforce these rules, despite threatening to do so in 2005. Morse, *supra* note 29, at 861.

171. Morse, *supra* note 29, at 859; Pierce, *supra* note 169, at 434.

172. See discussion *supra* Part II (discussing reporting into and congressional oversight of USAGM conduct).

For example, in response to the discovery of U.S. government interference in news reporting leading up to the 2003 Iraq War, the House of Representatives introduced the “Federal Prohibition Act” in 2005.¹⁷³ This Act proposed instituting new regulations on federal media activity, including mandating executive agencies to submit a notice of any public relations contract within thirty days of being made; prohibiting the allocation of U.S. funds for publicity and propaganda purposes not authorized by law; and requiring the prominent disclosure of federal sponsorship for any “advertisement or other communications.”¹⁷⁴ Simultaneously with the House’s proposed Federal Prohibition Act, the Senate introduced the “Stop Government Propaganda Act,” which attempted to codify and define “publicity and propaganda” to penalize and ban such activities by federal agencies.¹⁷⁵ Later in 2005, the Senate managed to pass the Truth in Broadcasting Act, which required the U.S. government to attribute its ready-to-use audio or video segments with “clear notice that such story was produced by the Federal Government.”¹⁷⁶ All three bills failed to become law, however, and Congress has not seriously considered similar legislation since.

Regulation of U.S. state media has become an even more pressing issue in the years following 2005. As before, U.S. presidential administrations have continued to advocate for policy objectives via executive agencies.¹⁷⁷ Now, though, they are able to use social media and other form of government-to-people communication to bypass the independent press and communicate directly to the American public.¹⁷⁸ When this occurs, there is no oversight of government communications—the role of journalists is minimized, and governmental entities assume the roles of information source, reporter, and broadcaster.¹⁷⁹

Despite the growing risk of domestic state media abuse from the federal government, some have called for relaxation—or even elimination—of the few

173. Stansislav Getmanenko, Note, *Freedom from the Press: Why Federal Propaganda Prohibition Act of 2005 Is a Good Idea*, 114 PENN ST. L. REV. 251, 271 (2009).

174. Federal Propaganda Prohibition Act of 2005, H.R. 373, 109th Cong. (2005).

175. Stop Government Propaganda Act, S. 266, 109th Cong. (2005); KEVIN R. KOSAR, CONG. RSCH. SERV., RL32750, PUBLIC RELATIONS AND PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES (2005).

176. S. COMM. ON COMMERCE, SCI. & TRANSP., TRUTH IN BROADCASTING ACT, S. REP. NO. 109-210, at 1 (2005).

177. Kosar, *supra* note 22, at 796 (“Executive agencies have an interest in aggressively promoting themselves and have shown themselves willing to do so in spite of the plain language of the law (inadequate though it may be) and Congress’s wishes.”).

178. *Cf.* Jennifer Grygiel & Suzanne Lysak, *Police Social Media and Broadcast News: An Investigation into the Impact of Police Use of Facebook on Journalists’ Gatekeeping Role*, JOURNALISM PRAC., May 5, 2020 (“President Obama’s 2014 Task Force on twenty-first Century Policing . . . focused on social media and recommended that law enforcement agencies adopt model policies and best practices for technology-based community engagement that increases community trust and access.”).

179. *Id.*

safeguards that restrict the domestic dissemination of U.S. state media.¹⁸⁰ These individuals assert that the U.S. government should not be subject to legal restrictions on its media operations because they hamstring the government's ability to combat foreign disinformation campaigns and place the government on unequal footing with independent media entities such as the *New York Times* or CNN.¹⁸¹

However well-intentioned these positions may be, they overlook concerns inherent to the U.S. government acting as a media broadcaster.¹⁸² The U.S. government is "unique" because of "its substantial resources, its privileged access to national security and intelligence information, and its [assumption] of [a] wide variety of . . . roles [such] as commander-in-chief, policymaker, [and] educator . . ." ¹⁸³ Unlike independent media companies, which are limited in scope, resources, and personnel, the U.S. government can "inflict great harm to the public" because of its unique "power, variety, and ubiquity" in American society.¹⁸⁴ Further, unlike many independent media outlets, which strive to produce evenhanded, objective reports and have ethical codes to support such practices,¹⁸⁵ U.S. state media agencies exist specifically to promote the U.S. agenda.¹⁸⁶

Legal safeguards for U.S. state media are especially important because the U.S. government is often inclined to conceal its authorship. In certain contexts, such as national security, the U.S. government is incentivized to attribute its involvement voluntarily to appear more credible.¹⁸⁷ But in others, the U.S. government assumes a nongovernmental identity, benefitting from the credibility, objectivity, and legitimacy often associated with independent organizations and individuals.¹⁸⁸ Such shapeshifting subverts institutional protections in a democratic society¹⁸⁹—people can only be expected to know when to support or protest the government if they

180. See, e.g., Brown, *supra* note 21, at 26; Lieberman, *supra* note 21, at 117 ("The most effective strategy for combating ISIS may be through active counter-propaganda efforts that challenge and undermine the terrorist group."). Some have even suggested that the State Department collaborate with private nongovernmental organizations to make its information appear more credible. See, e.g., Brown, *supra* note 21, at 13–16; Lieberman, *supra* note 21, at 120 (noting that, in certain contexts, the U.S. government may not appear credible and that utilizing a different spokesperson unaffiliated with the government may appear more credible).

181. E.g., Brown, *supra* note 21, at 12–13; Lieberman, *supra* note 21, at 120.

182. Grygiel & Lysak, *supra* note 178.

183. Helen Norton, *Government Speech and the War on Terror*, 86 *FORDHAM L. REV.* 543, 543 (2017).

184. *Id.*

185. Kent, *supra* note 170.

186. See, e.g., 22 U.S.C. §§ 1431, 6201, 6209b.

187. Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943, 1017 (1995).

188. Kari Karppinen & Hallvard Moe, *What We Talk About When We Talk About "Media Independence,"* 23 *JAVNOST: PUB.* 105, 105–19 (2016); see also Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 *B.U. L. REV.* 587, 592–94 (2008) ("Studies confirm that the more credible a speaker, the more likely her message will be effective, regardless of its content.").

189. See Norton, *supra* note 183, at 558.

know when the government is speaking.¹⁹⁰ This issue is pronounced in the context of state media, where USAGM agencies frequently liken their content to independent journalism.¹⁹¹ The USAGM and other U.S. state media agencies, for example, often present their publications as though they were created by an independent entity,¹⁹² even going so far as to label their websites “.com”¹⁹³ and “.org”¹⁹⁴ instead of “.gov.” This is disorienting to the public and inhibits American citizens’ ability to identify when the message is originating from their government.

Advocates for the uninhibited domestic dissemination of U.S. state media counter that the potential harm to free public discourse is minimal given the U.S. government’s record of providing “truthful” information.¹⁹⁵ “True” stories, however, can still mislead when they fail to provide an unbiased, comprehensive account of what actually occurred—as U.S. state media publications often do.¹⁹⁶ Paradoxically, “truthful” state media has the potential to do *more* harm to free public discourse than sensationalized and inaccurate state media because it appears more credible and, therefore, is less likely to be internalized with the appropriate skepticism.¹⁹⁷

Relaxation of domestic dissemination laws also conflicts with the historic role of U.S. state media. Since the end of World War II, U.S. state media agencies have largely confined their broadcasts to information-poor environments—such as

190. *Id.* (“[G]overnment speech is most valuable and least dangerous when its governmental source is apparent . . .”). Some have even suggested Due Process may be violated if government action deprives the people of their ability to “meaningfully exercise voting or other protected rights.” *See, e.g.*, Norton, *supra* note 183, at 558; *see also* Damon Mayrl & Sarah Quinn, *Defining the State from Within: Boundaries, Schemas, and Associational Policymaking*, 34 SOCIO. THEORY 1, 3 (2016) (“[P]rograms that are enacted through private channels may be misrecognized as the product of private efforts, limiting the degree to which they are subject to public oversight and affecting citizens’ awareness of the role of government in their lives.”).

191. *E.g.*, Amanda Bennett, *Trump’s ‘Worldwide Network’ Is a Great Idea. But It Already Exists*, WASH. POST (Nov. 27, 2018, 1:41 PM), https://www.washingtonpost.com/opinions/trumps-worldwide-network-is-a-great-idea-but-it-already-exists/2018/11/27/79b320bc-f269-11e8-bc79-68604ed88993_story.html [<https://perma.cc/856V-75NW>].

192. *See, e.g.*, BBG STRATEGIC PLAN 2018–2022, *supra* note 117, at 11; VOICE OF AMERICA, THE LARGEST U.S. INTERNATIONAL BROADCASTER (2020), <https://docs.voanews.eu/en-US-INSIDE/2020/06/12/aa06bcb3-37d3-4eb6-bb01-2c7849af4255.pdf> [<https://perma.cc/4LH6-79QM>] (providing ambiguous description of VOA’s history and purpose). *But see Mission and Values*, VOA, <https://www.insidevoa.com/p/5831.html> [<https://perma.cc/TYV5-5TMY>] (last visited Aug. 10, 2019).

193. VOA, *supra* note 89 (using www.voanews.com not www.voanews.gov).

194. RADIO FREE EUR./RADIO LIBERTY, *supra* note 89 (using www.rferl.org not www.rferl.gov).

195. Lieberman, *supra* note 21, at 99, 120–21; Brown, *supra* note 21, at 12–13, 26; *see supra* Section B (noting how post-World War II U.S. state media is by and large truthful).

196. *See, e.g.*, Kosar, *supra* note 22, at 793 (“One can mislead another by communicating just facts but not all the facts.”); Eko, *supra* note 87, at 21 (noting that NATO broadcasts during the 1990s Serbian conflict, which included VOA and RFE/RL state media, “[kept] strict control of information about the air strikes”); MANNING & ROMERSTEIN, *supra* note 2, at 125 (noting the United States was criticized for withholding certain information during the Gulf War in the early 1990s).

197. *See* MANNING & ROMERSTEIN, *supra* note 2, at 281–82.

countries under authoritarian rule.¹⁹⁸ But if the paramount criterion for broadcasting U.S. state media is whether the country lacks representative government or an established independent media industry, the USAGM should not be targeting the United States and other countries that foster free public discourse.¹⁹⁹ Perhaps to sidestep this issue, the USAGM's recent strategic plans have added a new factor for disseminating state media: countering “bad actors flooding media markets with an abundance of false, doctored, or misleading information.”²⁰⁰ Although “bad actors” attempting to undermine free public discourse within the United States is a troublesome issue,²⁰¹ it is unclear whether an increase in the domestic dissemination of U.S. state media is the solution.²⁰² European

198. 22 U.S.C. § 1431 (“The Congress declares that the objectives of this [Act] are to enable the Government of the United States to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries.”); *id.* § 6201(4) (“The continuation of existing United States international broadcasting, and the creation of a new broadcasting service to the people of the People’s Republic of China and other countries of Asia which lack adequate sources of free information, would enhance the promotion of information and ideas, while advancing the goals of United States foreign policy.”). This policy continues to persist. *Id.* § 6202(b)(5) (“United States international broadcasting shall include . . . programming to meet needs which remain unserved by the totality of media voices available to the people of certain nations”); BBG STRATEGIC PLAN 2012–2016, *supra* note 92, at 2 (“The goal [to become the world’s leading international news agency] refers to the BBG’s focus on countries that lack free media as well as freedom and democracy and, as such, constitute U.S. national security imperatives. In service to these places, the agency aims to be the leader (not to rival U.S. commercial broadcasting entities).”); BBG STRATEGIC PLAN 2018–2022, *supra* note 117, at 16 (“In deciding where to target, the BBG consider[ed] the local media situation, along with U.S. strategic interests, and prioritizes countries that lack a free or developed press.”); BBG FISCAL YEAR 2014 CONGRESSIONAL BUDGET REQUEST, *supra* note 111, at 39 (“A member of the European Union and NATO, with an established democracy and free media, Greece no longer meets criteria justifying VOA broadcasts.”); *id.* at 41 (“The Balkans cannot yet sustain free, independent media. The continued VOA broadcasts will serve to maintain a robust [USAGM] presence in the region as local media further develop.”).

199. Although the United States has not placed as highly in press freedom rankings in recent years, it is still considered one of the world’s most stable democracies with a thriving independent media industry. Sasha Ingber, *The U.S. Now Ranks as a ‘Problematic’ Place for Journalists*, NPR (Apr. 18, 2019, 5:13 PM), <https://www.npr.org/2019/04/18/714625907/the-u-s-now-ranks-as-a-problematic-place-for-journalists> [<https://perma.cc/TG5X-G9CY>]; *The Economist Intelligence Unit’s Democracy Index*, ECONOMIST INTEL. UNIT, <https://infographics.economist.com/2019/DemocracyIndex/> [<https://perma.cc/Z7HM-JM8V>] (last visited Aug. 10, 2019); Michael J. Abramowitz & Jennifer Dunham, *Freedom of the Press 2017: Press Freedom’s Dark Horizon*, FREEDOM HOUSE, <https://www.freedomhouse.org/report/freedom-press/2017/press-freedoms-dark-horizon> [<https://perma.cc/TM6W-ETL3>] (last visited Nov. 11, 2020).

200. BBG STRATEGIC PLAN 2018–2022, *supra* note 117, at 9.

201. See, e.g., *Disinformation*, N.Y. TIMES, <https://www.nytimes.com/spotlight/disinformation> [<https://perma.cc/6DZW-53Y3>] (last visited Aug. 10, 2019); BBG STRATEGIC PLAN 2018–2022, *supra* note 117, at 9–10 (arguing that countering the “weaponization of information” by foreign powers is “a key focus of U.S. foreign policy”).

202. That is not to say that U.S. state media does not have a place in American society. As a subject of academic research, it may help inform the American people about the government’s positions on certain issues, and so long as it is tightly regulated and monitored, it could be used in limited circumstances to help counter anti-American state media. See Norton, *supra* note 183, at 546–47.

governments have endeavored to counter foreign disinformation campaigns with their own state media, but such efforts have so far proven unsuccessful.²⁰³

Increasing domestic U.S. state media to combat foreign state media may be an example of the medicine being worse than the malady. Left unchecked, it would not take long for the USAGM and other state media agencies to be on par with one or more of the major independent American news networks. To achieve this, the U.S. government does not need to amass more followers than the entire independent media industry; it merely needs to scale such that it interferes with the free press's ability to act as the Fourth Estate.²⁰⁴ This could lead to the U.S. government becoming one of the primary domestic broadcasters of news-like information²⁰⁵—a role often assumed by governments in autocratic countries.²⁰⁶

IV. STATE MEDIA ANALYSES AND FACTORS

The federal judiciary, social media companies, federal agencies, and federal statutory law each offer different approaches for identifying government publications and state media. Although no one approach is sufficiently comprehensive, each addresses an important characteristic of state media.

203. See, e.g., Matt Apuzzo, *Europe Built a System to Fight Russian Meddling. It's Struggling.*, N.Y. TIMES (July 6, 2019), <https://www.nytimes.com/2019/07/06/world/europe/europe-russian-disinformation-propaganda-elections.html> [<https://perma.cc/7PBG-YTTL>]. But see BBG STRATEGIC PLAN 2018–2022, *supra* note 117, at 9–10 (arguing that countering the “weaponization of information” by foreign powers is “a key focus of U.S. foreign policy”). Independent media outlets in the United States have decades of experience rebuking misleading and inaccurate information and do not carry many of the inherent conflicts when the U.S. government acts as a content publisher. Although the American independent media industry is currently experiencing financial strain as it adapts to a digital media world, it remains fully capable of reporting on foreign disinformation campaigns. See, e.g., *Disinformation*, *supra* note 201. Increased competition from U.S. state media may also diminish the available audience that independent media companies rely on to generate revenue. Sara Fischer, *Local Media Falls Victim to Partisan Politics*, AXIOS (July 30, 2019), <https://www.axios.com/local-news-media-partisan-websites-11a39f2d-362f-4f51-b6d6-899a693a7700.html> [<https://perma.cc/K3YD-KR2T>].

204. The USAGM has employed individuals well-known to U.S. audiences, such as former-cable-news-host-turned-VOA-contributor Greta Van Susteren. Brett Samuels, *Van Susteren Gets Her Own Show on Voice of America*, HILL (Feb. 6, 2018, 8:33 PM), <https://www.thehill.com/homenews/media/372664-van-susteren-gets-her-own-show-on-voice-of-america> [<https://perma.cc/8T7R-D7MP>]. Susteren also frequently promotes her VOA content on Twitter, where she has over one million followers. Greta Van Susteren (@greta), TWITTER, https://www.twitter.com/search?q=from%3Agreta%20voa&src=typed_query [<https://perma.cc/Z728-AAN2>] (last visited Sept. 27, 2020) (listing promoted posts); Greta Van Susteren (@greta), TWITTER, <https://www.twitter.com/greta> [<http://web.archive.org/web/20200905070043/https://www.twitter.com/greta>] (last visited Sept. 27, 2020).

205. This would also cause the independent press to transform from an information “gatekeeper” to a conduit for news curation and amplification. Grygiel & Lysak, *supra* note 178.

206. Simeon Djankov, Caralee McLiesh, Tatiana Nenova & Andrei Shleifer, *Who Owns the Media?*, 46 J.L. & ECON. 341 (2003).

A. Factor 1: Government Control

In recent years, the federal judiciary has grappled with how the U.S. government may speak to its citizenry in conformance with the First Amendment.²⁰⁷ In an attempt to resolve this challenging legal issue, the Supreme Court has established the “government speech doctrine,” a relatively new judicial theory²⁰⁸ that permits the government to speak directly to American citizens unencumbered by the First Amendment restrictions typically associated with government regulation of private speech.²⁰⁹

The watershed government speech doctrine case is *Johanns v. Livestock Marketing Association*.²¹⁰ In *Johanns*, cattle sellers sued the U.S. Secretary of Agriculture, the U.S. Department of Agriculture (the USDA), and the Cattlemen’s Beef Promotion and Research Board (the Beef Board), seeking injunctive relief for their pro-beef advertising (including the well-known “Beef. It’s What’s For Dinner” campaign) funded by a targeted, one-dollar-per-head-of-cattle assessment.²¹¹ The plaintiffs argued that these campaigns unconstitutionally compelled them to

207. There is little debate that the government should be able to speak to the American people so long as it does not amount to a monopoly over the marketplace of ideas. *See Warner Cable Commc’ns, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990). If Americans could challenge government speech simply by virtue of it being funded with tax dollars, it would cripple many essential government functions. *See Pleasant Grove City v. Sumnum*, 555 U.S. 460, 468 (2009); *Delano Farms Co. v. Cal. Table Grape Comm’n*, 417 P.3d 699, 710 (Cal. 2018) (quoting *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015)).

208. *Adams v. Me. Mun. Ass’n*, No. 1:10-cv-00258-JAW, 2013 U.S. Dist. LEXIS 19789, at *56–57 (D. Me. Feb. 14, 2013) (“Although the government speech doctrine is now securely fixed as part of First Amendment jurisprudence, it is still comparatively new and undeveloped.”).

209. When regulating private speech, the government is subject to constitutional restrictions on what it can and cannot do depending on the type of regulation and the forum in which the regulation occurred. *See, e.g., Sumnum*, 555 U.S. at 469 (“[G]overnment entities are strictly limited in their ability to regulate private speech in . . . ‘traditional public fora.’ Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited.” (citations omitted)). When speaking directly to the public, the government may advocate for certain viewpoints without needing to abide by many of the constitutional restrictions associated with regulating private viewpoints. *Id.* at 467 (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”). In practice, it is often difficult to distinguish between government regulation of private viewpoints and government speech. *Id.* at 470; *Sons of Confederate Veterans, Fla. Div., Inc. v. Atwater*, No. 6:09-cv-134-Orl-28KRS, 2011 U.S. Dist. LEXIS 34104, at *13 (M.D. Fla. Mar. 30, 2011) (“The Supreme Court has yet to set forth a specific framework for differentiating government speech from private speech”); Norton, *supra* note 188, at 590 (“[D]istinguishing between private and governmental speech is not always easy. Courts often struggle with the challenge of parsing government expression from private expression”). Even though government speech is not subject to the constitutional restrictions contained in the Free Speech Clause, it may still be subject to other constitutional restrictions, including those contained in the Equal Protection Clause and the Establishment Clause. *See Sumnum*, 555 U.S. at 482 (Stevens, J., concurring) (“[G]overnment speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”); Norton, *supra* note 188, at 600.

210. 544 U.S. 550 (2005).

211. *Id.* at 554–55.

subsidize private speech to which they objected.²¹² Specifically, the plaintiffs complained that the campaigns promoted beef generically and impeded their ability to promote the superiority of specialty beef, e.g., “American beef” or “certified Angus beef.”²¹³

In a 6–3 decision, the Supreme Court held that the compelled subsidy was constitutional because it funded government speech rather than private speech.²¹⁴ The Supreme Court began by noting that compelled support of government speech—including objectionable government speech—“is of course perfectly constitutional, as every taxpayer must attest.”²¹⁵ Regarding the promotional campaigns themselves, the Supreme Court determined that they constituted government speech because they were “effectively controlled by the Federal Government itself.”²¹⁶ In support of this conclusion, the Supreme Court noted that the federal government dictated the “overarching message” of the campaigns, the Secretary of Agriculture had final approval authority over “every word” of the campaigns, the promotional materials were reviewed by USDA officials, and the federal government could rewrite the materials and attend meetings on the proposals as they were developed.²¹⁷ Because the compelled subsidy went to support government speech—which the plaintiffs had “no First Amendment right not to fund”—the plaintiffs’ First Amendment challenge to the promotional campaigns failed.²¹⁸

Government control is likewise a crucial factor in identifying state media. If a publication is written or otherwise controlled by the government—such as content produced by VOA—it is more likely to be state media. The inverse is also true: if a message is not written or otherwise controlled by the government, it is less likely to be state media.²¹⁹

As *Johanns* suggests, government control may arise in several forms.²²⁰ The most obvious form is when the state media agency is a part of the government itself—the State Department’s GEC, for example. Another is when the government controls the leadership of an organization,²²¹ such as the USAGM or RFE/RL. The government may also exercise control over private organizations through equity ownership, corporate voting rights, or contract. Additionally, government control

212. *Id.* at 556, 560.

213. *Id.* at 555–56.

214. *Id.* at 560–70.

215. *Id.* at 559.

216. *Id.* at 560–62, 566–67.

217. *See id.* at 561.

218. *Id.* at 562.

219. For example, a private citizen’s email to his colleagues urging them to adopt a point of view consistent with American foreign policy is probably not state media because the government is not controlling the content of the message. The private citizen is voicing a personal opinion.

220. *See Johanns*, 544 U.S. at 561.

221. *See id.* at 561, 564.

may exist over discrete publications (rather than over the publisher) if the government authors the materials or provides extensive editorial input.²²²

Though important, government control should not be the sole factor for identifying state media because state media may exist even when the message is not under direct government control.²²³ Conversely, there are instances where the government controls the message but the message does not implicate state media, such as many routine government budgetary reports. Consideration of other factors is, therefore, necessary.

B. Factor 2: Government Funding

Social media platforms such as YouTube, Facebook, and Twitter have become critical players not only in enabling the dissemination of state media but also in identifying to the public when a publication or media entity is funded by the government. YouTube has led the way with labeling state media videos via a Wikipedia integration feature that populates funding designations in the description below the video player.²²⁴ This feature was implemented in the wake of the 2016 U.S. presidential election when it was discovered that unattributed Russian state media such as Russia Today (RT) was used to sow disinformation amongst American voters.²²⁵ In a move that upset some, YouTube developed a policy and took a broad approach to labeling any media outlets that received government funding, including publicly funded media such as the U.S. Public Broadcasting Service (PBS).²²⁶ Even though it had a different designation than state media entities like RT, many were quick to point out that PBS was only partially funded by the U.S. government through grants and that labeling this broadcaster created an air of suspicion, given that purely independent media outlets such as CNN or Fox News received no such designation.²²⁷

222. *See id.* The examples listed in this paragraph are but a sampling of the different forms of government control; there are undoubtedly others.

223. Such examples include the 1987 State Department op-ed scandal and the 2018 Iran Disinformation Project controversy. *See supra* notes 144–45, 159 and accompanying text.

224. Gold, *supra* note 20.

225. Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html> [<https://perma.cc/SWN4-QS3C>].

226. Summer Meza, *PBS and Russia's RT Will Share Same Label as YouTube Tackles 'Fake News'*, NEWSWEEK (Feb. 2, 2018, 5:22 PM), <https://www.newsweek.com/youtube-tackles-fake-news-label-state-sponsored-videos-pbs-rt-798764> [<https://perma.cc/Y8QC-V7ND>].

227. Josh Horwitz, *YouTube's Latest Counter-propaganda Effort Lumps PBS with State Media from China and Russia*, QUARTZ (Feb. 4, 2018), <https://www.qz.com/1197968/youtubes-latest-counter-propaganda-effort-lumps-pbs-alongside-russias-rt-and-chinas-xinhua/> [<https://perma.cc/3EFF-9JWJ>]. This concern is misplaced, however, because YouTube's system accounts for different funding types. For example, NPR is listed as "An American Public Broadcasting Service," whereas RT publications are labeled with the following disclosure: "RT is funded in whole or in part by the Russian Government." *See, e.g.*, NPR, *How the U.S. Is Dealing with a Medical Supply Shortage*, YOUTUBE (Apr. 11, 2020), https://www.youtube.com/watch?v=f_Ej5XjYZqg [<https://perma.cc/QRM3->

In 2018, Facebook launched a political ads system that helped individuals view and track ads funded by the U.S. government and foreign governments.²²⁸ The political ad library (formerly referred to as an archive²²⁹) used an algorithm for filtering ads deemed “political,” which may or may not have contained a “paid by” label disclosure when the advertisement was launched. If an advertisement was later deemed “political” and did not contain a “paid by” disclosure, Facebook pulled down the advertisement and catalogued it.²³⁰

Facebook also has a labeling system for its pages that allows page administrators to differentiate between various types of media outlets. This labeling system, though, may have made it *more* difficult for the public to distinguish independent news sites from state-funded ones because they share the same labels. For example, RFE/RL (a state media outlet) and *The Guardian* (an independent media outlet) are both categorized as “Media/News Company.”²³¹ U.S. state media entity VOA, meanwhile, describes itself as a “Broadcasting & Media Production Company”—the same category used by publicly funded media entities like National Public Radio (NPR) and independent media entities like *The Washington Post*.²³² These labels are misleading not only because they lump all media entities together but also because the term “company” falsely implies that government-funded media entities such as RFE/RL and VOA are producing independent, unbiased journalism.²³³ These overinclusive labels and flawed social media governance create the impression that the source of funding is the same

RNYP]; RT Documentary, *Love You to Death: Testimonies of Domestic Violence Survivors*, YOUTUBE (Apr. 10, 2020), <https://www.youtube.com/watch?v=36hzpROxzX4> [<https://perma.cc/E5P7-CHV8>].

228. Natasha Singer, *Tech Giants Now Share Details on Political Ads. What Does That Mean For You?*, N.Y. TIMES (Sept. 2, 2018), <https://www.nytimes.com/2018/09/02/technology/03adarchive.html> [<https://perma.cc/3DKG-J7Y9>].

229. The changing terminology related to the Facebook ad library demonstrates that the ads database is not as exhaustive as the company purported it to be at launch. The term “library” indicates elective selection and curation as opposed to full and complete stable records that one would expect in an “archive.”

230. Changes to the Facebook ads archive have resulted in the removal of U.S. state media ads, including those ads that violated federal law as described in the July 2018 *New York Times* article and the Royce Report. By making these alterations to its archive, Facebook eliminated the documented violations of the Smith-Mundt Act by U.S. state media agencies.

231. *Radio Free Europe/Radio Liberty*, *supra* note 158; *The Guardian*, FACEBOOK, <https://www.facebook.com/ads/library> [<https://perma.cc/VA79-PB9L>] (search for “The Guardian” and select the @theguardian account) (last visited July 2, 2020).

232. NPR, FACEBOOK, <https://www.facebook.com/ads/library> [<https://perma.cc/VA79-PB9L>] (search for “NPR” and select the @NPR account) (last visited July 2, 2020); *Voice of America - VOA*, FACEBOOK, <https://www.facebook.com/ads/library> [<https://perma.cc/VA79-PB9L>] (search for “Voice of America - VOA” and select the @voiceofamerica account) (last visited July 2, 2020); *Washington Post*, FACEBOOK, <https://www.facebook.com/ads/library> [<https://perma.cc/VA79-PB9L>] (search for “Washington Post” and select the @washingtonpost account) (last visited July 2, 2020).

233. As part of the page verification process, Facebook should consider requiring governments to select appropriate categories to ensure that the category representing their page adequately discloses that they are a government entity.

across state media, independent media, and public media, and that the editorial independence and reliability of the information is comparable.²³⁴

Twitter has taken similar steps to Facebook.²³⁵ In 2019, Twitter announced that it would no longer accept advertising from “state-controlled news media entities” in response to the platform identifying more than 900 accounts originating from the People’s Republic of China that were part of a coordinated effort to undermine political protests in Hong Kong.²³⁶ But Twitter’s broad definition of state media, which ostensibly included all media “[c]ontrol[led] by state authorities [that] entails lack of financial or editorial independence,”²³⁷ contained hidden limitations.²³⁸ U.S. state media, such as VOA and RFE/RL, were exempted from Twitter’s state media policy for reasons that were not entirely clear.²³⁹

234. In June 2020, Facebook introduced new labels under their state-affiliated policy in the “Ad Library Page view, on Pages, and in the Page Transparency section.” Nathaniel Gleicher, *Labeling State-Controlled Media on Facebook*, FACEBOOK (June 4, 2020), <https://www.about.fb.com/news/2020/06/labeling-state-controlled-media/> [https://perma.cc/CC3P-2Z]Q]. Unlike YouTube’s policy, Facebook’s provides exemptions based on “editorial independence” and does not apply to U.S. state media such as VOA. *Id.* These changes have prompted legal challenges from state media outlets that are displeased with their state media designations. Radsch, *supra* note 22; Samuel Rebo, *Facebook, FARA and Foreign Media*, LAWFARE (Sept. 16, 2020, 12:58 PM), <https://www.lawfareblog.com/facebook-fara-and-foreign-media> [https://perma.cc/Z4CM-LMTC].

235. Twitter, Inc., *supra* note 22. Limited exceptions include sports, travel, and tourism content. *Id.* This change followed a company announcement claiming that the Chinese government had used Twitter to influence political protests in Hong Kong. Twitter Safety, *Information Operations Directed at Hong Kong*, TWITTER: CO. BLOG (Aug. 19, 2019), https://blog.twitter.com/en_us/topics/company/2019/information_operations_directed_at_Hong_Kong.html [https://perma.cc/84GZ-C67N]. In this announcement, Twitter specifically deemed that the Chinese government’s activities were a “state-backed information operation.” *Id.*

236. Twitter, Inc., *supra* note 22; Twitter Safety, *supra* note 235.

237. *State Media*, TWITTER: BUS., <https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/state-media.html> [https://perma.cc/SJ6M-HZV9] (last visited Oct. 25, 2019).

238. *Id.* The company also carved out an exemption for accounts that are dedicated to entertainment, sports, or travel. *Id.*

239. Ryan Mac (@RMac18), TWITTER (Aug. 20, 2019, 11:10 AM), <https://www.twitter.com/rmac18/status/1163875943540150273?s=20> [https://perma.cc/XX8U-L5C]; Angela Chen, *Twitter’s State-Media Ban Should Include Voice of America*, MIT TECH. REV. (Aug. 20, 2019), <https://www.technologyreview.com/2019/08/20/133614/twitter-advertising-disinformation-ban-voice-of-america-state-media-china-xinhua-protest/> [https://perma.cc/M9EB-YN CZ]. Facebook later followed suit with similar policies restricting state-funded and state-controlled policies. Adi Robertson, *Facebook Starts Labeling ‘State-Controlled Media’ Pages*, VERGE (June 4, 2020, 1:52 PM), <https://www.theverge.com/2020/6/4/21280542/facebook-state-controlled-media-account-post-label-election-interference-ads-rt> [https://web.archive.org/web/20201009232559/https://www.theverge.com/2020/6/4/21280542/facebook-state-controlled-media-account-post-label-election-interference-ads-rt]. Like Twitter, this policy carved out exemptions for U.S. state media, this time based on their alleged independence from “the editorial control of their government.” *See id.*; Press Release, Voice of America, VOA Director’s Statement on VOA’s Exclusion from Facebook’s News Content Labeling Policy (June 5, 2020), <https://www.insidevoa.com/a/voa-director-s-statement-on-voa-s-exclusion-from-facebook-s-news-content-labeling-policy-/5450932.html> [https://perma.cc/46WV-4VJP]. This exemption may be revisited following questions regarding U.S.-state-media independence in the wake of the mass-firing of U.S.-state-media heads by the newly appointed CEO of the USAGM. *See supra* notes 118–24 and accompanying text.

Twitter's decision to exempt U.S. state media entities from a state media classification creates information asymmetry for social media consumers. State media from foreign countries, such as China and Russia, is flagged, limited, or blocked when appearing on social media platforms.²⁴⁰ This disparity in treatment not only gives U.S. state media agencies an advantage over their foreign rivals but also allows U.S. state media to avoid detection by social media users; because U.S. state media is readily accessible and lack the appropriate state media labels, users may assume that these materials constitute independent news.

Despite challenges surrounding implementation,²⁴¹ social media companies like YouTube, Facebook, and Twitter are correct that government funding is an indicator of state media. If an independent media entity accepts funds from the government, it is more likely that it will endorse that government's viewpoints. Pursuant to the terms of the funding arrangement, the government may require the entity to promote certain government policies. Even if this condition is not present, an independent media entity may voluntarily take a progovernment stance in the hopes of receiving future funding.

Although perhaps only a handful of the many U.S. and foreign organizations that receive government funding should be classified as state media entities, those that do receive government funding ought to be closely examined. Several state media organizations, such as RFE/RL and the now-defunct Iran Disinformation Project,²⁴² are predominantly government funded but are technically "independent" organizations.²⁴³ The U.S. government has also attempted to assume different identities by outsourcing and collaborating with independent journalists.²⁴⁴ For

240. See *supra* Section IV.B. This imbalance of power is also drawing the ire of countries around the world. This may lead to the partitioning of the open web by competing governmental firewalls.

241. In August 2020, the Committee to Protect Journalists (the CPJ) acknowledged the challenges facing independent media platforms when labeling state media outlets. Radsch, *supra* note 22. The CPJ noted that "[d]etermining the level of state interference in a given media outlet requires considerable expertise," and that media platforms were adopting definitions that could carry the "potential to reduce the visibility of select media outlets, their ability to advertise, and how audiences encounter their work on social media." *Id.* The CPJ also interviewed a Facebook official who noted that there is "no such thing as a collectively agreed upon definition" for state media. *Id.* Similarly, Sally-Ann Wilson, Chief Executive Officer of the Public Media Alliance, a global association of public media broadcasters such as PBS, acknowledged difficulties surrounding VOA's media classification. Email from Sally-Ann Wilson, Chief Exec. Officer, Pub. Media All., to Jennifer Grygiel, Assistant Professor of Commc'ns, S.I. Newhouse Sch. of Pub. Commc'ns (Aug. 3, 2020) (on file with authors). Wilson stated in correspondence that she could not "pre judge" whether VOA would be considered public media because VOA had not applied to be a member of the Alliance and applications need to be reviewed by the Alliance's board. *Id.* Strangely, however, in a CPJ article published days later, it was noted that Wilson considers VOA to be a public media entity. Radsch, *supra* note 22 ("The [Public Media] Alliance considers VOA public media, Wilson said.").

242. See *supra* notes 118, 144.

243. This is another U.S. government strategy that masks its control much like the practice of hosting VOA's website on a ".com" website domain, as opposed to a government website domain (e.g., ".gov"), which makes it more difficult for the public to understand that they are viewing state media.

244. This strategy also helps to build credibility for its state media outlets through affiliation and helps the government reach new audiences.

example, ProPublica, an independent investigative journalism website, copublished a story about a New York City sanitation criminal investigation with VOA in May 2018.²⁴⁵ If funding was not included as a factor in identifying state media, such public-private collaborations could provide a loophole for U.S. state media agencies to exploit.²⁴⁶

Just how much government funding is required to tip the scales from independent media to state media will vary. A rule mandating a certain dollar amount or a certain percentage of annual revenue could be both overinclusive and underinclusive. A multibillion-dollar media company is unlikely to scoff at losing a million dollars in government funding, and a nonprofit organization with a large endowment but low annual income probably would not be concerned about forfeiting its yearly government grant—even if that grant constitutes the majority of its annual fundraising total. The crucial factor is not how much government funding is received but rather how dependent the private organization or individual is on the funding.²⁴⁷ The more likely the withdrawal of government funding would result in a financial crisis for the private organization or individual, the more likely such an organization or individual is to espouse the government’s viewpoints.²⁴⁸

245. Keira Feldman, *Treated like Trash*, VOA (May 4, 2018, 9:30 PM), <https://www.voanews.com/usa/treated-trash> [<https://perma.cc/NXY9-PVEH>]; Keira Feldman, *Treated like Trash*, PROPUBLICA (May 4, 2018, 9:30 PM), <https://www.propublica.org/article/treated-like-trash> [<https://perma.cc/YPU5-NWQ9>]; *About Us*, PROPUBLICA, <https://www.propublica.org/about/> [<https://perma.cc/AZ89-UX9V>] (last visited Aug. 10, 2019). The compensation of political commentators during the George W. Bush administration is another instance of such conduct. Dep’t of Def., B-316443, 2009 WL 2152305, at *1–2 (Comp. Gen. July 21, 2009).

246. Co-publishing with U.S.-focused outlets may violate the Smith-Mundt Act, which requires that USAGM content be distributed abroad prior to domestic dissemination. 22 U.S.C. § 1461(b)(1).

247. This could include, for example, struggling newsrooms that accept government funding through federal coronavirus relief loan programs. Kelly McBride & Rick Edmonds, *Many News Organizations Will Cast Aside Historic Taboos and Apply for Federal Money. Will They Need a Whole New Set of Ethics?*, POYNTER (Apr. 3, 2020), <https://www.poynter.org/ethics-trust/2020/many-news-organizations-will-apply-for-federal-money-is-this-the-first-step-to-government-support-for-local-news/> [<https://perma.cc/ZTM7-2UGD>]. Media entities may also become dependent on federal advertising money. *See, e.g.*, Brian Fung, Ryan Nobles & Kevin Liptak, *Trump Signs Executive Order Targeting Social Media Companies*, CNN: POL. (May 28, 2020, 9:22 PM), <https://www.cnn.com/2020/05/28/politics/trump-twitter-social-media-executive-order/index.html> [<https://perma.cc/899P-MM3J>] (describing how the Trump administration attempted to apply financial pressure to social media companies by banning federal agencies from buying social media advertising on platforms that allegedly did not conduct business in good faith).

248. Using this approach, certain organizations that rely in part on U.S. government-funded grants, such as PBS and NPR, would not necessarily be considered state media. Although federal grants make up a significant portion of the PBS and NPR budgets, most of their funding comes from other sources. Laura Kirchner, *Don’t Forget the Facts About NPR Funding*, COLUM. JOURNALISM REV. (Oct. 28, 2010), https://archives.cjr.org/behind_the_news/dont_forget_the_facts_about_np.php [<https://perma.cc/A9Z2-HDEE>]; Madhulika Sikka, *How Do Federal \$\$\$ Get to Your Local Station?*, PBS, <https://www.pbs.org/publiceditor/blogs/pbs-public-editor/how-do-federal-get-to-your-local-station/> [<https://perma.cc/VJ8P-PLF7>] (July 6, 2020). This is not the case for state media agencies such as VOA and RFE/RL, which receive all or substantially all their funding from the federal government. Nonetheless, due to their annual receipt of federal funds, organizations like PBS and NPR

C. Factor 3: Attribution

The U.S. government sometimes chooses not to identify itself when it speaks. Supreme Court Justice David Souter examined this issue in the government speech doctrine cases *Johanns v. Livestock Marketing Association*²⁴⁹ and *Pleasant Grove City v. Summum*.²⁵⁰ Although Justice Souter was not concerned with the presence of state media in these cases, his reasoning provides insight into why government attribution (or the lack thereof) should be considered when defining and identifying state media.

In *Johanns*, plaintiffs sued the federal government arguing that certain governmental promotional campaigns for beef were unconstitutional under the First Amendment because they compelled them to subsidize speech with which they disagreed.²⁵¹ The federal government attributed many, but not all, of their marketing efforts with “Funded by America’s Beef Producers” and the Beef Board logo—a checkmark with the word “BEEF.”²⁵² However, few (if any) of the promotional messages disclosed that “America’s Beef Producers” were, in fact, a state-funded-and-controlled arm of the federal government.²⁵³

Even though the government did not attribute its involvement in the promotional campaigns, the Supreme Court majority held that the promotional campaigns were government speech not subject to certain First Amendment restrictions because the government controlled the message.²⁵⁴ Although acknowledging that the promotional campaigns ought to be subject to democratic accountability, the majority believed there were adequate “political safeguards” in

should be scrutinized because they have rebroadcast U.S. state media programming in the past. For example, in 1982, 142 PBS affiliates chose to air a USIA-produced documentary entitled *Let Poland Be Poland* coinciding with President Reagan’s public support of the Polish solidarity movement. MANNING & ROMERSTEIN, *supra* note 2, at 164–65; *see also id.* at xlv (“1982 (January 31)—Expensive USIA TV production *Let Poland be Poland*, hosted by Frank Sinatra, was televised on January 31 to support Polish people under martial law. Fifteen world leaders, among them British Prime Minister Margaret Thatcher, came together to offer courage and concern. Under H.J. Resolution 382, Congress allowed the film to be shown in the United States.”).

249. 544 U.S. 550, 570–580 (2005) (Souter, J., dissenting); *supra* Section IV.B. This factor also is addressed in the so-called “covert propaganda” restriction often contained in federal appropriations bills. *See, e.g.*, Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7055, 125 Stat. 786, 1243–44 (2011); Pierce, *supra* note 169, at 430; Env’t Prot. Agency, B-326944, 2015 WL 8618591, at *6–8 (Comp. Gen. Dec. 14, 2015). As interpreted by the GAO, this restriction prohibits “communications that fail to disclose the [government] agency’s role as the source of the information.” Env’t Prot. Agency, 2015 WL 8618591 at *7. The GAO considers the government’s intent to conceal its involvement immaterial—the only factor is whether the government’s involvement can be readily identified. Pierce, *supra* note 169, at 432. Over the last three decades, the GAO has found numerous “covert propaganda” violations across various federal agencies. *See supra* Part II.

250. 555 U.S. 460, 485 (2009) (Souter, J., concurring).

251. *Johanns*, 544 U.S. at 555–56 (majority opinion).

252. *Id.*

253. *See id.* at 555, 564.

254. *Id.* at 564 n.7 (“[T]he correct focus is not on whether the ads’ audience realizes the Government is speaking, but on the compelled assessment’s purported interference with respondents’ First Amendment rights.”); *see supra* section IV.A.

place: (1) the promotional campaigns were authorized and governed by a federal statute, (2) the “specific requirements for the promotions’ content . . . imposed by federal regulations” had a notice and consent period, (3) the Secretary of Agriculture, who oversaw the campaigns, was “a politically accountable official,” and (4) Congress had “oversight authority” and “the ability to reform the program at any time.”²⁵⁵ According to the Supreme Court majority, “[n]o more [was] required.”²⁵⁶

Justice David Souter, Justice Anthony Kennedy, and Justice John Stevens disagreed. Justice Souter, writing for the three dissenting justices, argued that the government should benefit from the government speech doctrine only if it attributes its speech:

[T]he government must put [its] speech forward as its own. Otherwise there is no check whatever on [the] government’s power [The] government can make an effective disclosure *only by explicitly labeling the speech as its own*.

. . . .

. . . It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them.²⁵⁷

The dissent stressed that government attribution was particularly important in the context of *Johanns*. A member of the public was unlikely to think that the promotional campaigns for beef originated from the government because the U.S. government was simultaneously advocating for *and* against Americans’ consumption of red meat.²⁵⁸ Further, the dissent argued, the federal government’s involvement in product marketing was inherently disorienting, writing “[n]o one hearing a commercial for Pepsi or Levi’s thinks Uncle Sam is the man talking behind the curtain,” and “[w]hy would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?”²⁵⁹

Four years later, Justice Souter again advocated for government attribution of its speech. In his concurrence to *Pleasant Grove City v. Summum*, he wrote the following: “[T]he government should lose when the character of the speech is at issue and its governmental nature has not been made clear”²⁶⁰ Justice Souter argued that the proper test should be “whether a *reasonable and fully informed observer* would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.”²⁶¹ Not only would this approach

255. *Johanns*, 544 U.S. at 563–64.

256. *Id.* at 564.

257. *Id.* at 571–72, 578 (Souter, J., dissenting) (emphasis added). Legal academics have made similar arguments. *See, e.g.*, Norton, *supra* note 188, at 598–601.

258. *Johanns*, 544 U.S. at 577.

259. *Id.* at 577–78.

260. 555 U.S. 460, 485 (2009) (Souter, J., concurring).

261. *Id.* at 487 (emphasis added).

promote government accountability, Justice Souter reasoned, but also it would align with the analysis “for spotting forbidden governmental endorsement of religion in the Establishment Clause cases.”²⁶²

Lower courts have by and large adopted the control test established by the Supreme Court majority in *Johanns*, but some have endorsed Justice Souter’s proposed “reasonable observer test” for government speech.²⁶³ Sixth Circuit Judge Boyce Martin, Jr. in his dissent to *Kidwell v. City of Union*, for example, argued that “the government, when it speaks, ought to be required to make clear that it is in fact the government that is speaking . . . to prevent confusion and subliminal government propaganda in the marketplace of ideas.”²⁶⁴ In 2014, the Fifth Circuit held that specialty Texas state license plates designed by Texas citizens were not government speech because the average observer would believe them to be expressions of private individuals.²⁶⁵ Even though the Supreme Court later overturned the Fifth Circuit’s decision,²⁶⁶ the Fifth Circuit’s unwillingness to abide strictly by the *Johanns* majority’s control test indicates that a judicially imposed attribution requirement for government speech remains a possibility.

Governmental attribution is likewise an important consideration when analyzing state media. When state media is anonymous, or worse, misattributed to a nongovernmental source,²⁶⁷ the potential impact on (and harm to) society is

262. *See id.* at 485–87; *Cressman v. Thompson*, 798 F.3d 938, 958 (10th Cir. 2015) (“In cases construing the Establishment Clause, courts have frequently employed the reasonable-observer test to discern ‘whether a “reasonable observer,” aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval of religion.’” (quotation omitted)).

263. *See, e.g.,* *A.N.S.W.E.R. Coal. v. Jewell*, 153 F. Supp. 3d 395, 413 (D.D.C. 2016); *Nat’l Ass’n of Mfrs. v. Perez*, 103 F. Supp. 3d 7, 15 n.4 (D.D.C. 2015); *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 338 n.16 (1st Cir. 2009) (Torruella, J., concurring in part and dissenting in part); *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir. 2009); *see also* *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008).

264. 462 F.3d 620, 627 n.1 (6th Cir. 2006) (Martin, J., dissenting). State courts have also addressed the issue of government speech attribution. In *Gallo Cattle Co. v. Kawamura*, for example, a California Court of Appeal entertained the idea of a “disclosure requirement” that would make “government speech . . . subject to the check of the political process.” 72 Cal. Rptr. 3d 1, 10–12 (Ct. App. 2008). In a similar vein, the California Supreme Court noted in a 2018 decision that attribution should be a factor in determining whether speech should be attributed to the government for First Amendment purposes. *Delano Farms Co. v. Cal. Table Grape Comm’n*, 417 P.3d 699, 724 (Cal. 2018). Nevertheless, both courts were skeptical that a government attribution requirement was needed to address government accountability issues. *See id.; Gallo Cattle Co.*, 72 Cal. Rptr. 3d at 10–12.

265. *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 394 (5th Cir. 2014), *rev’d*, 576 U.S. 200 (2015).

266. The U.S. Supreme Court relied primarily on the *Johanns* control test in holding that the specialty license plates were, in fact, government speech. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 205, 207, 212–13 (2015).

267. The U.S. Supreme Court has signaled that misattribution (i.e., speaking under the guise of another, typically private, entity) is off limits:

The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under

amplified. In such scenarios, the public does not know it is interfacing with the government, which strips citizens' ability to formulate unbiased opinions free from government influence and hold their elected officials accountable. Surreptitious government publications threaten the "free marketplace of ideas" and endow the government with enormous power to covertly influence public discourse. Consequently, when the source of the government publication is unattributed such that it cannot be identified by a reasonable observer, it weighs in favor of a state media classification.

D. Factor 4: Intent to Influence

The Smith-Mundt Act is the foundational piece of legislation for U.S. state media operations after World War II.²⁶⁸ Generally speaking, the Smith-Mundt Act enabled the State Department and other government agencies to disseminate U.S. state media abroad while prohibiting them from disseminating these materials domestically.²⁶⁹

Even though the Smith-Mundt Act's ban on the domestic dissemination of U.S. state media was repealed in 2013,²⁷⁰ safeguards remain. These include statutory requirements that the USAGM and State Department abide by the following limitations: (1) provide their state media to the public only "upon request,"²⁷¹ (2) ensure that the state media is intended for a foreign audience,²⁷² (3) not duplicate the actions of independent broadcasters,²⁷³ and (4) not attempt to influence public opinion in the United States.²⁷⁴ Taken together, these surviving protections provide some defense against the U.S. government targeting Americans with influential content.²⁷⁵

These Smith-Mundt Act restrictions survived because U.S. state media has

the government's control. This principle follows not only from our cases establishing that the government may not compel individuals to convey messages with which they disagree, but also from our expressive-association cases, which prohibit the government from coercively associating individuals or groups with unwanted messages.

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 568 (2005) (Thomas, J., concurring) (citations omitted); see also *Charter v. U.S. Dep't of Agric.*, 412 F.3d 1017 (9th Cir. 2005); *Gallo Cattle Co.*, 72 Cal. Rptr. 3d at 10–12.

268. See *supra* Section I.B.

269. See *supra* Section I.B.

270. See *supra* Section I.C.

271. 22 U.S.C. § 1461(b)(1).

272. *Id.*

273. *Id.* § 6202(a)(3).

274. *Id.* § 1461-1a(a). This prohibition is related to the restriction against cultivating a domestic audience, and the two are considered together for purposes of this analysis. *Id.* § 1461(b)(1). Notably, there are multiple exceptions and carve-outs to this particular restriction, rendering the influence prohibition toothless under current law. See Sager, *supra* note 7, at 533–34.

275. The persistence of legal limitations on U.S. state media indicates that lawmakers still understand the risks associated with the domestic dissemination of U.S. state media, and makes clear that the USAGM and State Department ought not to influence public discourse in the United States through their outlets, publications, content, and communications.

inherent risks.²⁷⁶ Although some have likened U.S. state media to independent journalism, they are fundamentally different: independent media outlets strive to report the facts to fully inform the public, whereas U.S. state media outlets strive to report those facts that strengthen public support for government policy objectives.²⁷⁷

The “intent to influence” factor consists of two components—“intent” and “influence.” “Intent” is determined by looking at the government’s distribution methods. If the government is *targeting* individuals and organizations with state media, this supports a state media classification because the government is seeking to change how certain people perceive certain issues.

“Influence” is a different consideration, one that requires examining the publication’s subject matter.²⁷⁸ U.S. state media agencies, like state media agencies of other countries, often describe and analyze current events in a form resembling news articles.²⁷⁹ This type of content has been widely adopted because it is effective at influencing people’s opinion on current issues of public importance.²⁸⁰ Older publications and publications that have little relation to current events of public importance are less likely to influence how people perceive government policies.²⁸¹

276. The risk remains even if state media outlets employ journalistic principles and ethics akin to those employed independent media outlets. See *SPJ Code of Ethics*, SOC’Y PRO. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/N7LJ-X28D>].

277. See 22 U.S.C. § 1431 (“The Congress declares that the objectives of this chapter are to enable the Government of the United States to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries.”). During the Cold War, the U.S. government employed state media to combat the Soviet Union. U.S. state media outlets broadcast to the Soviet Bloc and other areas of strategic importance, and the Soviets in turn attempted to jam these signals. See *supra* note 64 and accompanying text.

278. This factor does not require determining how influential the content is or is not. Such an analysis could lead to inconsistent identification because content that may seem influential to one person may not seem influential to another. For example, Internet memes (e.g., images with text overlays) are difficult to classify and decipher as they are created using symbols and visual rhetoric (e.g., cowboy hats, flags), which may contain encoded meanings and alternate interpretations. See Nitasha Tiku, *How Russia ‘Pushed Our Buttons’ with Fake Online Ads*, WIRED (Nov. 3, 2017, 7:00 AM), <https://www.wired.com/story/how-russia-pushed-our-buttons-with-fake-online-ads/> [<https://perma.cc/LGP6-NABF>].

279. E.g., VOA, <https://www.voanews.com> [<https://perma.cc/XLZ7-3A8Q>] (last visited Jan. 10, 2020); see also Twitter, Inc., *supra* note 22 (defining state media as “news media” that are “either financially or editorially controlled by the state”).

280. See Vincent, *supra* note 22, at 44–45; Kosar, *supra* note 22, at 793.

281. But this does not mean that state media may consist only of trending news. State media could also seek to impact current events by recasting relevant historical events. For example, RFE/RL has published new historical works about U.S.-Soviet relations that depict America in a favorable light. See, e.g., Carlos Coelho, *Why the Soviets Never Landed a Man on the Moon*, RADIO FREE EUR./RADIO LIBERTY (July 8, 2019, 2:23 PM), <https://www.rferl.org/a/why-the-soviets-never-landed-on-the-moon/30043556.html> [<https://perma.cc/D59Q-PKBQ>]. On the other side, the Russian government’s 2015 documentary on Czechoslovakia portrays past Soviet events in a favorable manner. Andrew Pulver, *New Russian Invasion Documentary Dismays Czech and Slovak Governments*, GUARDIAN (June 2, 2015, 8:25 AM), <https://www.theguardian.com/film/2015/jun/02/new-russian-invasion->

This is why, in 1990, Congress allowed Americans to access U.S. state media published at least twelve years earlier.²⁸² Congress believed that older state media had lost its ability to influence current events and should be available to Americans for academic and historical research.²⁸³

The “intent to influence” factor helps distinguish state media from other, innocuous government publications. A state media classification may be appropriate when the government targets certain groups with its content or when it publishes content about current issues of public importance.²⁸⁴ But when the government publishes content without concurrent promotion (such as many pieces of federal legislation), or when the content does not address current issues of public importance (such as the construction of a historical monument commemorating the Revolutionary War), this weighs against a state media classification. Without consideration of the government’s intent to influence, a legal test for defining and identifying state media would risk being overinclusive.

V. A PROPOSED LEGAL TEST FOR DEFINING AND IDENTIFYING STATE MEDIA

Despite documented U.S. government misconduct²⁸⁵ and foreign government-backed disinformation campaigns²⁸⁶ on social media and elsewhere,

documentary-dismays-czech-slovak-governments [https://perma.cc/WL8U-PXNJ]. Although these pieces have a historical focus, they are positioned to impact current events (i.e., the tumultuous American-Russian relations under the Trump administration) and should be classified as state media. In rare occasions, state funds may be focused on long-term changes to culture, such as the funding of artworks and exhibits for successive generations. *See, e.g.*, Frances Stonor Saunders, *Modern Art Was CIA ‘Weapon,’* INDEP. (Oct. 22, 1995, 12:02 AM), <https://www.independent.co.uk/news/world/modern-art-was-cia-weapon-1578808.html> [https://web.archive.org/web/20201029144333/https://www.independent.co.uk/news/world/modern-art-was-cia-weapon-1578808.html]. Such programs may also be considered state media even though they are not intended to have an immediate impact on public opinion.

282. *See* Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, § 202, 104 Stat. 15, 49 (1990); *supra* Section I.C.

283. *See* Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 § 202; *supra* Section I.C.

284. A state media classification may be warranted even when the outlet in question is publishing true stories and ostensibly has editorial independence. Even under these circumstances, the outlet may still be seeking to convince the public to adopt a certain point of view. *See generally* Edson C. Tandoc, Jr., Zheng Wei Lim & Richard Ling, *Defining “Fake News”: A Typology of Scholarly Definitions*, 6 DIGIT. JOURNALISM 137 (2018).

285. *E.g.*, ROYCE, *supra* note 16; ROOSE, *supra* note 6; *supra* notes 144–46 and accompanying text.

286. *E.g.*, Tom McKay, *Facebook Suspends Three Pages with Millions of Video Views, Saying They Need to Disclose Russia Ties*, GIZMODO (Feb. 16, 2019, 8:45 PM), <https://www.gizmodo.com/facebook-suspends-three-pages-with-millions-of-video-vi-1832679030> [http://web.archive.org/web/20201029060117/https://www.gizmodo.com/facebook-suspends-three-pages-with-millions-of-video-vi-1832679030]; Andrew Buncombe, *Facebook Takes Down First Covert Propaganda Campaign Tied to Saudi Government*, INDEP. (Aug. 1, 2019, 1:10 PM), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-saudi-arabia-government-campaign-cyber-security-a9034796.html> [https://web.archive.org/web/20200607004057/https://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-saudi-arabia-government-campaign-cyber-security-a9034796.html].

there remain few tools to help identify and manage state media.²⁸⁷ Complicating matters is that individuals and organizations in the public and private sectors are employing varying definitions of state media,²⁸⁸ resulting in confusion, inconsistent identification, and sporadic enforcement.²⁸⁹

A comprehensive, apolitical legal test for defining and identifying state media that can be used by all, from Washington, D.C., to Silicon Valley, California, is an important first step in establishing the necessary framework for monitoring and regulating state media. Incorporating the factors analyzed in Part IV, the following working legal test is intended to be used for defining and identifying state media in various applications:

State media may exist in any medium, including but not limited to written, oral, analog, and digital media, and including but not limited to news, journalism, criticism, comment, video broadcasts, audio broadcasts, scholarship, entertainment, and research.

The following factors shall weigh in favor of a finding of state media—

- (1) the presence and the degree of government control over the entity that produced the content or over the content itself;
- (2) the presence and the amount of government funding for the entity that produced the content or for the content itself;
- (3) if the entity that produced the content or the content itself fails to attribute and disclose the government's control or support; and
- (4) if the entity that produced the content targets certain groups with its content or if it publishes content about current issues of public importance.

The fact that content is produced by an individual or organization without government affiliation shall not itself bar a classification of state media if such finding is made upon consideration of all the above factors.²⁹⁰

287. Social media companies have begun to implement state media definitions and policies, but these measures are often unreliable. *See* Twitter, Inc., *supra* note 22; Roose, *supra* note 6; Gold, *supra* note 20. Regardless, relying on corporations such as Twitter to create their own tests for determining state media is risky, particularly if they are dependent on state media agencies for advertising revenue. Currently, the public is often left with discretionary corporate social responsibility (CSR) policies as the primary motivator for safe products. Jennifer Grygiel & Nina Brown, *Are Social Media Companies Motivated to Be Good Corporate Citizens? Examination of the Connection Between Corporate Social Responsibility and Social Media Safety*, 43 TELECOMMS. POL'Y 445 (2019).

288. *E.g.*, *supra* Part IV; Gold, *supra* note 20.

289. *See, e.g.*, Radsch, *supra* note 22.

290. This test relies upon the fair use test as a framework:

Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

There are several advantages to adopting the above legal test instead of relying on the numerous state media definitions currently in existence:

1. *Flexible.* The factor test above can accommodate a wide variety of circumstances. This is essential for evaluating a concept as amorphous and varied as state media. Mass communications have developed rapidly and unpredictably over the past century, evolving from slower analog media such as newsprint and radio to high-speed digital transmission via the Internet and social media. A test that can incorporate all forms of media is crucial to prevent state actors from exploiting new technology to bypass a state media classification.²⁹¹

2. *Comprehensive.* The varied and vague definitions currently used to define and identify state media have been exploited by competing interests to promote disparate agendas and motives.²⁹² Having a singular functional legal test will help develop a shared understanding regarding state media and help eliminate government manipulation of ambiguity.

3. *Objective.* To the extent possible, none of the factors for the proposed legal test requires the subjective “I know it when I see it”²⁹³ approach that often accompanies content analysis. Tests that rely on subjective criteria may produce inconsistent results depending on the biases of the evaluator—particularly where, as is often true for state media, the content at issue is political or provocative. The above test attempts to sidestep this subjectivity issue by employing an evenhanded approach and by relying on neutral considerations.

4. *Adaptable.* The federal judiciary, independent media companies, and federal regulatory bodies are all capable of adopting the legal identification test described above. Implementing this test through some combination of legislation, common

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107. Using this test as a framework is consistent with existing academic literature on identifying patterns of media ownership by the government. *See WHO OWNS THE MEDIA?: GLOBAL TRENDS AND LOCAL RESISTANCES* (Pradip N. Thomas & Zaharom Nain eds., 2004) (noting that methods of government media ownership include, *inter alia*, legislation, government media licenses, elected officials, and purchase of a significant amount of advertising). Additionally, at least one scholar has looked to intellectual property law in the context of analyzing state media. *See, e.g., Norton, supra* note 188, at 611–18.

291. Of course, flexibility can also introduce “unpredictability” to the test’s application—at least until the factors have been applied repeatedly to real-world situations. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 551 (2008). But this is still preferable to a rigid rules-based test that can be easily circumvented.

292. *See* Agustín Vicente, *Polysemy and Word Meaning: An Account of Lexical Meaning for Different Kinds of Content Words*, 175 PHIL. STUD. 947, 948 (2018).

293. *See, e.g., Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (analyzing pornographic material).

law, and private industry corporate policy would provide federal agencies and independent media companies the clarity necessary to consistently identify, regulate, and manage state media.

5. *Foundational.* Since the repeal of the U.S. state media domestic dissemination ban in 2013, the federal government has been caught illegally disseminating state media within the United States on several occasions. Although U.S. state media should be accessible by Americans for academic research and other limited purposes,²⁹⁴ in order to protect the free and independent press, these materials should not be disseminated directly to the public or be employed to influence public discourse surreptitiously. The widespread use and acceptance of a comprehensive state media legal identification test like the one above may lead to the enactment of additional laws, regulations, and policies that require attribution of U.S. state media and provide meaningful penalties when the U.S. government illegally targets Americans with its state media.

CONCLUSION

The U.S. government is a large, well-funded, and powerful media entity with an innate desire to promote its policies. Without effective oversight to identify, monitor, and regulate U.S. state media, the federal government will continue to have enormous power to influence American public opinion.

This is not a theoretical problem. The 2013 repeal of the Smith-Mundt Act's domestic dissemination ban gave the U.S. government more freedom to broadcast its state media within the United States. Since then, federal agencies have been repeatedly caught targeting Americans with state media beyond legal limitations.

Oversight of U.S. state media agencies must be enhanced to prevent the federal government from entrenching itself in the American media landscape. Although foreign disinformation campaigns pose a threat to free public discourse, this issue does not justify allowing the federal government to freely manipulate public opinion within the United States.

Unlike other state media definitions and tests, which are narrow in focus and rely upon subjective criteria, this Article sets forth a comprehensive legal test that relies on objective criteria currently employed by the federal government and independent media platforms. This test should be widely adopted to help define and identify state media consistently, accurately, and effectively across the public and private sectors. It is crucial for the American people to know when Uncle Sam is communicating with them. Without this knowledge, the free and independent

294. See United States Information and Educational Exchange Act of 1948, Pub. L. No. 80-402, § 501, 62 Stat. 6, 10 ("Any such press release or radio script, on request, shall be available in the English language at the Department of State, at all reasonable times following its release as information abroad, for examination by representatives of United States press associations, newspapers, magazines, radio systems, and stations, and, on request, shall be made available to Members of Congress.").

marketplace of ideas could well become much less free and independent in the coming years.

