Restrictions on Influencing a Domestic Audience
Applicable to the Department of Defense

Historically, at least over the last fifty years, both as a legal and prudential matter, the position of executive branch lawyers generally has been to deny the existence of authority to engage in activities intended to influence a domestic audience. Notwithstanding the absence of an explicit statutory provision applicable to the Department of Defense (DoD), the long-standing view is that it is contrary to law for the Department to undertake operations intended to influence a domestic audience. With respect to the Department of Defense, the term "influence," encompasses much of the activities subsumed under Information Operations. While the term "domestic audience" has generally been thought of in contradistinction to a foreign audience, but for the sake of simplicity has been descriptive of and confined to persons residing within the territory of the United States.

The conclusion that DoD is banned from engaging in domestic influence operations is derived from the consideration of specific statutory provisions on the one hand and the absence of statutory authority on the other. Regarding the former, where Congress has addressed the propriety of influencing a domestic audience, it has spoken with a clear voice.

The Smith-Mundt Act of 1948, (Pub. L. No. 80-402, 62 Stat. 6 (1948)) among other things, created the means for the U.S. "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." The Smith-Mundt Act, however, not only promotes dissemination of truthful information, but it also restricts dissemination of government propaganda to Americans. As originally written in 1948, the act did not contain an explicit ban on domestic dissemination of U.S. propaganda. Rather, it authorized the Secretary of State to prepare and disseminate information about the United States through "press, publications, radio, motion pictures, and other information media…" After some period of uncertainty on the subject of domestic dissemination, the Act was amended in 1972 to include "a blanket provision barring [domestic] public distribution of any and all materials produced by the United States Information Agency (22 U.S.C. § 1461). Finally, in 1985, a section was added to clarify that "no funds authorized to be appropriated to the United States Information Agency shall be used to influence public opinion in the United States, and no program material prepared by the United States Information Agency shall be distributed within the United States."(22 U.S.C. §1461-1a) The basic idea behind the **Smith-Mundt** Act's domestic dissemination ban was stated succinctly by Sen. Edward Zorinsky of Nebraska, who introduced the 1985 amendment: "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. 14945, June 7, 1985)* When the U.S. Information Agency was collapsed into the State Department in 1999, Congress specified that the Smith-Mundt restrictions would be applied to the public affairs and information roles of the Secretary of State. (PL 105-277 (1998)) Again, although addressed to the activities of USIA and now the Department of State, Smith-Mundt, in its text and legislative history, indicates a strong aversion by Congress to government activities intended to influence a domestic audience.

The second relevant provision is the prohibition contained in the National Security Act's regulation of covert action. Title 50 U.S.C. § 413b (f) states: "No covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media." Although limited to covert action, operations traditionally conducted by the CIA, the provision is a further reflection of congressional concern and a reinforcement of the spirit of Smith-Mundt. Moreover, it would not be unreasonable to extrapolate the existence of a similar ban for many Information Operations conducted by DoD.

By implication too, Congress has indicated its rejection of an implied authority to engage in efforts to influence a domestic audience in the "publicity and propaganda" provisions pervading the public laws. These are generally included in government-wide appropriations bills but also, more importantly, routinely included specifically in the DoD annual appropriations. For example, section 8001 of the Department of Defense Appropriations Act for 2006 (Public Law 109-148) provided "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress. An identical provision appeared in Department of Defense Appropriations Act for 2005 (PL 108-287; sec. 8001). These so-called "publicity and propaganda riders" are intended to prohibit three types of activities, only one of which is relevant to the issue at hand. That activity is covert propaganda and the executive branch has accepted the following dictionary definition: a systematic effort at indoctrination to a particular viewpoint, as opposed to a mere promulgation of information.** It is likely that many Information Operations influence efforts would be captured by this definition.

As a general constitutional rule, in the absence of specific statutory authority and a corresponding appropriation, and assuming no textual constitutional power otherwise vested in the President, executive branch

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* PDD 68, promulgated in 1999 by President Clinton, created an International Public Information System, but in so doing the Smith-Mundt restriction. The IPI Core Group Charter made clear that its activities were overt and addressed foreign audiences only.

** See *Expenditure of Appropriated Funds for Informational Video New Releases*, Office of Legal Counsel, U.S. Department of Justice, July 30, 2004.

departments are limited in what they may do. In other words, such agencies may only do what Congress has authorized and funded them to do. The publicity and propaganda riders go further, however. Lest there be any doubt, the riders restate this principle, and in the case under discussion, with regard to covert propaganda. Thus, while Congress has funded various Information Operations activities abroad, it has never authorized or funded Information Operations activities targeting a domestic audience. Moreover, Congress has also authorized and funded the position of Assistant Secretary of Defense for Public Affairs[***], who obviously is permitted to target a domestic audience but for purely informational purposes only. Under both the general rule and the more specific rider then, DoD lacks the authority to engage in domestic influence operations.

The legal objection to engaging in activities designed to influence a domestic audience is, to be sure, strong even in the absence of a specific prohibition on DoD. When the government tries to sway the American public through the various means at its disposal it imperils the essential relationship between the governed and the governing. Without going into a lengthy exegesis of the point, suffice it to say that while a particular undertaking may be intended to be benign, even ameliorative, what is to prevent a partisan effort or a malign one in the future. The far safer course is the current, well-settled ban.

Lastly, it should be apparent that the only activity under discussion here is one intended to influence a domestic audience and not one, which may do so inadvertently. Much has been written and discussed about that distinction in other settings, but the foregoing analysis does not purport to treat that subject in any way.

Note: This paper was authored by Richard Shiffrin, former Deputy DoD General Counsel for Intelligence and Compartmented Activities. Mr. Shiffrin authored this document in late August 2006 in response to tasking received from the Defense Policy Analysis Office (DPAO).

[***] 10 U.S.C. § 138 authorizes nine assistant secretaries, four by title. The Assistant Secretary for Public Affairs (not one of the four specified) appears in Title 32 of the Code of Federal Regulations.