3-1-2012

Making the Argument that the Smith-Mundt Act Has little Control over the Press' Publication of U.S. Government-Produced Foreign Views

Brett Holladay

Follow this and additional works at: http://scholarship.law.unc.edu/falr

Part of the First Amendment Commons

Recommended Citation
Brett Holladay, Making the Argument that the Smith-Mundt Act Has little Control over the Press' Publication of U.S. Government-Produced Foreign Views, 10 First Amend. L. Rev. 608 (2012).
Available at: http://scholarship.law.unc.edu/falr/vol10/iss3/6

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in First Amendment Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
MAKING THE ARGUMENT THAT THE SMITH-MUNDT ACT HAS LITTLE CONTROL OVER THE PRESS' PUBLICATION OF U.S. GOVERNMENT-PRODUCED FOREIGN NEWS

Brett Holladay*

INTRODUCTION

In 2011, a Tunisian by the name of Mohamed Bouazizi lit a match that ignited revolt and revolution across the Arab World. What started as an act of self-immolation in response to "rising food prices, youth unemployment," and the general disdain of living under years of tyrannical rule, turned into an act of martyrdom that would spark unrest in nations throughout the region. The resulting protest movement became known as the "Arab Spring," a movement now responsible for toppling long-ruling governments in Tunisia, Egypt, and Libya, along with ongoing bloody revolts in Bahrain, Syria, and Yemen.

As protests raged in Tahrir Square in downtown Cairo, news agencies in Egypt and throughout the world fought to provide their audiences with the most up-to-date information available. One of those news agencies was Alhurra TV. According to a poll ordered by the

* Juris Doctor Candidate, University of North Carolina School of Law, 2013.
2. Id.
Broadcasting Board of Governors (BBG), Alhurra TV reached an estimated one-quarter of the market in the important protest cities of Cairo and Alexandria.\textsuperscript{7} Adding to its accolades in news coverage, Alhurra was the first news organization to report the forthcoming resignation of Egypt’s President, Hosni Mubarak.\textsuperscript{8} At first glance, learning that Alhurra was so effective at delivering the news just appears to be evidence of a news station doing its job in a diligent manner. However, what truly sets Alhurra apart from other news agencies in Egypt is that Alhurra is controlled and funded by the United States Government.\textsuperscript{9}

Even more interesting about Alhurra’s broadcasts is that according to a provision of the United States Information and Educational Exchange Act of 1948,\textsuperscript{10} popularly known as the Smith-Mundt Act, the dissemination of Alhurra programming is prohibited within the United States.\textsuperscript{11} According to two sections of the Smith-Mundt Act—22 U.S.C. §§ 1461(a), 1461–1—material distributed abroad by U.S.-controlled news groups may not be disseminated within the United States.\textsuperscript{12} Essentially, the American public has been bankrolling United States created foreign media for over a half a century, with little knowledge of what it is being said at the expense of their tax dollars.\textsuperscript{13} In 2010 alone, the BBG, which is the parent organization for Alhurra and other U.S.-controlled foreign news agencies, had a budget of $758.9 million dollars.\textsuperscript{14} As one journalist states, “[t]he United States

\begin{footnotes}
\footnotetext[7]{Recent_Crisis.html.}
\footnotetext[8]{Id.}
\footnotetext[9]{Id.}
\footnotetext[12]{See 22 U.S.C. §§ 1461(a), 1461-1a (2006).}
\footnotetext[13]{Id. Even though these two provisions purport to ban domestic dissemination, they interestingly lack any explicit penalties for such dissemination. Id.}
\footnotetext[14]{See Mark Landler, A New Voice of America For the Age of Twitter, N.Y. Times, June 8, 2011, at A9.}
\end{footnotes}
Government may be the largest broadcaster that few Americans know about.15

The Smith-Mundt Act's domestic dissemination ban raises several issues of concern. First, there is a strong argument that American taxpayers should have access to the information they are funding and that is being distributed throughout the world on their behalf for the sake of diplomacy.16 Americans are aware that they are not always entitled to view certain information, such as some national security material, even if their taxes did pay for the information.17 Despite this reality though, the government-sanctioned production of foreign news involves a much different issue because the information is being made public to everyone in the world, except to Americans who are paying for it.18 In addition to concerns of government transparency, there is an even more serious issue involving the constitutionality of such a ban and the limits it places on the American press.19 Specifically, the ban invokes two First Amendment issues: the American press' right to access such information and its ability to publish it within the United States.20

15. Landler, supra note 13.
17. See David H. Topol, United States v. Morison: A Threat to the First Amendment Right to Publish National Security Information, 43 S.C. L. REV. 581, 593–94 (1992) (arguing that greater public access to government information is needed, but acknowledging that there are some situations in which access may be limited for just reasons).
18. See Landler, supra note 13.
20. See Gartner v. U.S. Info. Agency, 726 F. Supp. 1183, 1185 (S.D. Iowa 1989) (stating that the plaintiff's challenge to the Smith-Mundt Act involved a constitutional challenge regarding (1) “the right to receive information” and (2) the “right to disseminate information”). Throughout this Note, the press' rights under the First Amendment are analyzed in the context of the Smith-Mundt Act. It is important to note early on that the First Amendment's guarantee of a free press does not create any independent or exclusive rights for the American press that it does not also preserve for every other member of the public. See Branzburg v. Hayes, 408 U.S. 665, 703 (1972) (citations omitted) (“Freedom of the press is a ‘fundamental
Whereas other commentators have called for revising or repealing the domestic dissemination ban in order to allow a more robust wealth of information from the press, 21 this Note maintains that repealing the Act’s ban is not necessary to obtain such a goal. Therefore, this Note endorses the perspective that foreign news produced by the United States government should be more readily available for domestic review; 22 an aim supported both by the notion that the public should be able to view news that it is financing 23 and that ultimately a more open press is necessary for an effective democracy. 24 However, this Note differs from past arguments in that it contends that amending or repealing the Smith-Mundt Act’s ban is not necessary to achieve such a purpose. 25 This conclusion is reached through an analysis that shows that the Smith-Mundt Act, in reality, has little control over domestic dissemination, and ultimately that the First Amendment of the United States Constitution would hardly tolerate any meaningful regulation of domestic dissemination anyways. 26

personal right’ which ‘is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”’). In other words, rights held by the press under the First Amendment are also held by the public, even if members of the public might not define themselves as members of the press. See id. Therefore, when this Note analyzes whether the press has certain First Amendment rights, it is in fact assessing every American’s rights under the First Amendment. Thus, any mention of a right that the press might possess should not be understood as a right exclusive to the press, but as one held by everyone in the United States. Press rights, instead of broadly held public rights, are discussed specifically throughout the following sections because this Note focuses on the press’ ability to gather and publish news under the Smith-Mundt Act, not the public’s ability to do so.


22. See Palmer & Carter, supra note 16, at 1–3 (discussing the importance of the “free and open flow of information” in the United States and abroad).

23. See supra note 16 and accompanying text.


25. See infra Parts III and IV.

26. See infra Part III.
Section I will highlight the historical background of the Smith-Mundt Act and the changes it has seen over the years. To fully understand why the domestic dissemination ban is so important, it is helpful to first understand why it was created, and how and why it has continuously evolved since its inception. Section II provides an analysis of *Gartner v. U.S. Information Agency*, 27 which involved several First Amendment challenges to the domestic dissemination ban by an American journalist. Considering *Gartner* involved a direct challenge to the constitutionality of the ban, it is necessary to understand how the court in that case ruled and on what basis it reached its decision. Section III will then provide an analysis of cases involving the media’s First Amendment right to publish seemingly public information. This area of law helps to solidify the argument that even with the domestic dissemination ban in place, the First Amendment likely still protects the press’ right to domestically publish foreign news produced by U.S. Government-controlled news organizations. Section IV focuses on the press’ First Amendment right of access arguments in favor of obtaining such information. While some U.S.-produced foreign news is already partially accessible today through the interception of foreign-bound broadcasts and the Internet, 29 Section IV will analyze First Amendment case law involving the right of access in order to assess whether the Constitution guarantees more access than is currently permitted. Finally, Section V will conclude that the Smith-Mundt Act’s domestic dissemination ban may remain intact for certain important purposes, while allowing the domestic flow of information that it purports to ban. The conclusion that the ban may remain intact and still achieve a more free press is where this Note seeks to separate itself from prior analysis of the domestic dissemination ban. 30

28. See id. at 1185.
30. See supra note 21 and accompanying text.
I. HISTORY OF THE SMITH-MUNDT ACT AND ITS EFFECT ON CURRENT U.S. DIPLOMACY

A. History of the Act

Broadcasting news to foreign countries is nothing new for the United States Government. As early as 1940, certain countries in Latin America began receiving "regularly scheduled" U.S. Government broadcasts as part of the Government's diplomacy efforts. Additionally, throughout World War II, the Office of War Information directed its resources "at both the enemy and occupied territories." Following World War II, and at the outset of the Cold War, Congress passed the Smith-Mundt Act "to promote a better understanding of the United States in other countries." Congress believed the Act was necessary because it felt that the United States had previously "failed to systematically promote itself to other nations" and such promotion was necessary as the country engaged in a global ideological war with the Soviet Union. The Act established the framework for news services that would spread information about the United States across the world and provide certain countries with otherwise unavailable news. Not long after, in 1953, the United States Information Agency (USIA) was chartered and given the primary responsibility of fulfilling the Smith-Mundt Act's purpose.

Interestingly, the original Smith-Mundt Act did not expressly ban the domestic dissemination of government-produced, internationally

32. Id. The broadcasts were carried out under the supervision of "Nelson Rockefeller's Office of Coordinator of Inter-American Affairs." Id.
33. Gormly, supra note 19, at 194 n.22.
36. 22 U.S.C. § 1431 (2006). Today, Radio Free Europe, Radio Free Asia, Radio Marti and TV Marti are all examples of stations that seek to provide foreign audiences with coverage of "domestic events that they are denied by their own media." BBG Fact Sheet, supra note 9.
37. See Stein, supra note 31, at 53 n.23 (citing the Reorganization Plan No. 8 of 1953).
bound material. However, although there was not a de jure ban, a de facto ban did exist; a reality noted by Congress’ perceived need to pass legislation in order to permit the domestic release of certain USIA films. Believing a de facto ban existed on domestic dissemination, Congress felt it necessary to pass legislation in order to allow exceptions for the public viewing of several USIA-produced films. Eventually, subsequent events triggered an explicit statutory ban on the domestic dissemination of USIA materials.

Specifically, in 1972, Senator James Buckley requested to broadcast a USIA film entitled Czechoslovakia 1968 during “his weekly television report[ ]” to his constituents in New York. The Attorney General at the time, Richard Kleindienst, gave a positive assessment of the proposed release, stating that under the Act the press and members of Congress were permitted to disseminate such material. Senator J. William Fulbright, then Chairman of the Senate Foreign Relations Committee, disagreed with this interpretation and sought to have an express ban on the dissemination of USIA material placed into the Act. Senator Fulbright eventually succeeded in his endeavor by “attach[ing] an amendment to the 1972 Foreign Relations Authorization Act” that altered the Smith-Mundt Act to include an express ban on the domestic dissemination of USIA material. A driving factor behind the 1972 Amendment was a desire to prevent the United States “government from ‘propagandizing the American public’” through its foreign news broadcasts.

39. See Gormly, supra note 19, at 196 (“Congress found it necessary to pass legislation permitting the domestic release of a USIA film on the life of President John F. Kennedy, ‘Years of Lightning, Day of Drums.’”).
40. Id.
41. See Berkowitz, supra note 21, at 276–77.
43. Berkowitz, supra note 21, at 276.
44. Id. at 276.
45. Id. at 276–77.
46. Id.
services. Essentially, the fear was that without such a ban on domestic dissemination, the U.S. Government could spread propaganda to the American public. Not far removed from World War II and Germany’s “anti-Jew and pro-Nazi propaganda,” it is easy to understand why legislators were sensitive to the possibility of the U.S. Government spreading propaganda to its own citizens through agencies like the USIA.

The 1972 Amendment altered a portion of the Act to state that all information prepared by the United States under the Act for distribution abroad “shall not be disseminated within the United States.” The newly revised provision did allow the press, student researchers, and scholars to view the released materials at the State Department any time after their release, but stipulated that reviews would be “for examination only.” The Amendment also contained an exception to allow for the domestic distribution of the USIA-produced journal, Problems of Communism. The rationale behind allowing this particular publication to be distributed domestically was that it would “help[] educate the American public about the dangers of Communism.”

The domestic dissemination ban has remained in effect since its enactment in 1972, with the exception of a slight alteration in 1990. The 1990 Amendment established that twelve years after its

49. See id. at 6 (discussing the American public’s negative perception of Germany’s propaganda efforts, as well as the efforts of “censorship and misinformation by the American government”).
52. Id. Members of Congress were also permitted to view the material “for examination only” upon request. Id.
53. Berkowitz, supra note 21, at 277. Problems of Communism was a journal that, at the time of the amendment, the Government Printing Office distributed some 5000 copies of annually. Id.
54. Id.
55. Id. at 278.
dissemination or twelve years after its preparation, material created under the Act is to be made “available to the Archivist of the United States, for domestic distribution.” Therefore, today, material prepared under the Smith-Mundt Act may still not be disseminated within the United States immediately after its foreign release, but scholars and journalists may examine it before its eventual lawful release by the Archivist of the United States.8

B. The Current State of U.S. Diplomacy Under the Smith-Mundt Act

Although the United States Information Agency (USIA) no longer exists, today, the Broadcasting Board of Governors (BBG) continues its mission. The BBG took charge of “all government-sponsored, non-military international broadcasting in 1994.” The BBG is technically considered an independent agency, but is wholly funded by the United States Government. The influence the U.S. Government exerts over the BBG is readily apparent in the composition of the organization’s board, which consists of eight members appointed by the President and confirmed by the Senate. The ninth member of the board is the Secretary of State, who “serves ex officio.” The BBG essentially functions as a parent organization that oversees and controls five distinct U.S. broadcasting agencies, each having their own particular geographical focus.

57. 22 U.S.C. § 1461 (2006). The 1990 amendment also added language to the statute regarding reimbursing the USIA for material and allowing the Archivist to charge reasonable fees for the distribution of that material. Id.
58. See id.
59. See Berkowitz, supra note 21, at 278–79.
60. Id. at 279.
61. See BBG Fact Sheet, supra note 9.
62. Id.
63. Id.
64. Id. The five broadcasters under the BBG’s control are: “Voice of America (VOA), Radio Free Europe/Radio Liberty (RFE/RL), Radio Free Asia (RFA), Office of Cuba Broadcasting (OCB; Radio and TV Marti), and Middle East Broadcasting Networks, Inc. (MBN; Radio Sawa and Alhurra Television).” Id.
While the BBG has a general mission for all of its broadcasters, each separate news agency has its own mission. These missions range from providing news not covered by the media in certain foreign countries to providing general international news injected with "coverage of the U.S." and its culture. What seems to be an undeniable fact is that with a weekly audience of 165 million people worldwide in 2010, in fifty-nine different languages, the BBG plays a significant role in the United States' diplomacy efforts abroad. As such, the fact that the BBG has such a massive reach further supports this Note's recognition that Americans should have some oversight or knowledge of this large program being conducted by their government.

Given the fact that the BBG represents such a powerful information engine worldwide, the Smith-Mundt Act's domestic dissemination ban raises some serious concerns. Specifically, an argument can be made that American taxpayers who fund all aspects of the BBG should have a right to view the material they are funding to be made public everywhere in the world except for the United States. Similarly, another contention is that the American press should be able to gather and provide this material to the public, as it usually would for other matters, in order to fulfill its traditional role as a "watchdog" for the American public. These serious policy concerns arising from the ban also implicate several important First Amendment questions: What level of access to this information does the Constitution require? More importantly, considering BBG materials have increasingly been made

65. See id. The BBG's mission is "[t]o promote freedom and democracy and enhance understanding through multimedia communication of accurate, objective, and balanced news, information and other programming about America and the world to audiences overseas." Id.
66. See id.
67. See id.
68. Id.
69. See infra notes 70–72 and accompanying text.
70. See supra note 16 and accompanying text.
71. See Nick Gamse, Legal Remedies for Saving Public Interest Journalism in America, 105 NW. U. L. REV. 329, 336 (2011) (noting the importance of the First Amendment in allowing the press to serve as "a watchdog to check the three branches of the government").
public through the Internet and other means,\textsuperscript{72} can the ban constitutionally prohibit the American press from distributing such seemingly public information to the American public?

The following sections will discuss and address these central questions at length, beginning first with an examination of \textit{Gartner v. U.S. Information Agency} and its implications on the American press' rights under the First Amendment.

\textbf{II. \textit{Gartner v. U.S. Information Agency}}

To date, \textit{Gartner} is the only published case to challenge the constitutionality of the Smith-Mundt Act's domestic dissemination ban.\textsuperscript{73} Specifically, \textit{Gartner} invokes important First Amendment issues involving the right to access and the right to domestically publish U.S. Government-produced foreign news.\textsuperscript{74} Thus, to fully analyze how other First Amendment case law bears on the issue of the domestic dissemination ban, as this Note will do in later sections,\textsuperscript{75} it is important to first assess how the court in \textit{Gartner} analyzed the constitutionality of the Act.

\textit{Gartner} involved an action brought against the BBG's precursor agency, the USIA, by journalist Michael Gartner,\textsuperscript{76} "a state legislator, and a newspaper publishing company."\textsuperscript{77} The dispute resulted from a letter response from a Voice of America\textsuperscript{78} official informing Gartner that

\begin{itemize}
  \item \textsuperscript{72} See \textit{Essential Info., Inc. v. U.S. Info. Agency}, 134 F.3d 1165, 1170 (D.C. Cir. 1998) (Tatel, J., dissenting) (noting that there are already means for the general public to obtain BBG-produced material).
  \item \textsuperscript{74} See \textit{Gartner}, 726 F. Supp. at 1185.
  \item \textsuperscript{75} See infra Parts III and IV.
  \item \textsuperscript{76} Michael Gartner has had an extensive career in journalism, including several editorial roles with various newspapers. \textit{Michael Gartner, UNIV. OF IOWA}, http://www.uiowa.edu/~acadtech/journalists/bios/gartner.html (last visited Apr. 12, 2012). The pinnacles of Gartner's career include serving as President of NBC News from 1988 to 1993 and receiving the Pulitzer Prize for Editorial Writing in 1997. \textit{Id.}
  \item \textsuperscript{77} \textit{Gartner}, 726 F. Supp. at 1185.
  \item \textsuperscript{78} Voice of America is a news organization that is currently under the purview of the Broadcasting Board of Governors. \textit{BBG Fact Sheet, supra} note 9.
\end{itemize}
he could not "'xerox' USIA materials and reprint them in his newspapers." The letter did not absolutely deny Gartner access to USIA-produced material because a provision of the ban allows journalists to review the material. However, the letter did deny Gartner the right to make "verbatim copies" of the material. As a result of the letter's prohibition, the plaintiffs sought a declaratory judgment that 22 U.S.C. §§ 1461 and 1461-1a violated their First Amendment rights by banning "the plaintiffs from receiving and disseminating within the United States information and materials disseminated abroad by the [USIA]." While the plaintiffs seem to have alleged one general infringement, the court bifurcated their complaint into two separate issues. According to the district court, the two issues raised in the case were whether the domestic dissemination ban violated the plaintiffs' First Amendment rights "to receive information" and "to disseminate information."

A. The Right to Receive Information

In assessing whether the plaintiffs had a constitutional right to make "verbatim copies" of USIA material, the court began with a broad review and analysis of the First Amendment. The court was quick to underscore that, while the First Amendment protects against government infringement of certain rights, "it does not create an affirmative duty upon the government to act." Essentially, the court suggested that the First Amendment serves to protect certain rights from government intrusion, but that it does not necessarily bestow upon the government

80. Id.
81. Id. at 1192.
84. Gartner, 726 F. Supp. at 1185 (quoting Complaint at 3).
85. Id.
86. Id.
87. See id. at 1187–88.
88. Id.
any specific duty to enhance those rights beyond what they already guarantee.\textsuperscript{89}

Consistent with the fact that the First Amendment generally does not impart affirmative duties upon the government,\textsuperscript{90} the court cited cases noting that the government has no constitutional duty to provide access to its own information.\textsuperscript{91} The court suggested that lacking any constitutional duty to provide access to its files, the only such duties the government owes are ""statutory in nature.""\textsuperscript{92} The issue was ultimately a question of the extent of access required, or in other words, whether the plaintiffs had the right to make verbatim copies and thus easily reproduce the material for media use.\textsuperscript{93} Ultimately, the court took a position in line with previous cases\textsuperscript{94} that suggested that the government has no

\textsuperscript{89} See id.
\textsuperscript{90} See id.
\textsuperscript{91} Id. at 1188; see Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (stating that there is not a "right of access to all sources of information within government control"); Wolfe v. Froehlke, 358 F. Supp. 1318, 1321 (D. D.C. 1973), aff'd per curiam, 510 F.2d 654 (D.C. Cir. 1974) (noting that the First Amendment does not "impose an affirmative duty on the part of the Government . . . to disclose Government files").
\textsuperscript{92} Gartner, 726 F. Supp. at 1188 (quoting Wolfe, 358 F. Supp. at 1321). In stating there are statutory rights of access, the court is referring to the Freedom of Information Act. See id.
\textsuperscript{93} See id. at 1188–90.
\textsuperscript{94} See Houchins, 438 U.S. at 15–16 (holding that the First Amendment does not "mandate[] a right of access to government information or sources of information within the government’s control" and that due to such, journalists did not have a constitutional right to full access to a jail and its inmates); Zemel v. Rusk, 381 U.S. 1, 16–17 (1965) (rejecting the plaintiff’s argument that the First Amendment permitted him to travel to Cuba in order to acquaint himself with their culture by noting that the First Amendment "does not carry with it the unrestrained right to gather information"); Capital Cities Media v. Chester, 797 F. 2d 1164, 1168–71 (3d Cir. 1986) (en banc) (ruling that the First Amendment did not guarantee plaintiff-newspapers the right to access environmental documents held by the government of Pennsylvania); Gregg v. Barrett, 771 F.2d 539, 546 (D.C. Cir. 1985) (holding there is no constitutional right to receive "verbatim transcript[s] of the proceedings of Congress"); Wolfe, 358 F. Supp. at 1321 (ruling that the plaintiffs did not have a constitutional right to access a file held by the Department of Defense); Herald Co. v. McNeal, 511 F. Supp. 269, 273 (E.D. Miss. 1981) (three-judge court) (finding that a newspaper did not have a First Amendment right to access certain documents held by the government); Trimble v. Johnston, 173 F. Supp. 651, 655–56
constitutional duty to provide convenient access to its information or even to provide access at all. Specifically, the court focused on *Gregg v. Barrett*, where the court in that case held that the government has no duty to provide "verbatim transcripts of congressional proceedings." Following its discussion of *Gregg* and other case law in the area, the court rejected the plaintiff's argument that, as a result of their statutory right to examine USIA material provided for in 22 U.S.C. § 1461, they also had a constitutional right to make "verbatim copies." As the court maintained, the plaintiffs "[had] no first amendment right to make verbatim copies of USIA materials at USIA offices." While this holding certainly has an impact on this Note's analysis of the domestic dissemination ban, what proves to be most important is actually dicta right before the court's decision. Before its ruling, the court notes that there is nothing in the law that prevents someone from "obtain[ing] verbatim transcripts of USIA broadcasts through less convenient channels such as receiving the broadcasts in other countries." This language, coupled with the holding's specific location ban on "verbatim copies," suggests that while verbatim copies of BBG material may not be made at BBG offices, they can be made anywhere else through other means. Such a position serves as a foundation for this Note's argument that the domestic dissemination ban actually has little legal effect on the media's right to access and publish BBG material, because the court expressly states that the obtainment of BBG materials through other means would likely be lawful.

(D. D.C. 1959) (deciding that absent a statutory right, the plaintiff had no constitutional right to access certain Congressional records).

96. 771 F.2d 539 (D.C. Cir. 1985).
100. *Id.* at 1190.
101. *Id.*
102. *Id.*
103. This proposition will be discussed later in this Note in the context of other relevant case law. *See infra* Part IV.
B. The Right to Disseminate Information

After ruling on the plaintiffs’ right of access, the Gartner court discussed whether the plaintiffs had a constitutional right to publish USIA materials. ¹⁰⁴ However, the court’s analysis of the constitutional question was quickly derailed by jurisdictional issues. ¹⁰⁵ The court noted that for it to hear a case on the constitutional validity of a congressional or executive action, the plaintiffs had to show that they had “sustained or [are] immediately in danger of sustaining some direct injury as a result of the challenged statute or official conduct.”¹⁰⁶ Taking the standard under consideration, the court decided, for several reasons, that the plaintiffs lacked standing.¹⁰⁷ The court stated that aside from the right of access issue, “nothing in the record suggest[ed] that the [USIA] ha[d] taken any action of any kind against the plaintiffs” in regards to their right to publish USIA material.¹⁰⁸ Notably, in one instance, Gartner did indeed disseminate USIA materials by quoting them in a speech.¹⁰⁹ In that instance, the USIA never “punished [n]or threatened to punish” Gartner.¹¹⁰ Furthermore, as the court notes, the domestic dissemination ban’s statutory language does not even provide a means for criminal or civil sanctions against violators.¹¹¹ Considering there was no evidence of punishment and no means for punishment, the court ruled that the plaintiffs could not establish an injury or even an impending one.¹¹² That the government was unwilling to punish Gartner for domestic publication¹¹³ and that the statute does not even provide for such punishment¹¹⁴ further supports the argument that the domestic dissemination ban has little to no power to prevent the domestic publication of BBG materials.

¹⁰⁴. See Gartner, 726 F. Supp. at 1190.
¹⁰⁵. See id.
¹⁰⁶. Id. at 1191 (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)).
¹⁰⁷. See id. at 1191–95.
¹⁰⁸. Id. at 1192.
¹⁰⁹. Id.
¹¹⁰. Id. at 1193.
¹¹¹. Id. at 1192.
¹¹². Id. at 1193.
¹¹³. Id. at 1192.
¹¹⁴. Id. at 1193.
After briefly dismissing the possibility of an injury through the theory that the domestic dissemination ban caused a "chilling effect" on publication, the court then addressed the plaintiff's argument that the threat of being enjoined from publishing is injurious through the theory of "prior restraints." The court, however, also dismissed this argument, stating that the USIA never enjoined or indicated that it would enjoin the plaintiffs from publishing its material in a newspaper. In fact, the USIA itself stated that it believed it had no such power and that enjoining such a publication would not be in accordance with the law. Once again, even though the court refused, due to a lack of standing, to address the constitutional issue of the right to publish, the facts of the case show a government that is ultimately unwilling to truly apply the domestic dissemination ban. This lack of government action further points to a domestic dissemination ban that is practically, if not completely, powerless against news organizations that choose to publish BBG material within the United States.

The court's refusal to rule on the plaintiffs' right to publish material under the ban is certainly frustrating for the purpose of this Note's argument; a reality enhanced by the lack of other cases directly challenging the right to publish under the Smith-Mundt Act. However, the dicta in the court's decision does point clearly to a government that is both unwilling to punish or prevent the domestic publication of BBG material. The dicta also presents a government that feels it is legally unable to punish or prevent such publication anyways. When coupled with the next section's analysis of relevant case law pertaining to the right to publish, this lack of government enforcement indicates a relatively clear view of the ban's limited power.

115. Id.
116. Id.
117. Id at 1193–94.
118. See id.
119. See supra notes 109–11, 114 and accompanying text.
120. See supra note 117 and accompanying text.
121. See supra notes 112, 118 and accompanying text.
122. See infra Part III.
III. THE RIGHT OF THE PRESS TO PUBLISH BBG MATERIAL

In considering the decision in *Gartner* and the Smith-Mundt Act’s ban, the question of whether the press has a First Amendment right to publish BBG material within the United States emerges. However, there seems to be little question or dispute as to the importance of the press’ ability to review and provide this information to the American public. This belief in the importance of the press is not just one held today, but one that has been firmly established since the nation’s inception. James Madison, one of the nation’s founding fathers, noted the importance of the press in explaining that the First Amendment ensures that “‘[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.’”

Taking this into consideration, the significance of a free press weighs heavily when considering the issue of what limits the Constitution permits on the domestic publication of BBG material.

Based on a strong history of protection for the press, and the fact that the world and the United States’ diplomatic efforts therein are becoming increasingly globalized, it is fair to argue that many Americans will continue to want to know what their government is saying in other countries on their behalf. Beyond traditional relations carried out by diplomats, the news published by the BBG is a huge part of the United States’ diplomatic efforts. Of course, there are means, such as the Internet, through which the American public can view some BBG-

123. See *Gartner*, 726 F. Supp. at 1190–95 (recognizing that there is a question of whether the ban on domestic publication is constitutional, but ultimately declining to rule on the issue for procedural reasons).

124. See supra note 71 and accompanying text.

125. See Curtis Pub. Co. v. Butts, 388 U.S. 130, 147 (1967) (“This carries out the intent of the Founders who felt that a free press would advance ‘truth, science, morality, and arts in general’ as well as responsible government.” (quoting Letter to the Inhabitants of Quebec, 1 Journals of the Continental Cong. 108)).


128. See *supra* notes 67–68 and accompanying text.
produced news on its own; a fact that suggests that, in a sense, BBG-produced news is already public information. However, just because the public has access to information does not obviate the traditional desire to have a robust press that gathers the information, reviews it, and publishes it for public consumption. As the Court in Cox Broadcasting Corp. v. Cohn noted, "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of [their] government, [citizens rely] necessarily upon the press to bring to [them] in convenient form the facts of those operations." Therefore, while some BBG material may already be accessible to the public, it is important for the press to be able to review the large quantities of information and then provide it to the public in "convenient form." By doing so, the press furthers the democratic process by allowing citizens to make informed voting decisions about U.S. diplomacy efforts and thus ensure a more effective government.

In light of the importance of the press' ability to publish and keep the citizenry well informed, the following discussion addresses whether the press can publish BBG-produced information even with the Smith-Mundt Act as current law. This issue can be best understood through two primary considerations: (1) the government's ability to civilly or criminally punish the press for publication under the Smith-Mundt Act, and (2) the government's ability to restrain or prevent such

129. See Landler, supra note 13.
130. See id. (discussing ways in which BBG material may already be accessed by the public).
131. See Mary-Rose Papandrea, Citizen Journalism and the Reporter's Privilege, 91 Minn. L. Rev. 515, 522 (2007) (noting the importance of the media and that the Supreme Court "has often recognized [its] important role . . . in our democracy").
133. Id. at 491.
134. See id.
135. Id. at 492 ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.").
publication.137 The subsequent sections, therefore, argue that the government likely lacks the ability to punish or restrain publication, both statutorily and constitutionally, and that the decision in Gartner only furthers the proposition that the press may publish such information in the United States.138

A. Government’s Ability to Punish Publication

1. Pre-Daily Mail Standard

Over the past fifty years, the United States Circuit Courts of Appeal and the Supreme Court have consistently struck down state statutes that made unlawful, or civilly or criminally punished the publication of publicly available information.139 In these cases, when the publisher obtained the information from some public source, the Supreme Court has protected everything from the press’ First Amendment right to publish sexual assault victims’ identities140 to a privacy advocate’s right to publish other persons’ full Social Security

137. See id. at 1193–94 (discussing the doctrine of prior restraints and the government’s ability to restrain or prevent the publication of BBG material).

138. See id. at 1190–95 (refusing for procedural reasons to take up the issue of what ability the government has to prevent or punish publication, but seemingly reasoning that if the Court were to take up the issue it would likely hold that the government has little to no power).

139. See The Florida Star v. B.J.F., 491 U.S. 524, 526 (1989) (declaring unconstitutional the application of a Florida statute that made it unlawful to publish the identity of a sexual offense victim); Smith v. Daily Mail Publ’g Co., 443 U.S. 97, 105–06 (1979) (finding unconstitutional the application of a West Virginia statute that punished the publication of juvenile offenders’ identities without court consent); Landmark Commc’ns, Inc. v. Virginia, 435 U.S. 829, 843–44 (1978) (declaring unconstitutional the application of a Virginia statute to punish reporters for publishing information from closed judicial review hearings); Cox, 420 U.S. at 496 (declaring unconstitutional the application of a Georgia statute imposing civil liability for the publication of a rape victim’s name lawfully obtained from open court proceedings); Ostergren v. Cuccinelli, 615 F.3d 263, 286–87, 289–90 (4th Cir. 2010) (declaring unconstitutional the application of a Virginia statute making it unlawful to publish other persons’ Social Security numbers).

140. Cox, 420 U.S. at 496–97.
numbers on the Internet. Thus, even when considering the protection of other important individual rights such as privacy rights, the Supreme Court has emphasized its high regard for First Amendment guarantees like the freedom of speech and the freedom of the press.

One of the early and important cases in this area of law was *Cox Broadcasting Corp. v. Cohn*. At issue in *Cox Broadcasting* was a Georgia statute that made "it a misdemeanor to publish or broadcast the name or identity of a rape victim." At the trial for the rape and murder of seventeen-year-old Cynthia Cohn, a reporter for a Cox Broadcasting Corp. television station uncovered Cohn's name by viewing the indictments in the courtroom and then subsequently published her name. It was an undisputed fact that these indictments were available for inspection as public records. As a result of this publication, the victim's father, the appellee, brought suit under the Georgia statute against the television station's owner, claiming "that his right to privacy had been invaded."

The Supreme Court, on appeal, narrowed the issue to "whether [a] State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records," specifically from judicial records "open to public inspection." In the Court's view, the issue came down to weighing public interests against important constitutional rights. The tension there existed between the state's interest in privacy and the First Amendment guarantees of a free press and freedom of speech. Favoring the importance of the freedom of the press in this specific case, the Court focused primarily on (1) the truthfulness of the published story and (2) the openness of the information in the case. First, the Court noted that considering "truth [is] recognized as a

143. *Id.* at 472.
144. *Id.* at 472–74.
145. *Id.* at 473–74.
146. *Id.* at 474 (noting that the particular claim was a "tort of public disclosure") (quoting *Cox Broad. Corp. v. Cohn*, 200 S.E.2d 127, 128 (Ga. 1973))).
147. *Id.* at 491.
148. *See id.* at 491–94.
149. *See id.*
150. *See id.*
defense” in defamation actions, the truthfulness of the article at issue strengthened the validity of publication.\textsuperscript{151} The Court then recognized that, considering “privacy fade[s] when the information involved already appears on the public record,” there seemed to be little public interest in upholding privacy rights in such a case.\textsuperscript{152} Essentially, the Court reasoned that, when information is already available to the public, privacy rights tend to yield to First Amendment rights.\textsuperscript{153} Considering the competing interests between a free press and privacy rights, the Court held that “States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.”\textsuperscript{154}

The framework used in \textit{Cox Broadcasting} was partially followed three years later in \textit{Landmark Communications, Inc. v. Virginia}.\textsuperscript{155} In \textit{Landmark}, the Court found that, under the United States Constitution, a Virginia statute could not punish a newspaper for publishing information from a judicial review session its reporters attended, even though the session was required to be confidential under Virginia law.\textsuperscript{156} Although the Court ultimately decided the statute’s constitutionality through a “clear and present danger” test,\textsuperscript{157} the Court did recognize some of \textit{Cox Broadcasting’s} factors such as the truthfulness of the information being published\textsuperscript{158} and the weighing of interests.\textsuperscript{159} Even though the Supreme Court eventually adopted a general standard for cases like these,\textsuperscript{160} these decisions exhibit the judiciary’s long-founded unwillingness to punish the publication of truthful information when that information is already publicly available in some form. Therefore, even without the Court’s

\textsuperscript{151} \textit{Id} at 490. The Court, however, “carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure.” \textit{Id}.

\textsuperscript{152} \textit{Id} at 494–95.

\textsuperscript{153} See \textit{id}.

\textsuperscript{154} \textit{Id} at 495 (emphasis added).

\textsuperscript{155} 435 U.S. 829 (1978).

\textsuperscript{156} \textit{Id} at 849.

\textsuperscript{157} See \textit{id} at 845.

\textsuperscript{158} See \textit{id} at 840.

\textsuperscript{159} See \textit{id} at 841–42.

\textsuperscript{160} See \textit{infra} Parts III.A.2–3.
current standard of review,\textsuperscript{161} it seems that precedent has long been on the side of publishing BBG material in the United States so long as the publication is accurate and the information is derived from an already accessible public source.

2. Daily Mail Standard

It was not until \textit{Smith v. Daily Mail Publishing Co.}\textsuperscript{162} that the Court truly established a coherent standard to be applied in cases involving the publication of publicly available information.\textsuperscript{163} \textit{Daily Mail} considered the constitutionality of two West Virginia statutes, as applied to the particular case, regarding the publication of a juvenile defendant’s name in a newspaper report.\textsuperscript{164} Specifically, West Virginia Code § 49-7-3\textsuperscript{165} made it unlawful to publish the name of a juvenile defendant without a written court order\textsuperscript{166} and § 49-7-20 criminally punished such infractions as misdemeanors.\textsuperscript{167}

The case arose from a school shooting in which a fourteen-year-old student shot a fifteen-year-old classmate.\textsuperscript{168} Shortly after the shooting, reporters working for “[t]he Charleston Daily Mail and the Charleston Gazette” arrived on scene to document the event.\textsuperscript{169} While at the school, the reporters learned the name of the alleged shooter, and future juvenile defendant, from the police and “an assistant prosecuting attorney” on the scene.\textsuperscript{170} Although the Charleston Daily Mail initially withheld the story due to knowledge of the West Virginia statutes referenced above,\textsuperscript{171} a decision was eventually made to publish an article

\textsuperscript{161. See id.}
\textsuperscript{162. 443 U.S. 97 (1979).}
\textsuperscript{163. See id. at 104.}
\textsuperscript{164. See id. at 98–100.}
\textsuperscript{165. W. Va. Code § 49-7-3 (1979).}
\textsuperscript{166. Id.}
\textsuperscript{167. W. Va. Code § 49-7-20 (1979). In the absence of punishment “specifically provided,” the stipulated penalty for conviction is a fine “not less than ten nor more than one hundred dollars,” or a jail sentence “not less than five day nor more than six months,” or both. Id.}
\textsuperscript{168. Daily Mail, 443 U.S. at 99.}
\textsuperscript{169. Id.}
\textsuperscript{170. Id.}
\textsuperscript{171. Id.}
listing the juvenile shooter's name after the Charleston Gazette did so. As a result of this publication, a grand jury returned an indictment alleging that the defendant-newspapers had knowingly published the student’s name in violation of § 49-7-3. The newspapers petitioned the West Virginia Supreme Court of Appeals for a writ of prohibition against the prosecutor and the circuit court judge, alleging that the application of the statute violated their First Amendment rights. The court issued the writ of prohibition, holding that the statute did infringe upon their rights “as a prior restraint on speech.”

In its decision, the U.S. Supreme Court rejected the argument that the statute should be held unconstitutional as a prior restraint, but noted that such a finding did not end its inquiry. Relying on precedent recently established in Cox Broadcasting and Landmark, the Court held that the application of the statute in this instance was an unconstitutional infringement of the defendant-newspapers’ First Amendment rights. In reaching its decision, the Court established a standard that is still followed by courts when deciding cases involving punishment for the publication of publicly available information.

The Daily Mail standard states “that if [an entity] lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.” In this case, the Court felt that while the state presented an important state interest (the

172. Id. at 99–100.
173. Id. at 100.
174. Id.
175. Id.
176. See id. at 101–03 (noting that traditionally prior restraints occur when a publication is enjoined and that such has not occurred here).
177. See id. (discussing the recent decisions in Cox Broadcasting and Landmark).
178. Id. at 103–04. The Court does not invalidate the law as a whole, rather it just considers its application in regards to the Daily Mail Publishing Company as invalid. Id. at 105.
180. Daily Mail, 443 U.S. at 103 (emphasis added).
anonymity of juvenile offenders), ultimately it was insufficient to justify the statute’s punishment of the newspapers’ publication of truthful information that was obtained through lawful means.\textsuperscript{181} Essentially, the standard defined by the Court calls for a balancing test that weighs state and public interests against the constitutional rights of those affected by such statutes.\textsuperscript{182} Understanding this standard and how it is applied is crucial in judging whether the government could constitutionally punish any person or entity for publishing BBG material in the United States.

3. Application of the Daily Mail Standard

According to a later case, The Florida Star v. B.J.F.,\textsuperscript{183} the Daily Mail standard is supported by “three separate considerations” that are all anchored in the “overarching ‘public interest, secured by the Constitution, in the dissemination of truth.’”\textsuperscript{184} The first of those considerations is that, since the Daily Mail standard only protects publication of lawfully obtained information, the government still has “ample means” by which to safeguard important state interests.\textsuperscript{185} In other words, since the standard only protects lawfully obtained information, the government can take measures to ensure that the acquisition of certain privately-held information is unlawful and can make unlawful the attainment of properly safeguarded information that is within the government’s control.\textsuperscript{186} Therefore, under the standard, if the acquisition of the information is unlawful in the first place, a news organization could be punished for publishing it.

The second consideration supporting the standard is “that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the

\textsuperscript{181} Id. at 105–06.
\textsuperscript{182} See id. at 104.
\textsuperscript{183} 491 U.S. 524 (1989).
\textsuperscript{184} Id. at 533 (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975)) (internal quotation marks omitted).
\textsuperscript{185} Id. at 534.
\textsuperscript{186} See id. For example, if the information is within the government’s possession it can still control its acquisition by classifying it or allowing redacted releases. Id.
service of which the State seeks to act."\textsuperscript{187} Stated differently, when the published information is already open to the public, a state's interest to keep it private has already been overridden.\textsuperscript{188} Once the state's interest has been defeated, it seems purposeless to punish anyone for further disseminating the public information, and thus the standard does little harm by protecting the publisher of such information.

The third consideration underlying the \textit{Daily Mail} standard "is the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing . . . truthful information."\textsuperscript{189} The Court believes that, absent a standard providing protection in certain circumstances, the news media will be deterred from publication and will censor itself out of fear of punishment.\textsuperscript{190} Therefore, the standard helps to preserve the role of the press by creating a system whereby the media may publish public information without fear of reprisal.\textsuperscript{191}

Beyond noting the three bedrock considerations supporting the \textit{Daily Mail} standard, the Court explained that the standard should be divided into two separate inquiries for courts to address.\textsuperscript{192} The first inquiry focuses on "whether the [publisher] 'lawfully obtain[ed] truthful information about a matter of public significance.'"\textsuperscript{193} This step focuses on whether the State took any measure to ban or limit the "receipt of information" and if the information was obtained in contravention of such measures.\textsuperscript{194} Taking into consideration a state's applicable law, courts should decide whether or not the particular receipt of information was lawful.\textsuperscript{195} If the information was truthful and lawfully obtained, courts will proceed to the next step to determine whether punishment is
justified by a state interest. Of course, if the information was unlawfully obtained or untruthful, the inquiry would end there and punishment would be justified.

The second inquiry of the *Daily Mail* standard is whether punishing publication "serves 'a need to further a state interest of the highest order.'" This portion of the standard calls on courts to balance state interests against First Amendment rights, maintaining a sense of deference to constitutional rights in the absence of compelling interests. As recognized by the Fourth Circuit in *Ostergren v. Cuccinelli*, what constitutes a state interest of the highest order should be established objectively by the court. In other words, courts should not "be bound by 'the State's view'" as to what rises to the level of such an important interest and should assess the interest objectively.

If a court does not find an interest of the highest order, punishment is not justified and thus is considered an infringement of First Amendment rights. However, even where the court does find an important interest, punishment must still be narrowly tailored to serve the interest. As highlighted by the previously listed considerations, there is a strong presumption against narrow tailoring when the government relies on punishment as a means to serve its interest, considering that other measures could properly have been taken to avoid disclosure in the first place. Augmenting this presumption is the fact that, when information is already available, a law designed to prevent publication

196. *See id.*  
197. *See id.*  
198. *Id.* at 537 (quoting *Daily Mail*, 443 U.S. at 103).  
199. *See id.*  
200. 615 F.3d 263 (4th Cir. 2010).  
201. *See id.* at 277. The court in *Ostergren* notes that what is objectively a state interest of the highest order can be partially determined through review of what other states have or have not done to protect such an interest. *See id.* For example, in another case a Florida statute requiring secrecy in certain situations was not justified by a state interest of the highest order when the Federal Rules of Criminal Procedure and 35 states did not also require secrecy in similar situations. *Id.* (citing *Butterworth v. Smith*, 494 U.S. 624, 625 (1990)).  
204. *See id.*  
205. *See id.* at 538.
through punishment is no longer serving its purpose since the information is already available in some form. 206 Therefore, when the first step of the inquiry is fulfilled and the law is either not justified by an interest of the highest order or is not narrowly tailored to serve such an interest, punishment will be considered unconstitutional. 207

How this standard is applied is of great importance in understanding the government’s ability—or lack thereof—to punish the domestic publication of BBG material. As shown in the next section, BBG material can be lawfully obtained, would most likely be truthfully published, and involves matters of public significance. 208 Therefore, even if weighed against state interests of the highest order, it seems likely that the government could not punish the publication of BBG material 209 even though the Smith-Mundt Act purports to ban such publication. 210

4. Ability to Punish Under the Smith-Mundt Act

As highlighted in Gartner, on its surface, the Smith-Mundt Act’s ban on dissemination “is neither a criminal statute nor one that provides for civil sanctions.” 211 It could be argued that this should end this Note’s analysis of the ability of the government to punish publishers because, if the statute does not provide for a criminal sanction or private remedy, neither may be imposed. 212 While this is true in regards to criminal punishment for publication, it does not preclude any private remedy that could be taken against a publisher. 213 As seen in Cox Broadcasting, even when a statute does not specifically provide for a private remedy, courts have been willing to entertain one based on a statute’s prohibition on

206. See id.
207. Id. at 541.
208. See infra Part III.A.4.
212. See 22 U.S.C. §§ 1461, 1461-la (neither providing a criminal nor civil penalty for the publication of BBG material within the United States).
213. However, just because there is not a criminal sanction in place now, that does not mean Congress could not create one. If this were the case, the constitutionality of such a sanction would be addressed under the same standard that is used in the following analysis of civil sanctions.
Taking this into consideration, the following discussion provides an analysis of whether such a civil sanction on publication, or a future properly-enacted criminal sanction, could survive under the *Daily Mail* standard.

Under the first step of the *Daily Mail* standard, the question would be “whether the [publisher] ‘lawfully obtain[ed] truthful information about a matter of public significance.’” So long as a publisher of BBG-produced material lawfully obtained the information and published it verbatim or in a non-misleading way, it would seem that this step of the inquiry is positively met. To lawfully obtain the information, the press can receive the information through methods such as the use of the Internet or through receiving BBG broadcasts in foreign countries. As noted in *Florida Star*, one rationale underlying the standard’s inquiry into whether information was lawfully obtained is that the government still has means by which to make the attainment of such information unlawful. In essence, if the government made obtaining BBG material unlawful in of itself, it could justify punishment of its publication under this standard. In the case of the Smith-Mundt Act, however, the government has chosen to prohibit dissemination of such information, not the mere obtainment of it. Therefore, it seems obtaining BBG material would currently be lawful under the standard. However, this does not preclude the possibility that someday the government might choose to make the mere obtainment of BBG news

---

216. See id.
218. *Florida Star*, 491 U.S. at 534.
219. See id.
221. See *Florida Star*, 491 U.S. at 534 (noting that the government can still punish the publication of material if it chooses to make the attainment of such material unlawful).
unlawful and thus be able to punish its publication in accordance with the standard.\footnote{222}{See id.}

Another facet of the first inquiry that could easily be satisfied by the media is producing truthful reports, as required by the standard.\footnote{223}{Id. at 536 (1989) (quoting Smith v. Daily Mail Publ’g Co., 443 U.S. 97, 103 (1979)).} Press standards already call for truthful reporting,\footnote{224}{See, e.g., The Associated Press Statement of News Values and Principles, ASSOCIATED PRESS, http://www.ap.org/newsvalues/index.html (last visited Apr. 12, 2012).} so it would hardly be a deviation from common practice for the media to accurately report BBG materials.\footnote{225}{See id.} Of course, if a news outlet were to vary the information or distort it, the information would not be truthful and its publication could be punished since the standard only provides protection from punishment for the publication of “truthful information.”\footnote{226}{Id.}

Additionally, one must consider the issue under the first inquiry of the standard as to whether the publication of BBG material could be deemed “a matter of public significance.”\footnote{227}{Daily Mail and Florida Star, the Supreme Court found that certain trial information relating to “the commission, and investigation, of . . . violent crime[s]” are matters of public importance.\footnote{228}{Florida Star, 491 U.S. at 525; see Daily Mail, 443 U.S. at 107.} Furthermore, in Ostergren, the Fourth Circuit considered the publication of social security numbers to be “a matter of public significance” because it involved a criticism of Virginia’s lack of proper redaction policies for public records.\footnote{229}{Ostergren v. Cuccinelli, 615 F.3d 263, 276 (4th Cir. 2010) (quoting Daily Mail, 443 U.S. at 103).} While the publication of BBG material does not involve important privacy rights or criminal trial processes, it does involve a news agency funded by the government that has substantial influence across the world.\footnote{230}{See BBG Fact Sheet, supra note 9.} If a single victim’s identity from one crime out of many is a matter of significance, as it was in Cox Broadcasting,\footnote{231}{See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 475 (1975).} it would seem logical that the material produced by a
news agency receiving over $758.9 million dollars from the U.S. government in 2010 would be deemed “a matter of public significance.” Therefore, the domestic publication of BBG material should pass the first inquiry of the Daily Mail standard as being “a matter of public significance.”

The next step under Daily Mail would be to determine whether punishing publication “serves ‘a need to further a state interest of the highest order.'” Whether a court would find punishment of such a publication to serve such an important state interest is a matter open to debate. Among the many state interests the government could propose as its justification, it might posit that punishment is necessary to deter BBG material from spreading to the public as propaganda. While it is pure speculation as to what state interest the government might put forward to justify punishment, it seems logical that this might be a stated interest since a driving force behind the enactment of the ban was to prevent government propaganda. Regardless, a court could consider any number of state interests and decide within its discretion whether any rise to the level of “‘a state interest of the highest order.’”

Whether or not a court was to find a substantial state interest, punishment would still almost certainly be considered unconstitutional under the second inquiry of the standard due to a lack of narrow tailoring. As noted in Florida Star, when the government chooses to punish publication of already available material, there is a strong

232. See BBG Fact Sheet, supra note 9.
236. See id.
237. See Ostergen v. Cuccinelli, 615 F.3d 263, 276–77 (4th Cir. 2010) (quoting Daily Mail, 443 U.S. at 103) (discussing the discretionary process courts should apply when deciding whether a state interest is sufficient under the Daily Mail standard).
238. See id. at 280–87 (discussing how the state statute punishing release of certain information was not sufficiently narrowly tailored to the asserted state interest, as required by the Daily Mail standard).
presumption against proper narrow tailoring to the stated interest.\textsuperscript{239} Here, the government would face the problem of narrow tailoring if any of its stated interests relied on the secrecy of BBG information.\textsuperscript{240} If the government wishes to prevent dissemination, a less restrictive alternative would be to prevent the obtaining of information or make obtaining unlawful in the first place.\textsuperscript{241} In addition to being overly harsh compared to other effective applications of law, punishment would hardly seem to serve any defined interest in secrecy because the material being published is already somewhat accessible.\textsuperscript{242} Therefore, even if any interest in secrecy were considered an important state interest, it seems highly unlikely that punishment could pass a narrow tailoring analysis since there are less restrictive means than punishment\textsuperscript{243} and because punishment would not even ensure the secrecy of BBG material since it is already somewhat publicly accessible.\textsuperscript{244} Having failed to satisfy the second inquiry of the standard, any punishment of publication under the Smith-Mundt Act would likely be considered unconstitutional under the Supreme Court’s decision in 	extit{Daily Mail}. Absent the ability to enjoin publication as is discussed in the next section,\textsuperscript{245} the government is likely powerless under the Constitution to restrain the domestic publication of BBG material.

\begin{itemize}
\item \textsuperscript{239} See Florida Star, 491 U.S. at 538.
\item \textsuperscript{240} See id. at 537–40 (finding that punishment was not narrowly tailored to meet the government interest of secrecy when the disclosed information had already been made public by the government).
\item \textsuperscript{241} See id. at 534 (discussing the government’s options for controlling the publication of materials through other laws).
\item \textsuperscript{243} See supra notes 236–42 and accompanying text.
\item \textsuperscript{244} See Essential Info., 134 F.3d at 1170 (noting that there are already means for the general public to obtain BBG-produced material).
\item \textsuperscript{245} See infra Part III.B.
\end{itemize}
B. Government’s Ability to Restrain Publication

1. The Doctrine of Prior Restraints

Whereas the courts have been extremely reluctant to consider civil or criminal punishment of publications constitutional, they have been even more reluctant to find government restraints on publication as constitutionally permissible uses of authority. As the Supreme Court stated in *Nebraska Press Association v. Stuart*, “if it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it . . . .” Not surprisingly, the Court has stated and consistently held that “it is the chief purpose of the guaranty [of a free press] to prevent previous restraints upon publication.”

In general, “[t]he term ‘prior restraint’ is used ‘to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to

---

246. See supra Part II.B.1–3.

247. See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 568–70 (1976) (finding unconstitutional a gag order by a judge to limit trial publicity, even when the trial was heavily publicized in a small community of only 850 people, thus indicating serious threats to the defendant’s right to an impartial jury); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (finding unconstitutional an injunction preventing “the New York Times and the Washington Post from publishing the contents of a classified study entitled ‘History of U.S. Decision-Making Process on Viet Nam Policy’”); *Near v. Minnesota*, 283 U.S. 697, 705 (1931) (declaring unconstitutional an ordinance that allowed for temporary and permanent enjoinder of the publication of “malicious, scandalous and defamatory matter[,]” even when truthful); *Columbia Broad. Sys., Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 729 F.2d 1174, 1183–84 (9th Cir. 1984) (declaring unconstitutional an injunction preventing CBS from publishing police surveillance tapes from the investigation of a well-known defendant that was on trial at the time).

248. *Nebraska Press Ass’n*, 427 U.S. at 559. The Court has said that “[b]ehind the distinction [between punishment and prior restraints] is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

249. *Near*, 283 U.S. at 713. The Supreme Court has stated that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n*, 427 U.S. at 559.
While this term is generally inclusive, a better understanding of the law of prior restraints comes from the seminal case, *Near v. Minnesota*. In *Near*, the Supreme Court considered the constitutionality of an ordinance allowing temporary and permanent injunctions against speech falling under certain parameters. Specifically, if a news organization was found to have published or have in its possession a “newspaper, magazine, or other periodical” that was “(a) . . . obscene, lewd and lascivious” or “(b) . . . malicious, scandalous and defamatory,” that news organization could be prosecuted for a nuisance and enjoined from further publication of similar material.

The “nuisance” in *Near* involved a series of articles published by Jay M. Near alleging that a Jewish gangster was largely in control of the City of Minneapolis and that the gangster had support from various public officials, including the chief of police and the City’s mayor. Finding the articles to be “malicious, scandalous and defamatory,” a trial court fined Near and enjoined him from publishing any future articles of such nature. Near appealed the decision, alleging, in part, that the law was unconstitutional on its face.

On appeal, the Supreme Court agreed, finding the statute to be an unconstitutional “infringement of the liberty of the press guaranteed by the Constitution.” The Court noted that throughout history the most important guarantee of the freedom of the press has been that the press shall not be restrained from publication, even where such publication may be “malicious, scandalous and defamatory.” Whereas actions of libel still may lie in untruthful reporting, restraints on publication altogether seem too extreme in the view of the Constitution.

251. 283 U.S. 697 (1931).
252. Id. at 702.
253. Id.
254. Id. at 703–04.
255. Id. at 703–06.
256. Id. at 706.
257. Id. at 723.
258. See id. at 713–15.
259. See id. at 711.
260. See id. at 711–13.
Court ruled strongly against the imposition of prior restraints, it did assert that there is a limit to the protection against prior restraints. However, this limit to protection is "recognized only in exceptional cases," such as preventing the publication of "sailing dates of transports or the number and location of troops." Since the decision in Near, courts have consistently recognized the lack of constitutional basis for the imposition of prior restraints. When assessing the validity of prior restraints, courts begin their analysis with "a heavy presumption against [a prior restraint's] constitutional validity." Keeping that presumption in mind, "[t]he Government ... 'carries a heavy burden of showing justification for the imposition of such a restraint.'" While the courts have never articulated a specific burden that must be met, they have held it to be a heavy one and, at times, engaged in discussion akin to traditional narrow tailoring analysis. For example, in Nebraska Press Association, the Supreme Court considered "whether other measures" could fulfill the government's interest and "how effective[ ] a restraining order" is to serve that interest. This type of scrutiny is found in traditional narrow tailoring inquiries, where the court asks if there is a less restrictive means to achieve a government interest and whether the means are designed to effectively serve that interest. Regardless of what precise analysis a

261. Id. at 716.
262. Id. at 716. The Court also mentions other rare exceptions where prior restraints may be valid. Id. These instances include restraining the publication of obscene materials, words of force, and other incitements of violence. Id.
263. See infra notes 264–69 and accompanying text.
265. Id. (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).
268. Id. In the precursor case to N.Y. Times Co. v. United States, the D.C. Circuit of the U.S. Court of Appeals engaged in a similar analysis. See United States v. Wash. Post Co., 446 F.2d 1327, 1329 (D.C. Cir. 1971) aff'd sub nom. N. Y. Times Co. v. U.S., 403 U.S. 713 (1971). In Wash. Post Co., the court struck down the injunction noting both the heavy presumption against prior restraints and that such an injunction hardly served as "effective relief" since disclosures had already been made. Id.
court chooses to use, it is clear that (1) prior restraints come to courts with a strong presumption against them and (2) the government will have a heavy burden in justifying such a restraint.270

2. Ability to Restrain Under the Smith-Mundt Act

When reviewing the history of prior restraints cases, it seems highly unlikely that the government could constitutionally restrain the press from publishing BBG-produced material.271 This is especially evident considering the courts have been unwilling to validate prior restraints even to protect important government interests such as national security272 and defendants' constitutional rights to a fair trial and impartial jury.273 Nevertheless, the constitutional validity of such a restraint would still be subject to the same constitutional analysis as is present in other cases involving prior restraints.274 Under that analysis, a prohibition on publication of BBG materials would almost certainly be considered a prior restraint, whether it came in the form of an administrative order, a judicial order, restraining order, injunction,275 or a statutory provision.276 If found to be a prior restraint, the restriction would be assessed with a “heavy presumption against its constitutional validity.”277 Keeping this strong presumption in mind, a court would then have to determine whether the government could meet its “heavy burden of showing justification for the imposition of [the] restraint.”278 As demonstrated below, there are multiple reasons why the government would unlikely be able to meet such a burden in justifying a ban on publication of BBG material.

First, such a ban would likely not involve any of Near's limited proposed exceptions to prior restraints in which the First Amendment

270. See supra notes 264–65 and accompanying text.
271. See supra Part III.B.1 (discussing the doctrine of prior restraints).
272. See N. Y. Times Co., 403 U.S. at 714.
274. See supra notes 264–70 and accompanying text.
would not guarantee protection. Next, considering that other case law addressing prior restraints has invalidated the restraints even in the face of important government interests and individual constitutional rights, it seems that the government’s justification would pale in comparison here since only information that is already available to parts of the public is at stake. Finally, even if the government did establish a sufficient interest, it seems unlikely that a restraint on publication would be sufficiently narrowly tailored to serve such an interest. As noted in both Nebraska Press and United States v. Washington Post, when information is already partially available to the public, it hardly seems that a restriction on its further publication effectively serves the government’s interest in non-disclosure. The government would face the same issue here as BBG material is already somewhat available through the Internet and other means such as intercepting radio and television broadcasts.

Considering that the government would unlikely be able to provide sufficient justification for a restraint on publication, it seems probable that such a restraint would thus fail under the doctrine of prior restraints. This fact is magnified by the notion that the government would most likely not seek to enjoin or prevent publication of BBG material anyways. In Gartner, the court did not address the issue of prior restraints because one had not been imposed, but the court did note that the government felt it lacked the power to enjoin or restrain the

279. Publication would likely not involve obscene material, words of force, or information on troop locations. See Near, 283 U.S. at 716. However, if publication did involve any of these scenarios, it might not be protected by the First Amendment and therefore a restriction might be constitutionally valid. See id.


283. See Essential Info., 134 F.3d at 1170 (noting that there are already means for the general public to obtain BBG-produced material).

dissemination of USIA material.285 This government-held notion that it has no power to restrain or enjoin,286 coupled with the fact that such a restraint would nevertheless likely fail constitutional scrutiny,287 indicates that there is little the government could do to prevent the widespread domestic publication of BBG material, even with a statute that seemingly prohibits such publication.

IV. PRESS’ RIGHT TO ACCESS BBG MATERIAL

As the above analysis indicates, it is highly unlikely that the Smith-Mundt Act’s ban on domestic dissemination can be applied to prevent the press from publishing BBG material or punish it for doing so.288 However, even if the government has little control over the press’ domestic publication of BBG material, does the press itself have a constitutional right or statutory right under the Freedom of Information Act289 (FOIA) to access the material in the first place?

As has been stated throughout, the press does already have some access to BBG material. News organizations can receive BBG television broadcasts originating in southern Florida bound for Cuba, they can access information through the Internet, or they can actually receive the information in a foreign country.290 Furthermore, the Smith-Mundt Act itself does provide that “examination only” viewing is available to members of the press.291 However, such viewing opportunities have previously been limited to on premises (BBG offices) review without the ability to make verbatim copies.292 Keeping in mind these more cumbersome forms of access, there is still the question of whether the press has the right to directly access and copy BBG material from the

---

285. Id.
286. Id.
287. See supra notes 259–72, and accompanying text.
288. See supra Part III (discussing relevant case law on the government’s ability to punish or prevent the publication of already public information).
BBG broadcasters themselves. As the court in Gartner considered, if the Constitution or FOIA provide access at all, what level of “convenience of access” must they provide?

Gartner and other cases involving right of access issues have consistently held that there is no constitutional right to access government-held information that is not generally available to the public. Conversely stated, the Constitution does not confer on the government an “affirmative duty to make available to journalists sources of information not available to members of the public generally.” Following this line of logic, courts have also held that there is no right to more convenient access, such as the ability to make verbatim copies, even when access is permitted. Lacking a more convenient form of access through the Constitution, the likely last resort for greater access available to news organizations is the Freedom of Information Act.

In Essential Information, Inc. v. U.S Information Agency, the D.C. Circuit Court of Appeals considered whether, aside from the statutory provision in the Smith-Mundt Act allowing for examination, the press has a right to obtain BBG material through an FOIA request.

293. See Berkowitz, supra note 21, at 288–92 (discussing recent case law concerning the right to access information that is already in the public domain and analyzing what this means in regards to the media’s right to access BBG material).

294. See Gartner, 726 F. Supp. at 1190.

295. See id. at 1188–90 (noting that there is no constitutional right to access government-held information or to have the government provide it in more convenient forms such as verbatim copies); Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”); Pell v. Procunier, 417 U.S. 817, 834 (1974) (stating that the media has no right to access inmates beyond the rights generally afforded to the public).

296. Pell, 417 U.S. at 834. The Supreme Court has explained that no such affirmative duty exists because “the first amendment reads in the negative, ‘Congress shall make no law . . . ,’ not in the affirmative.” Gartner, 726 F. Supp. at 1187–88 (citing Edmond Kahn, Justice Black and First Amendment “Absolutes”: A Public Interview, 37 N.Y.U. L. REV. 549, 553 (1962)).


298. 134 F.3d 1165 (D.C. Cir. 1998).


The court’s analysis of the issue is rather short, as it quickly determines that under FOIA Exemption 3, the government is exempted from having to disclose BBG material. According to the exemption, the government may withhold information when the information is “specifically exempted from disclosure by [a] statute,” if the statute “(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue” or “(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” Taking note of this language, the court determined that the Smith-Mundt Act’s ban on dissemination qualified as such an exempting statute under Exemption 3. Thus, the court held that “on its face the Act appears to be ‘the sort of nondisclosure statute contemplated by FOIA [E]xemption 3’ because it is ‘a statute specifically exempting certain matters from disclosure to the general public and leaving [USIA] with no discretion to reveal those matters publicly.’” Since Exemption 3 applies, the government may deny FOIA requests for BBG information.

Currently, the decision in Essential Information represents yet another blow to the media’s right to gain more convenient and direct access to BBG material. However, the dissenting opinion by Judge Tatel in Essential Information does provide a legally sound alternative examination of FOIA requests for BBG material that might be adopted by other courts or circuits in the future. In his dissenting opinion, Judge Tatel first notes that courts have a duty “to construe FOIA

304. Essential Info., 134 F.3d at 1167.
305. Id. (quoting Tax Analysts v. IRS, 117 F.3d 607, 611 (D.C. Cir. 1997)).
306. Id. at 1169.
307. See Berkowitz, supra note 21, at 280–83 (criticizing the Court’s decision in Essential Information as out of line with precedent and noting that the decision is “outdated, since much of the information that the Smith-Mundt Act protects is now publically available on the Internet and through other sources”).
308. See Essential Info., 134 F.3d at 1170–72 (Tatel, J., dissenting).
exemptions narrowly.” 309 This duty means that “congressional intent to exempt matters from FOIA disclosure must appear in the ‘actual words’ of the statute.” 310 Focusing on the actual words of the statutes at issue, Judge Tatel took issue with the fact that the court’s decision glosses over the difference between the words “dissemination” and “distribution” (language found in the Smith-Mundt Act), 311 and “disclosure,” which is the primary “focus of Exemption 3.” 312 Judge Tatel pointed out that these words convey quite different meanings. 313 “Distribution” and “dissemination” generally refer to the spreading of information, whereas “disclosure” refers to the opening up or exposing of information not already available. 314 Therefore, in Judge Tatel’s view, the Smith-Mundt ban more likely seeks to prohibit the spread of information, not its disclosure upon a proper FOIA request. 315

In addition to not finding a statutory intent to prevent disclosure in the plain meaning of the words, Judge Tatel also argued that a historical review of the legislative history shows the lack of such an intent as well. 316 Upon his own review of the history behind the enactment of the Smith-Mundt Act and its later amendments, Judge Tatel determined that congressional intent revolved around preventing government propaganda, not preventing disclosure and publication by other sources in the media. 317 Taking this into consideration, Judge Tatel argued that the majority failed to deduce the proper intent from both the words of the statute and other evidence at hand. 318 This flawed interpretation of intent led to a failed application of Exemption 3 and thus an improper denial of the FOIA request. 319

309. Id. at 1170 (citing John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989)).
312. Essential Info., 134 F.3d at 1170.
313. Id. at 1170–71.
314. Id.
315. Id.
316. See id. at 1171.
317. See id.
318. See id. at 1170–73.
319. See id. at 1169.
While Judge Tatel’s dissenting opinion provides hope that other courts might allow FOIA access in the future, for now, the press is left to gather its information through the Smith-Mundt Act’s provision allowing “examination only” review of BBG materials by certain members of the public, and through less conventional means such as the Internet and the interception of BBG television broadcasts. Realistically though, the American press will most likely have to rely solely on sources like the Internet and foreign broadcasts because Gartner made clear that the Smith-Mundt Act’s provision for “examination only” viewing of BBG materials does not permit the convenience of making verbatim copies of such material. Given the press’ need to fully document information, this suggests that the only currently viable options for access are through other means such as the interception of BBG broadcasts and the Internet.

V. CONCLUSION: RECOMMENDING MORE PRESS COVERAGE WITHOUT TAKING STEPS TO REPEAL THE SMITH-MUNDT ACT’S BAN ON DOMESTIC DISSEMINATION

As this Note has highlighted, the two key First Amendment concerns about the press’ rights under the Smith-Mundt Act’s ban are (1) the press’ ability to obtain BBG material and (2) the press’ ability to publish that material. While access to BBG material might not come in the most convenient forms for the news media, it is nevertheless accessible through various mediums. Furthermore, even though FOIA requests have been treated unfavorably under the Smith-Mundt Act, there is hope that new FOIA transparency mandates by President Barack

321. See Essential Info., 134 F.3d at 1170 (discussing other means of accessing BBG material).
323. See Essential Info., 134 F.3d at 1170 (discussing other means of accessing BBG material).
324. See supra Part IV.
325. See supra Part III.
326. See Essential Info., 134 F.3d at 1170.
327. See id. at 1165 (majority opinion); Gartner, 726 F. Supp. at 1185.
Obama and Attorney General Eric Holder might facilitate more robust access to this information in the future.328

Just as the Smith-Mundt Act cannot fully prevent access to BBG material, it most likely cannot restrain its domestic publication either.329 Under the traditional rule of prior restraints, any attempt to prevent publication of such material would likely be deemed unconstitutional as an infringement upon the First Amendment’s guarantee of a free press.330 And while the law of prior restraints would not bar punishment of publication of BBG material after the fact,331 the application of the Daily Mail standard almost certainly would.332 Therefore, even though the terms of the Smith-Mundt Act seem to prohibit domestic dissemination, under First Amendment jurisprudence the government would have little, if any, actual recourse against the publication of BBG material.333

There seems to be little denying that the free flow of BBG material would be beneficial for the American public. Access to this information will give American citizens a means by which to inquire into the particularly large portion of the United States’ foreign diplomacy mission that is carried out through BBG news organizations.334 With the ability to analyze this portion of the United States’ diplomacy efforts voters can then vote to affect the changes they want to see in U.S. diplomatic efforts and hold those currently in power accountable.335

328. See Memorandum from Eric Holder, U.S. Att’y Gen., to Heads of Executive Departments and Agencies (March 19, 2011), available at http://www.justice.gov/ag/foia-memo-march2009.pdf. The memorandum states that “[a]s President Obama instructed in his January 21 FOIA Memorandum, ‘The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.’” Id. The memorandum goes on to state that just because “as a technical matter . . . the [requested] records fall within the scope of a FOIA exemption” does not mean they should be withheld. Id. If records are withheld in such instances, the memorandum warns that the Department of Justice will not defend such a non-disclosure. Id.

329. See supra Part III.B.2.

330. See supra Part III.B.2.


332. See supra Part III.A.4.

333. See supra Part III.A.4.

334. See BBG Fact Sheet, supra note 9.

335. See Hugo M. Mialon & Paul H. Rubin, The Economics of the Bill of Rights, 10 AM. L. & ECON. REV. 1, 10 (2008) (discussing the importance of the
being able to provide such information, the press is able to fulfill its traditional role in our democratic process as both a contributor to and moderator of our political and social discourse.

This Note certainly recognizes the importance of publication of such information and the author shares the sentiment with others336 that members of the public should be able to know what their government is saying to the rest of the world about their own culture. However, due to the strong likelihood that domestic publication of BBG material can occur even under the Act's domestic dissemination ban, this Note differs from other scholarly work regarding the Act337 by refraining from calling for a repeal of the Act's ban. In other words, since access to BBG material and publication of that material is possible even under the Act, a repeal is not necessary to achieve the goal of obtaining a more plentiful source of news and perspectives.

In addition to the rationale that since a repeal is not necessary it should not be sought, there is the underlying notion that the Smith-Mundt Act’s domestic dissemination ban still does some good for the American public. As several courts have noted, the primary Congressional intent behind the ban was to prevent the U.S. government from spreading propaganda to its own citizens.338 By leaving the Act’s ban on domestic dissemination as it is, the government itself would thus still likely be prevented from spreading propaganda to residents of the United States.339 While an open flow of information certainly seems important in a free society, equally important is that the information is not being force fed to the public by its government. The beauty of the First Amendment standards discussed throughout this Note is that, without repealing the


337. See supra note 21 and accompanying text.


339. Whether it is morally proper for the government to be spreading what is likely propaganda to foreign countries is beyond the scope of this Note.
Act's ban, a harmony can be achieved whereby the press is still free to serve its important informational roles and the government is still restrained from using such entities as the BBG against its own people. It is now time for the press to embrace the Act's weaknesses and bring into the light the actions of a government agency that is known so well to the rest of the world, yet so little at home.