

# ARTICLES

## NEWS MEDIA SATELLITES AND THE FIRST AMENDMENT: A CASE STUDY IN THE TREATMENT OF NEW TECHNOLOGIES

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*[In the eyes of the Founders,] [t]he press was to serve the governed, not the governors . . . . The press was protected so that it could bare the secrets of government and inform the people.<sup>1</sup>*

On April 29, 1986, a U.S. LANDSAT satellite took a photo of the nuclear reactor in Chernobyl; when computer enhanced, the photo clearly showed the burning reactor and its plume of radioactive smoke. With the publication of that one photo, the world had more information about the disaster than had otherwise been pieced together in the entire first week after the accident.

Since then, the news media have used satellite photos on a number of occasions to provide first-hand images of locations such as the Persian Gulf, Libyan airfields and chemical weapons facilities, and Soviet submarine bases and nuclear-test sites. In this way, the world press has begun to make use of sophisticated reconnaissance information that was previously the private domain of superpower intelligence agencies.

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Mr. Merges and Mr. Reynolds are authors of *Outer Space: Problems of Law and Policy*, to be published by Westview Press. The authors would like to thank Mark Brender, National Security Producer, ABC News; Burke Marshall, Yale Law School; and Vincent Blasi and Harold Edgar of Columbia Law School, all of whom contributed many helpful comments and suggestions. The authors, however, are entirely responsible for the contents of this article.

1. *New York Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (emphasis added).

Not surprisingly, the availability of such information to private organizations has created consternation in some circles.<sup>2</sup> Information -- and control over information -- is power in the intelligence arena, and the ability of private organizations to gather information via satellite poses a threat to the information monopoly previously held by superpower intelligence agencies. In some ways, members of those agencies have been more upset by the acquisition of satellites by outside organizations than they would have been by the development of satellite reconnaissance programs by other sovereign nations. Perhaps this is because mass media access to satellite information poses domestic risks, such as embarrassment and political damage, which are not posed by foreign national activities.

Superpower intelligence agencies have consistently followed a policy of not releasing information that might embarrass the adversary, on the theory that any political advantage gained by that embarrassment would be cancelled out both by the information on their own capabilities that the release would provide and by efforts at retaliation, perhaps in kind.<sup>3</sup> Private organizations would not be restrained by such considerations. This could make life more difficult for both American and Soviet officials. In addition, many in the military and intelligence communities fear (with some basis) that private organizations might disclose information about U.S. military actions and dispositions that could compromise ongoing operations or provide valuable general information to adversaries.

Nonetheless, news organizations have shown considerable interest in using satellite images. Discussions have begun regarding a "Mediasat" -- that is, a satellite service, dedicated to satisfying the needs of news organizations, that would be operated directly by a network or consortium of networks. In response, the Department of Commerce, pursuant to its authority under the Land Remote-Sensing Commercialization Act of 1984,<sup>4</sup> has recently issued regulations (the "Regulations")

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2. U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, COMMERCIAL NEWSGATHERING FROM SPACE: A TECHNICAL MEMORANDUM 31 (1987) [hereinafter OTA Report] (reporting bitter complaints by Soviet diplomats after the magazine *Aviation Week & Space Technology* published satellite photos of Soviet space launch facilities at Tyuratam).

3. See W. BURROWS, DEEP BLACK: SPACE ESPIONAGE AND NATIONAL SECURITY 132-34 (1986) (describing reasons why U.S. intelligence officials do not release information from satellite reconnaissance, including reluctance to embarrass other countries publicly and incur resulting hostility).

4. Pub. L. No. 98-365, 98 Stat. 451 (codified at 15 U.S.C. §§ 4201 *et seq.* and scattered sections of 49 U.S.C. (1985 Supp.)) (which we refer to as "the Act," and cite only by U.S. Code sections in this article).

regarding the private operation of satellite newsgathering facilities.<sup>5</sup> Those regulations set forth broad, yet poorly defined, "national security" grounds for enacting potentially prohibitive limits on private operation of satellite newsgathering facilities, and sweeping powers of information seizure and license revocation for operators found by the Secretary of Commerce to have violated those limits.

In this article, we will first provide a brief introduction to the technology and issues involved, and then discuss the Regulations from a First Amendment and national security perspective. We conclude that the Regulations as currently constituted violate the First Amendment, and suggest an alternative regime that will protect important national security interests without overriding equally important considerations of press freedom and free access to information.

Aside from these narrower concerns, the Regulations provide an illustration of Lee Bollinger's often quoted statement that "new technologies of communication are both new battlegrounds for renewed fighting over old First Amendment issues and focal points for reform efforts."<sup>6</sup> Such has been the case with motion pictures, which were originally denied First Amendment protection,<sup>7</sup> with broadcasting, which was originally seen as mere entertainment not falling within the First Amendment,<sup>8</sup> and with cable television.<sup>9</sup>

The tendency to associate First Amendment protection with familiar modes of expression is altogether understandable, but with the current pace of technological innovation<sup>10</sup> it poses real risks to freedom. We hope that our discussion of First Amendment doctrine in this somewhat unusual context will demonstrate that basic First Amendment doctrine is powerful and flexible enough to protect established freedoms while still accommodating other important interests in almost any technological

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5. Licensing of Private Remote-Sensing Space Systems, 15 C.F.R. § 960 (1988) (referred to in this article as "Licensing Regulations" or "Regulations"); A Notice of Proposed Rulemaking (NPRM) was published at 51 Fed. Reg. 9,971 (1986) (proposed March 24, 1986).

6. Bollinger, *Freedom of the Press and Public Access*, 75 MICH. L. REV. 1, 24 (1976).

7. See *Mutual Film Corp. v. Ohio Indus. Comm.*, 236 U.S. 230 (1915); *Mutual Film Corp. v. Indus. Comm. of Ohio*, 236 U.S. 247 (1915); *Mutual Film Corp. v. Kansas*, 236 U.S. 248 (1915).

8. See *KFKB Broadcasting Ass'n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), revised as *POLITICAL FREEDOM 78-89* (1960); L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 22-23, 27-30 (1987).

9. L. POWE, *supra* note 8, at 216-47.

10. See, e.g., NAT'L TELECOMMUNICATIONS & INFORMATION ADMINISTRATION, *TELECOM 2000: CHARTING THE COURSE FOR A NEW CENTURY* (1988), at 409-35 (describing new information technologies, such as videotext, and their likely displacement of many print media).

context so long as one does not ignore the fundamentals of what is going on: communication.

## I. SATELLITE INFORMATION GATHERING: TECHNOLOGY AND LAW

The idea of using satellites for intelligence gathering predates the space age by many years.<sup>11</sup> It was not until the early 1960s, however, that it became a reality. Beginning with the Corona series, the United States began building increasingly more sophisticated intelligence satellites, some of which are now said to be able to read the license plates of cars parked at the Kremlin.<sup>12</sup> The Soviet Union followed suit, but was always somewhat behind the United States in terms of image resolution.

Photographs from these satellites have played an important role in maintaining superpower stability and avoiding unnecessary military spending. Satellite photos during the Cuban missile crisis showed President Kennedy that the Soviet Union was not prepared to go to war over the missiles in Cuba, and showed Premier Khrushchev that the United States was so prepared. Even earlier satellite photos had served to discredit the "missile gap" myth that many advocates of increased U.S. missile spending were bemoaning.<sup>13</sup> More recently, satellites of far lower resolving power (measured in tens of meters instead of in inches) have been put into space to provide resource and cartographic information to the public.

The two public systems currently operating are EOSAT, the private system that inherited the U.S. LANDSAT satellite, and SPOT, a French

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11. In 1946, a study commissioned by the Air Force and conducted by the RAND Corporation and the Douglas Aircraft Co. recommended the use of satellites as a novel and unconventional instrument of reconnaissance, comparable to "an observation aircraft which cannot be brought down." DOUGLAS AIRCRAFT CO., Report no. SM-11827, PRELIMINARY DESIGN OF AN EXPERIMENTAL WORLD-CIRCLING SPACESHIP 17 (May 2, 1946). See also W. MCDUGALL, THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE 99-111 (1985) (outlining early history of U.S. intelligence satellite program); P. STARES, THE MILITARIZATION OF SPACE: U.S. POLICY, 1945-1984 (1985), 24-30.

12. W. BURROWS, *supra* note 3, at 248. The terms "image resolution" or "resolving power" are used to describe the ability of satellite cameras to distinguish objects. Such figures are given in terms of object size, so that a resolution of ten meters means that the satellite can distinguish an object ten meters in diameter from the objects around it. The United States' KH-11 intelligence satellite has a resolution of 2-4 inches under ideal conditions, which is generally considered sharp enough to read license plates; a more capable satellite, the KH-12, is scheduled to be deployed in 1989. *Id.* at 248, 307-09. See also R.M. HORD, REMOTE SENSING: METHODS AND APPLICATIONS 27-117 (1986) (describing different types of sensors and different applications of remote sensing); T. LILLESAND & R. KIEFAN, REMOTE SENSING AND IMAGE INTERPRETATION 98-102 (1987) (explaining meaning of spatial and spectral resolution); P. STARES, *supra* note 11, at 32, 44-45.

13. W. BURROWS, *supra* note 3, at 130-32; W. MCDUGALL, *supra* note 11, at 268.

system with similar functions. SPOT provides higher resolution images than EOSAT -- approximately ten meters as opposed to EOSAT's thirty meters. Both are capable of making photographs in both visible and infrared light, and of computer and spectral enhancement that can reveal details not otherwise visible (such as signs of mineral deposits, power plant effluents, or diseased vegetation). Photographs taken by these satellites are relayed to ground stations by radio links, then processed and made available to customers.<sup>14</sup>

These systems have been the primary source of space photographs used by the news media to date. Although their resolution is low, and the time required to obtain photographs is measured in days at best, these public systems have nonetheless been important sources of information. Photographs of the Chernobyl site, for example, showed that one of the reactors was in fact burning and that the containment system had failed, and other satellite photos used by the media have shown Soviet space launch facilities, missile bases, and nuclear test facilities.<sup>15</sup> Nonetheless, dissatisfaction with the low resolution of existing systems has led to growing interest in the possibility of a specialized satellite for use by the media. Such a "Mediasat" would have higher resolution than is available from SPOT or EOSAT; most experts believe that it would need a resolution of at least five meters to produce photographs of substantially greater news value than those publicly available now. It would also have to be capable of covering all important parts of the globe (meaning that it would need to orbit in a largely north-south inclination so that it would cross all inhabited latitudes), and to return information quickly and directly to the media organizations involved without passing through the hands of government officials who might have an incentive to delay or tamper with data.

Such a system would be expensive, but not outside the financial reach of the major American television networks, either individually or as a group.<sup>16</sup> In order to operate it, however, a network would need

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14. THE ILLUSTRATED ENCYCLOPEDIA OF SPACE TECHNOLOGY 106-15 (K. Gatland ed. 1985); U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, INTERNATIONAL COOPERATION AND COMPETITION IN CIVILIAN SPACE ACTIVITIES 253-334 (1985); OTA Report, *supra* note 2, at 39-44.

15. Brender, *New Technology in News Gathering: Remote Sensing and the First Amendment*, in WIRING THE CONSTITUTION: THE NEWS MEDIA IN AN INFORMATION AGE 11, 11 (Media Institute ed. 1987) [hereinafter Brender, *New Technology*]; Mark Brender, *News Gathering from Space: Commercial Remote Sensing and the Press* (Dec. 15, 1986) (unpublished manuscript presented at the U.S. Congress Office of Technology Assessment Commercial Newsgathering from Space Workshop) (on file with authors).

16. The Office of Technology Assessment predicts that a mediasat system would cost approximately \$215 million to construct and another \$10-15 million per year to operate, although some of that cost could be recouped via sales of data to third parties. By way

more than money; it would need a license under the 1984 Land Remote-Sensing Commercialization Act.<sup>17</sup> Title IV of that Act requires that any person subject to the jurisdiction or control of the United States who directly or indirectly operates a private remote-sensing space system must obtain a license from the Secretary of Commerce. The Secretary, before issuing a license, must certify in writing that the operator will comply with all applicable domestic law and regulations, "and any applicable international obligations and national security concerns of the United States."<sup>18</sup>

Under the Regulations implementing the Act, an applicant for a license must supply information concerning the date operations are to commence, the method of launch, the range of orbits and altitudes requested, the image resolution of the satellite, the spectral bands used, plans for data transmission and distribution, and related matters. That information is to be forwarded immediately to the Department of Defense, the Department of State, and other federal agencies that may have an interest. Those agencies have sixty days to recommend approval or disapproval; if the Secretary of Defense or the Secretary of State recommends disapproval (or approval with modification or conditions) for national security grounds, the determination must state why that is necessary. Before approving an application and issuing a license, the Administrator must find that the system will be operated in compliance with applicable law, and that "the licensee will operate the system in a manner consistent with the national security and the international obligations of the U.S."<sup>19</sup> Where there is a failure to do so after a license

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of comparison, NBC is said to have paid \$309 million for the rights to the 1988 Olympics and expected to spend another \$300 million to produce its Olympic coverage. OTA Report, *supra* note 2, at 24-25.

17. 15 U.S.C. § 4201 *et seq.*

18. 15 U.S.C. § 4241(2)(b) (Supp. 1987). The Secretary's authority in this area has been delegated to the Administrator of the National Oceanic and Atmospheric Administration (NOAA), and then redelegated to the Assistant Administrator for Environmental Satellite, Data, and Information Services. Licensing Regulations, 15 C.F.R. § 960 (1988). In addition, launch of a satellite by a commercial launch service (probably the only feasible alternative) would require a launch license from the Secretary of Transportation; authority to issue those licenses has been delegated to the Office of Commercial Space Transportation, which reviews proposed launches for consistency with the public health and safety, national security, and foreign policy interests of the United States. See 49 U.S.C. § 2601 (Supp. 1984); Final Rule, Commercial Space Transportation Licensing Regulations, 14 C.F.R. § 400 *et seq.* (1988). Note that the Regulations apply to *all* private remote-sensing systems (such as those used for map-making or oil exploration), not just those operated by media organizations for newsgathering purposes. First Amendment issues are most clearly implicated in the media context, however.

19. 15 C.F.R. § 960.11(a) (1988). Where an application is denied, the Administrator must provide the applicant with a statement of reasons for the denial; there is a right of appeal by either a formal or an informal hearing at the option of the applicant. 15 C.F.R. § 960.10(b) (1988). See also 15 U.S.C. § 4241(b) (Supp. 1984) ("No license

has been granted, the licensee may be subject to license revocation, fines of up to \$10,000 per day, or, where "the Administrator determines that there is probable cause to believe that any object, record, or report was used, is being used, or is likely to be used in violation of the Act, these Regulations, or the requirements of any license,"<sup>20</sup> the Administrator may seize the item and issue a Notice of Seizure containing a description of the item seized, a statement of facts upon which the seizure was based, and a reference to provisions of the act, regulation, or license actually violated. Appeal is by administrative hearing.<sup>21</sup>

## II. FIRST AMENDMENT CONCERNS

### A. Does the First Amendment Apply?

There are three threshold issues that must be considered before going on to a full discussion of the First Amendment problems arising out of Mediasat licensing: (1) where is the situs of the activity the government would seek to regulate -- earth or space; (2) if the situs is space, then does the First Amendment protect activities carried on there, or does the government have plenary power over them; and (3) is satellite photography the sort of activity protected by the First Amendment?

The answer to the question of where the activity takes place depends on how the activity is defined. Obviously, remote sensing satellites are positioned in space, far beyond the geographic borders of the United States.<sup>22</sup> Yet the information they gather is transmitted to earth for use here, and it is that earthbound use that concerned the drafters of the Regulations.

One indication that earth is the primary situs appears in the Regulations themselves. The Regulations permit the Secretary of Commerce to raid earth receiving stations which he or she has probable cause to

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shall be granted unless the Secretary determines in writing that the applicant will comply with . . . any applicable international obligations and national security concerns of the United States.").

20. 15 C.F.R. § 960.16(a) (1988).

21. 15 C.F.R. § 960.16 (1988).

22. To date, only one small group of countries has had the audacity to claim that national boundaries literally extend into the heavens. In the Bogota Declaration, a group of equatorial nations made this claim in a vain attempt to capture some of the benefits of scarce and valuable equatorial geostationary orbits. See International Telecommunication Union, Broadcasting Satellite Conference, Doc. No. 81-E (Jan. 17, 1977), Annex 4, reprinted in 6 J. SPACE L. 193 (1978). For a sampling of the criticism generated by this Declaration, see Gorbil, *The Legal Status of Geostationary Orbits: Some Remarks*, 6 J. SPACE L. 171, 176-77 (1978). See also Wihlborg & Wijkman, *Outer Space Resources in Efficient and Equitable Use* 24 J. L. & ECON 23 (1981) (discussing legal and economic considerations applicable to geosynchronous orbit and to space resources generally).

suspect are not being operated in a manner "consistent with the national security of the United States."<sup>23</sup> If the Regulations are designed to affect activity on earth and their primary effect is felt on earth, then it is hard to argue that the real activity being regulated is in space and hence beyond the reach of constitutional protections.<sup>24</sup>

But even if such an argument were made, critics of the Regulations would have a strong counterargument, which runs as follows: the United States, by signing the Outer Space Treaty in 1967,<sup>25</sup> agreed that U.S. "jurisdiction and control" would henceforth extend to outer space objects launched under its flag. If the First Amendment applies to space activities because of the extension of U.S. jurisdiction, as seems likely, then the situs issue is irrelevant -- the First Amendment applies no matter where the activity in question is said to take place, so long as the spacecraft involved is registered under the U.S. flag.<sup>26</sup> The space situs issue, therefore, is tangential. The Regulations are aimed at controlling the dissemination of information in the U.S., by American news organizations. Thus the Regulations are no less connected with U.S.-based activities than if they concerned the dispatches of foreign correspondents

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23. 15 U.S.C. § 4241(2)(b), *supra* note 18.

24. Similarly, the right to publish does not entail the right to distribute a newspaper in whatever manner its owners choose, but it does entail the right to be free from content-based decisions regarding who may do so. See *City of Lakewood v. Cleveland Plain Dealer*, \_\_U.S.\_\_, 108 S.Ct. 2138 (1988). As Professor Powe notes, government may regulate aspects of expressive conduct on various grounds, but once it does so on the basis of content, First Amendment analysis is triggered even if the conduct itself is not directly implicated in expression:

To use another example, the cafeteria of the *Washington Post* may be regulated by public health authorities even if Richard Nixon is president -- but the ability to regulate what is served up in the cafeteria doesn't allow regulation of what is served up in the pages of the newspaper.

L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT*, 241-42 (1987).

Thus, though the government has the power -- and even the international obligation -- to regulate its citizens' use of outer space, it may not base its exercise of that power on those citizens' expressive activity without triggering First Amendment scrutiny. Cf. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

25. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (1967). See generally G. REYNOLDS & R. MERGES, *OUTER SPACE: PROBLEMS OF LAW AND POLICY*, at 62-94, 248-57 (forthcoming from Westview Press) (discussing 1967 Outer Space Treaty and its jurisdiction and control provisions in context of private space activities).

26. The question of whether the First Amendment "follows the flag" in the context of a United States spacecraft is not entirely settled. However, the most widely accepted model relating to extraterritorial jurisdiction over analogous objects -- ships at sea -- suggests that it would do so. That model, known as the "floating island" approach, says that ships at sea are treated as extensions of the territory of the flag state. *Cunard S.S. v. Mellon*, 262 U.S. 100 (1923). For more on this question, see G. REYNOLDS & R. MERGES, *supra* note 25, at 248-57, 311-12.

or the satellite transmission of network news stories -- activities no one would claim are outside the scope of First Amendment protection.

## B. The Right to Gather News

As the previous examples suggest, the central question is not where the media activities take place, but what those activities are. In the case of foreign dispatches or satellite transmission of stories from correspondents to the network for editing, reporters are not actually engaged in the direct transmission of news. These events are instead part of a broad range of activities that are necessary to collect, package, and transmit the information that becomes public news. In a word, they are referred to as newsgathering. The courts have said that the gathering of news is entitled to some protection under the First Amendment, but they have not clearly defined exactly which activities qualify for protection.<sup>27</sup> What is clear, however, is that the restrictions that have been upheld have been concerned with the circumstances surrounding the gathering -- the extent to which it imperils reporters' safety, for example -- rather than with the content of the news gathered.

These cases hold that the press can be prevented from interviewing individual prisoners,<sup>28</sup> and indicate that the press can be prevented from entering the scene of an accident or natural disaster, if relief authorities have excluded the general public for safety reasons.<sup>29</sup> The press can even be restrained, in certain circumstances, from covering

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27. See *infra* notes 28 through 31 and accompanying text.

28. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (no First Amendment right to interview individual prisoners); *Pell v. Procunier*, 417 U.S. 817 (1974) (same).

29. See *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) (dictum); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (dictum). Cf. *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958) (excluding news photographer from courtroom).

military operations, where considerations of secrecy and safety so dictate,<sup>30</sup> or from travelling to restricted countries,<sup>31</sup> although the validity of travel restrictions has been questioned.<sup>32</sup>

Even so, the Supreme Court has recognized on a number of occasions that the press does have a right of access to newsworthy information, without completely clarifying the contours of that right. "[W]ithout some protection for seeking out the news," the Court has declared, "freedom of the press would be eviscerated."<sup>33</sup> In fact, some members of the Court have gone so far as to indicate that the press should, at times, be given preferential access to newsworthy sources.<sup>34</sup> And in cases where the Court has restricted the press from freely gathering news, it has done so in response to an immediate threat to order or safety.<sup>35</sup> The Court has, by contrast, never declared a novel newsgathering technology off-limits solely because of the information it might reveal. Indeed, such a declaration would appear patently inconsistent with the function of the First Amendment and its place in our system of government.

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30. *Flynt v. Weinberger*, 588 F.Supp. 57 (D.D.C. 1984) (refusal to grant injunctive or declaratory relief against Department of Defense prohibiting it from restricting press access to military operations such as Grenada invasion). See also *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (stating that the regular freedom of speech standard should apply to members of the press). Note that restrictions of press access to government operations due to national security considerations have been roundly criticized in the wake of the Reagan Administration's denial of press coverage of the Grenada operation. See, e.g., Goldston, Granholm & Robinson, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409 (1986).

31. *Zemel v. Rusk*, 381 U.S. 1 (1965) (dismissing First Amendment claim while upholding prohibition on travel to Cuba). Note, however, that the travel restrictions challenged in *Zemel*, and the prior State Department policies that they codified, allowed preferential access to news reporters. 381 U.S. at 3, 9. Mr. Zemel, however, claimed First Amendment protection not for newsgathering but on the grounds that travel to Cuba would help him educate himself and become a better citizen. 381 U.S. at 4.

32. See M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.05 (1986).

33. *Branzburg*, 408 U.S. at 681.

34. *Houchins v. KQED*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring). A three member plurality of the *Houchins* Court stated that television station KQED should not have been allowed into a jail to document unhealthy and unsafe conditions; however Justice Stewart, in his concurring opinion, stated that there are situations where the press should be given preferential access. *Id.* See also *Branzburg v. Hayes*, *supra* note 33 (dictum).

35. See cases cited *supra* notes 28-31. Arguably the restriction on travel to Cuba in *Zemel v. Rusk*, 381 U.S. 1 (1965), was not the result of a direct and imminent threat to national security. Even so, the restrictions might have been upheld as a way to protect the safety of travelers and journalists, as in the still-hypothetical exclusion of newsmen from danger zones such as earthquake areas. Certainly the Court treated the restrictions in this fashion, comparing them to orders excluding all American travelers (except journalists, relief workers, etc.) from Ethiopia during the Italian invasion and from Spain during its Civil War. 381 U.S. at 9. Thus *Zemel* cannot be said to support the imposition of travel restrictions as a means of controlling news content.

### C. Are Media Satellites Newsgathering Instruments?

It is important to clarify what the media do when they use satellite photos in news stories, i.e., what activities they undertake. Without understanding this, it is impossible to evaluate the constitutional status of those activities.

Photography has been part of the newsperson's documentary arsenal since the time of Mathew Brady. Photography is newsgathering, the acquisition of information for dissemination to the public. As the discussion above makes clear, satellite photography is a sophisticated modern technology that stretches our knowledge of optics and imaging to its (present) limits. But it is, fundamentally, photography, no different in principle from the activities undertaken by such famous photojournalists as Mathew Brady or Walker Evans.<sup>36</sup>

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36. Although somewhat beyond the scope of this article, a concern that may arise is the possibility that a mediasat might encourage invasions of privacy, e.g., by allowing photography of secluded and apparently private areas such as residential back yards. See, e.g., *Snooping From Space*, PRIVACY JOURNAL, May, 1986, at 2, 4. For the foreseeable future, this is unlikely to be a problem, since extremely high resolutions -- probably of one centimeter or better -- would be required in order to produce recognizable photos of human beings. Should the media desire such photos, for example, of movie stars sunbathing in their back yards, much better photos could be produced much more inexpensively via more traditional techniques such as aerial photography or long-lens cameras stationed on nearby high-rises. In any event, privacy invasions are, of course, subject to tort actions. See RESTATEMENT (SECOND) OF TORTS § 652B ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."); § 652D ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.") See also *U.S. v. Tabor*, 635 F.2d 131, 139 (2d Cir. 1980) (law enforcement officer's looking into a dwelling window with telescope invades Fourth Amendment privacy interest).

The Supreme Court has recently held that there can normally be no reasonable expectation of privacy from aerial photography or observation. See *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *California v. Ciraolo*, 476 U.S. 207 (1986). *Dow* involved the Environmental Protection Agency's use of aerial photographs with a resolution of one-half inch; *Ciraolo* involved the use of naked-eye observation from low-flying aircraft to detect marijuana cultivation. Both cases were decided 5-4, and featured strong dissents warning of risks to privacy rights posed by overhead observation. These cases present serious problems, since a strong case can be made that privacy rights should be jealously protected, at least in the context of private residences. However, protection should be accomplished via private tort actions (where private entities are involved) and Fourth Amendment law (where authorities are involved), not through restrictions on the licensing or operation of satellite systems or aircraft. This would cast far too wide a net, restricting a huge amount of constitutionally privileged expression to protect privacy rights. As in the national security context, subsequent civil and criminal punishment is to be preferred over such wholesale *ex ante* restrictions.

Where photography of military installations is involved, privacy concerns, whether in tort or under the Fourth Amendment, are not likely to play a role. However, security at

Advanced media satellites, then, are merely sophisticated cameras. As a consequence, to the extent that the Regulations can be used to prohibit the launching of a media satellite or the use of existing satellites for newsgathering out of fear that the media will use satellite information in ways that are injurious to national security, they are akin to a ban on private ownership of unlicensed cameras for fear that those cameras might be used to photograph items in a way that harms national security. Such a prohibition would surely fail in the face of a First Amendment challenge. Because of this, the satellite Regulations in their present form cannot withstand constitutional scrutiny in light of the principles of the First Amendment.

To make this argument a bit clearer, consider the following thought experiment: The town of Covertia houses a number of highly secret military installations whose activities are vital to national security. In order to prevent the disclosure of those activities, the Department of Defense issues regulations governing the private ownership of cameras. Those regulations provide that the citizenry of Covertia may not own or operate cameras without first obtaining a license from the local military authorities, who will be responsible for ascertaining that the prospective camera-owner will not use his/her camera to photograph the secret installations.

Protests by attorneys for the local newspaper, the *Covertia Mirror*, go unheeded. "You have a First Amendment right to publish," say the military officials, "but not a First Amendment right to own a camera. What we're doing is simply a regulatory matter, a way of denying you access to information that you are not constitutionally entitled to gather -- no different from excluding you from our bases."

It is hard to imagine that a court would accept such arguments, or even that government attorneys would seriously assert them. Yet those are the sorts of arguments made by the Government in support of the Regulations, arguments which are scarcely distinguishable from the earthbound camera-ban described above.<sup>37</sup> This contradiction is no

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many military installations is currently maintained in part via restrictions on aircraft overflight, which promote a sort of "military privacy." See 14 C.F.R. §§ 99.1-49 (1987) (Federal Aviation Administration regulations concerning overflight of defense-sensitive areas). Such restrictions are not practical in the case of satellites (whose paths are determined largely by orbital mechanics, meaning that their operators cannot avoid overflying specific areas as aircraft operators can), which will require some sort of alternative regime. But that regime should be guided by the spirit of the overflight regulations -- a narrow, specific set of clear limitations. This approach is discussed in more detail further on.

37. See, e.g., 52 Fed. Reg. 25,968 (1988) (discussing national security concerns and arguing that restrictions under Regulations "[i]n many cases . . . may simply be a denial of access to information . . ." not a prior restraint).

doubt a result of the fact that satellite imaging technology, long an exclusive preserve of governments, does not "feel" like a traditional First Amendment activity, while earthbound photography, long engaged in by reporters, does.<sup>38</sup> But such intuitions, however powerful their grip, must be unlearned if the new technologies of communication are to take their rightful places within the system of freedom of expression established by the Constitution.

#### D. Which First Amendment Principles Apply?

It is generally accepted that First Amendment rights are not absolute and must sometimes bow to urgent concerns of national security.<sup>39</sup> Yet it is also bedrock constitutional law that the press must be given the freedom to foster a robust, wide-ranging debate on issues of national significance.<sup>40</sup> It is in the context of these competing principles that the battle is joined over media rights in space.

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38. We recognize, of course, that the above is not a complete answer to flat assertions that satellite photography just "isn't speech" or publication and hence is not a matter of First Amendment concern at all. In a sense, such objections are unanswerable, as they are assertions, not arguments. As the previous discussion illustrates, though, satellite photography looks a lot like activities that generally are regarded as falling within the realm of the First Amendment. In light of this resemblance, and in light of the general trend toward expansion of First Amendment coverage to include activities (such as motion picture production) previously regarded as outside its purview, we believe that the burden of proof must rest with those who would characterize satellite photography as being outside of First Amendment protection. We do not believe that burden can be met.

39. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops") (footnote omitted). See also *Schenck v. United States*, 249 U.S. 47, 51-52 (1919) (upholding criminal punishment of peace workers who distributed anti-draft pamphlets to new draftees, as a "clear and present danger" to national security).

Although possible restrictions relating to the "international obligations of the United States" (see *supra* note 19, and accompanying text) have received far less attention than the national security issues, restrictions based on those considerations would also pose First Amendment problems. To the extent that those international obligations conflict with the First Amendment, they would, of course, be void. See *Reid v. Covert*, 354 U.S. 1, 16-17 (1957); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-4 (1978). However, the only international law issue that appears to be directly relevant -- the international legal status of remote sensing -- does not pose a barrier to media satellite operations. See George Paul Sloup, *Mediasat, Gray Reconnaissance, and the New United Nations Principles on Remote Sensing* (unpublished paper presented at the 38th Congress of the International Astronautical Federation, Brighton, U.K., October 10-17, 1987) (on file with authors) (concluding that mediasats are consistent with international law, including the United Nations principles on remote sensing and the 1967 Outer Space Treaty). On the international legal and political aspects of remote sensing generally, see G. REYNOLDS & R. MERGES, *supra* note 25, at 178-94.

40. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

In terms of First Amendment analysis, three doctrines seem especially relevant to the Regulations: the doctrine of prior restraint, the overbreadth doctrine and the rule disfavoring content-based restrictions on expression. We will address each of these in turn, beginning with the question of whether the Regulations constitute a prior restraint.

### E. The Regulations as a Prior Restraint

Under prior restraint doctrine, the government may not restrain most expression prior to its dissemination even though that expression could constitutionally be subjected to punishment after dissemination.<sup>41</sup> The doctrine assumes that prior restraints are more harmful to free speech than subsequent civil or criminal punishment. Although the doctrine has its origins in the opposition to official licensing of speech in seventeenth and eighteenth century England,<sup>42</sup> it has in recent times been extended to prohibit pre-dissemination regulation in a wide variety of contexts, most notably -- and importantly -- to government injunctions against publication.

The classic application of the doctrine in recent times came in *New York Times Co. v. United States*,<sup>43</sup> where the Supreme Court vacated an injunction prohibiting the *New York Times* from publishing the national security-sensitive "Pentagon Papers." Justice William Brennan sounded the keynote in his concurrence, stating that prior restraints imposed for national security reasons are unconstitutional absent ". . . governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . ." <sup>44</sup>

With the decision in *New York Times*, the national-security injunction joined the classic case of government licensing schemes at the center of prior restraint theory. But in addition to these two restrictions, the prior restraint doctrine has been invoked to prohibit a number of other, loosely related restrictions.<sup>45</sup> Indeed, at least one commentator, Professor

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41. See, e.g., *Id.*; Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650-52 (1955).

42. See Judge Merritt's scholarly treatment of this issue in *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), cert. denied, 479 U.S. 915 (1986) (describing roots of prior restraint doctrine in abhorrence of English licensing practices). See also Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 10-12 (1942).

43. 403 U.S. 713 (1971).

44. 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (paraphrasing *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

45. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (penal statute barring publication of names of youthful offenders without court permission is a prior restraint); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976) (Stewart, J., dissenting) (prior restraint doctrine applied to city zoning ordinance restricting concentration of "adult" theaters); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546

John Jeffries, noting the loose relationship among many of the activities that have been labelled prior restraints in recent years, has declared the doctrine unworkable.<sup>46</sup> He advocates that it be "retired" in favor of the more coherent and substance-oriented overbreadth doctrine, which we discuss below.<sup>47</sup>

This is a serious challenge to existing First Amendment theory. And it is a challenge we must take seriously even in the context of this (admittedly non-theoretical) article, because we rely on the prior restraint doctrine in our critique of the Regulations. Thus we must take a moment to consider the arguments that have been set forth against prior restraints as a distinct subject of constitutional inquiry.

At the outset, it should be quite clear that the Regulations do present a classic prior restraint on dissemination of expression. They allow the Secretary of Commerce (or his/her delegate) to deny a remote sensing license before any photographs have been taken; this temporal element is the essence of a prior restraint.<sup>48</sup> Second, and closely related to the first point, the Regulations prevent expression while the permit is being processed. If their permit is rejected, mediasat operators will be denied the right to publish before having received a full and fair judicial hearing on the constitutional status of their photos. For these reasons, the Regulations operate in the same way as the government licensing schemes that originally gave rise to the prior restraint doctrine.

This is an essential point. Most First Amendment theorists -- with the important exception of Professor Jeffries, who wants to see the doctrine scrapped in its entirety -- recognize licensing as the paradigmatic prior restraint and believe the doctrine should be applied vigorously to cut down the effectiveness of licensing schemes.<sup>49</sup> Thus it is unnecessary

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(1975) (city official's refusal to lease theater for production of musical "Hair" was a prior restraint); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (activities of Rhode Island Commission to Encourage Morality in Youth constituted prior restraint); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (gross receipts tax on newspapers is a prior restraint).

46. Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983).

47. *Id.* at 434-35, *See infra* notes 72-81, and accompanying text for a discussion of the application of the overbreadth doctrine to the Regulations.

48. *See* Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984) [hereinafter Redish, *Proper Role*].

49. Thus Professor Redish, though critical of the use of the doctrine to sidestep difficult constitutional questions, nevertheless recognizes that licensing programs are the "most disfavored" form of prior restraint. *See* Redish, *Proper Role*, *supra* note 48, at 57. Professor Vincent Blasi, in an important piece on the theory of prior restraint analysis, likewise finds licensing to be the central case around which prior restraint theory must be built. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981) [hereinafter Blasi, *Theory of Prior Restraint*]. Blasi begins with the notion that the best way to test the extension of prior restraint analysis into the general area of speech injunctions is to look for analogies -- or "linkages" -- between licensing and injunctions. He finds that there are four fundamental reasons why the analogy makes

to analyze the majority of objections that have been registered against the doctrine; they do not apply in the context of licensing.

We are left, however, with the challenge of Professor Jeffries. His main conclusion is that prior restraint analysis is inferior to the overbreadth doctrine as a framework for evaluating licensing schemes. According to Jeffries, prior restraint analysis has outgrown its usefulness, as successive generations of First Amendment theorists seized on the doctrine's "latent plasticities" as a "tactical short-cut to expanded substantive coverage of the First Amendment."<sup>50</sup> The most notable consequence of this tendency "to cram the law into the disfavored category of prior restraint,"<sup>51</sup> according to Jeffries, was the expansion of the doctrine to include court-ordered injunctions.<sup>52</sup> An injunction, he points out, is quite different from the classic prior restraint situation, the administrative licensing scheme.<sup>53</sup> Injunctions are issued by courts, not bureaucrats,<sup>54</sup> after an adversary, not *ex parte*, proceeding,<sup>55</sup> and (often) restrain continued, not future, publication.<sup>56</sup>

Jeffries thus maintains that the rule against prior restraints is stretched out of recognition when applied to injunctions. But he does not contend that First Amendment challenges to injunctions against speech have been wrongly decided.<sup>57</sup> Instead, he claims that such cases should be decided on other grounds, namely under the doctrine of overbreadth. "Simply put," he writes, "[this] doctrine asserts that an overbroad regulation of speech or publication may be subject to facial

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good sense: injunctions and licensing both involve (1) adjudication prior to dissemination; (2) a tendency on the part of officials to overuse the restriction; (3) interference with the speaker's control over the timing and delivery of the message, which may affect the audience's perception of it; and (4) conceptual assumptions repugnant to a free society, such as distrust of citizens and the notion that speech is disruptive of, rather than central to, social order. By structuring his analysis around the historical touchstone of licensing practices, Blasi presents a strong case for the coherence of the prior restraint doctrine. Note how thoroughly the remote sensing Regulations embody Blasi's factors (1), (3), and (4). Although there is as yet no history from which to judge, factor (2) is likely to come into play as well, given the general attitude of government officials toward the press in this decade. See generally O. FISS & D. RENDLEMAN, INJUNCTIONS 188-242 (2d ed. 1984) (application of prior restraint doctrine in injunction context).

50. Jeffries, *Rethinking Prior Restraint*, *supra* note 46, at 413-14.

51. *Id.* at 416.

52. *Id.* at 417-19.

53. *Id.* at 426-34.

54. *Id.* at 416.

55. *Id.*

56. *Id.*

57. *Id.* at 421.

review and invalidation, even though its application in the instant case is constitutionally unobjectionable."<sup>58</sup>

Viewed from the perspective of overbreadth, what links injunction cases like *New York Times* and *Near* to the classic administrative licensing examples is the element of excessive discretion.

A rule of special hostility to administrative preclearance is just another way of saying that determinations under the overbreadth doctrine should take account not only of the substance of the law but also of the structure of its administration. The reason that the various features of timing, process, and institutional structure . . . are thought to render administrative preclearance requirements especially objectionable is precisely that they increase the prospect of unconstitutional application.<sup>59</sup>

Hypothetical application of the Regulations provides an opportunity to challenge Professor Jeffries' thesis. Would the overbreadth doctrine as applied to the Regulations produce the same result as the doctrine of prior restraint?

The answer, of course, turns on a number of variables, including the applicant in question and the court. But while we cannot answer with certainty, we can inquire into tendencies and likelihoods.

The first point to note is that, as Professor Jeffries acknowledges, overbreadth analysis requires an inquiry into "not only the substance of the law but also of the structure of its administration,"<sup>60</sup> including elements of "timing, process, and institutional structure."<sup>61</sup> Thus it is significant that there will be a tendency for a court to analyze the Regulations in detail, with regard to both their substantive and procedural (structural) dimensions. This will take time. Meanwhile, there may well be suppression of a good deal of constitutionally protected speech. The effective suppression of all mediasat photographic information during the appeal of the license rejection -- as well as the substantial chilling effect on the other potential mediasat operators -- is precisely the sort of evil many defenders of the prior restraint doctrine wish to avoid.<sup>62</sup>

It is difficult to overestimate the harm of this interim suppression. Consider the case of a mediasat consortium that includes both a

58. *Id.* at 425.

59. *Id.*

60. *Id.*

61. *Id.*

62. This is at the heart of Professor Redish's thesis concerning the proper role of the prior restraint doctrine.

[Prior restraints should be disfavored] because of the coincidental harm to fully protected expression that results from the *preliminary* restraint imposed prior to a decision on the merits of a *final* restraint.

See Redish, *Proper Role*, *supra* note 48, at 55 (emphasis in original).

communist newspaper and an arms-control lobbying group. If their license application is rejected, and they attack the rejection on overbreadth grounds, the court hearing the case will have to consider a broad array of evidence concerning the activities of the consortium members, the details of the administrative procedure leading up to the rejection, and the potential applicability of the Regulations to other applicants.<sup>63</sup>

Prior restraint analysis, on the other hand, will be much faster. Absent proof that the consortium plans to use photos of extremely sensitive military installations or activities, the license denial will be struck down. Interim publication, along with future publication, will therefore be protected without the uncertainty and delay of a detailed and lengthy trial. In this respect, prior restraint doctrine resembles a *per se* rule (albeit with several well-defined exceptions), and is therefore preferable under the same rationale used to justify such rules in antitrust law -- certainty and efficiency.

A second reason to prefer prior restraint in addition to a more "substantive" doctrine such as overbreadth<sup>64</sup> is that the mediasat applicant will be forced to argue against the Regulations before any photos have been taken. As Professor Blasi points out in his important piece on prior restraint, such adjudication "in the abstract" tends to overstate the potential evils of the expression;<sup>65</sup> *ex post* adjudication, on the other hand, is conducted with the benefit of knowledge concerning the actual (versus imagined) impact of the expression.<sup>66</sup> The concern here is not with interim suppression, but with "the need to counteract chronic risk-averse tendencies regarding the regulation of controversial speech,"<sup>67</sup> that is, with the fairness of a final decision made on the basis of imperfect information. It must be recalled that defense information is entitled to the same treatment as other expression *unless* the government proves

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63. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) (describing growth of overbreadth doctrine, and summarizing the detailed fact situations courts must analyze in applying it).

64. It should be clear by now that we are not out to discredit the overbreadth doctrine; in fact, we believe it also applies to the Regulations. See *infra* notes 72-81 and accompanying text. We object only to the argument that it should replace prior restraint analysis.

65. Blasi, *Theory of Prior Restraint*, *supra* note 49, at 49-54.

66. Blasi states that:

If the need to counteract chronic risk-averse tendencies regarding the regulation of controversial speech is taken as one of the central considerations in the formulation of First Amendment doctrine, a preference for the dynamics of subsequent punishment makes sense. The ideal of a "balanced assessment of competing values" is unlikely to be achieved in the sterile, caution-inducing environment of adjudication prior to initial dissemination.

*Id.* at 52-53.

67. *Id.* at 52.

its publication would present a grave danger to national security.<sup>68</sup> As between the judge's fear that sensitive information may fall into the wrong hands, and society's fear that judges may be overly cautious in deciding what should be published, the doctrine of prior restraint favors the latter over the former. This is true even -- some would say especially<sup>69</sup> -- in the case of defense-related information.

While the overbreadth doctrine may sometimes have the effect of preventing "adjudication in the abstract," this is not one of its intended features. In fact, overbreadth permits a good deal of abstract litigation, normally over the classes of persons and activities that a prohibition applies to. And this *ex ante* interpretation of statutory or regulatory language leaves a good deal of room for the inclusion of fears about effects. For example, a judge deciding whether "national security"-related information is an overly broad class of restricted information might well be influenced by the prospect of being held responsible for the leakage of key defense secrets to enemies of the United States. The same fears are at work regardless of which doctrine is at issue, but prior restraint analysis, with its presumptive favoring of expression and very restricted exceptions, operates as a more effective check on fears of this sort.

In summary, the preceding discussion illustrates the temporal dimension of the prior restraint doctrine which distinguishes it from overbreadth. Two points stand out: first, the harm associated with interim suppression of dissemination provides one of the chief rationales for the prior restraint doctrine; and second, the rule itself is applied with a keen sensitivity to the fact that the timing of dissemination is important and thus should be left up to the discretion of the speaker in as many cases as practicable.<sup>70</sup>

As mentioned above, the Regulations demonstrate the continued vitality of prior restraint theory in at least some contexts. A mediasat can be expected to take photos of a wide variety of newsworthy places and activities (such as natural disasters, garbage slicks, or ocean dumping) aside from military installations and maneuvers. During the pendency of an appeal from license denial or revocation, these places and

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68. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to [the] Court with a 'heavy presumption' against its constitutional validity."). See also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

69. See Goldston, Granholm & Robinson, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV.C.R.-C.L. L. REV. 409 (1986) (criticizing extensions of "national security" rationale under the Reagan Administration, and emphasizing the public's need to know about military affairs).

70. This point is well made by Professor Blasi. See Blasi, *Theory of Prior Restraint*, *supra* note 49, at 63-69.

activities, as well as protected and potentially unprotected "national security" events, will be effectively off-limits to the mediasat operator.<sup>71</sup> Because of the complexity of the issues, which include the extension of First Amendment principles to a geographic realm and technological category heretofore devoid of First Amendment attention, this appeal could take a long time. In the meantime, regardless of whether the Regulations are ultimately declared overbroad, much protected speech, together with some that could be expected to challenge the boundaries of protection, would be suppressed. That is the root harm in prior restraints; it is also the best reason for a distinct doctrine to discourage them.

### III. VAGUENESS, OVERBREADTH, AND EXCESSIVE DISCRETION

Closely related to the prior restraint doctrine is the rule that a restriction on protected speech will fail where people "of common intelligence must necessarily guess at its meaning,"<sup>72</sup> *i.e.*, where it is too vague to serve as a guide to conduct.<sup>73</sup> A good example of the application of this rule is the Supreme Court's decision in *Hynes v. Mayor of Oradell*.<sup>74</sup> In striking down a city ordinance requiring door-to-door solicitors for "recognized charitable causes" to identify themselves to city police before canvassing homes, the Court emphasized the broad sweep of the ordinance's language,<sup>75</sup> as well as the ordinance's failure to "sufficiently specify what those within its reach must do to comply."<sup>76</sup> The same

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71. Just as, in our camera-licensing hypothetical, (*see supra* text accompanying notes 37-38), earthbound reporters would be unable to photograph important events in their community such as fires, presidential candidates' visits, and so on.

72. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

73. For a summary of cases dealing with vagueness, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-28 to 12-29 (1978).

74. 425 U.S. 610 (1976).

75.

[T]he coverage of the ordinance is unclear; it does not explain, for example, whether a "recognized charitable cause" means one recognized by the Internal Revenue Service as tax exempt, one recognized by some community agency, or one approved by some municipal official.

425 U.S. 610, 621 (1976) (emphasis in original).

*Accord* *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (anti-noise statute prohibiting demonstrations on school grounds while school is in session is not invalid for vagueness; noise content dictates standards of compliance). *See also* *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (statute authorizing the removal of a faculty member for seditious utterances held unconstitutionally vague since teacher could not know the extent to which utterance must transcend mere statements of abstract doctrine to fall within statute's reach).

76. 425 U.S. 610, 621. *See also* *City of Lakewood v. Cleveland Plain Dealer*, \_\_\_U.S. \_\_\_, 108 S.Ct. 2138 (1988) (ordinance vesting excessive discretion in Mayor regarding newsrack licensing is overbroad); *Saia v. City of New York*, 334 U.S. 558 (1948)

fatal attraction to vagueness visited the authors of the satellite Regulations. "[T]he licensee," the Regulations state, "will operate the system in a manner consistent with national security and the international obligations of the U.S."<sup>77</sup> It hardly needs stating that "national security and international obligations" is more vague by a few orders of magnitude than "recognized charitable cause." If the latter must fall for vagueness under the First Amendment, the former must also.

Similarly, the satellite Regulations are defective because they can be applied to forestall constitutionally protected speech; that is, they are overbroad. Failure to gain approval for a license eliminates from public discussion not only national security-related stories, but also all of the myriad stories that would otherwise flow from a satellite system. Again, the Regulations can be applied to forbid a satellite from being launched, or from being used by the media; an almost unknowable range of information will then be declared "off-limits" simply because some of it may turn out to be sensitive. Since the Regulations allow foreclosure of access to all this information, albeit only for the sake of keeping a tiny part of it secret, they are too broad. They must accordingly either be narrowed or abandoned.<sup>78</sup>

A final objection in this connection is that the Regulations are unconstitutional because they leave too much discretion in the hands of NOAA officials. The Supreme Court has held on a number of occasions that a regulation affecting First Amendment rights will be invalidated where the ordinance does not "provide explicit standards for those who apply" it.<sup>79</sup> Where regulations permit an officer of the government to retain "the effective power to grant or deny permission" to engage in First Amendment activity, those regulations must be invalidated.<sup>80</sup> Likewise,

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(ordinance giving unbridled discretion to officials in charge of licensing sound trucks is overbroad); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (ordinance giving licensor complete discretion as to who may distribute literature is overbroad). Professor Tribe summarizes the rule well:

Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate -- to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-35, at 733 (1978).

77. 15 C.F.R. § 960.11(a) (1988).

78. See *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463, 470 (6th Cir. 1986), cert. denied, 479 U.S. 915 (1986). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-24 (1978) (describing doctrine of overbreadth as applied to First Amendment cases).

79. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). See also *City of Lake-wood v. Cleveland Plain Dealer*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2138 (1988).

80. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976). See also *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940) (striking down similar ordinance that had been interpreted to prevent Jehovah's Witnesses from soliciting door-to-door); *Schneider v. State of New Jersey*, 308 U.S. 147 (1939) (striking down ordinance giving Chief of Pol-

where the ability to communicate "depends upon the exercise of [an] officer's discretion," the First Amendment invalidates the regulation.<sup>81</sup>

The Regulations do not define those "national security and international obligations" that warrant denial of a license. They leave it for the NOAA and the Secretaries of Defense and State to apply these vague terms to the circumstances of each license application. Like the government agents with power to deny canvassing permits, they are guided by no standard but their own sense of what the Regulations mean. So the same defect apparent in the canvassing ordinances exists here as well: unbridled discretion is all that stands between the media and the denial of their First Amendment rights. If the principles of the cases dealing with administrative discretion are to have any meaning in the context of satellite sensing technology, they must be applied to overturn the Regulations.

#### IV. THE REGULATIONS AS CONTENT-BASED RESTRICTIONS

Another important concept in contemporary First Amendment jurisprudence, one with some importance for our discussion of the Regulations, is the distinction between content-neutral and content-based restrictions. As a result of doctrinal developments beginning in the 1930s and 1940s, restrictions based on the content of expression have come to be looked on less favorably than those drawn without reference to the content of the regulated speech.<sup>82</sup> The rationale behind this special hostility to "content-based" regulations has been challenged by at least one theorist,<sup>83</sup> but it remains at the center of much First Amendment analysis in the courts.<sup>84</sup>

What is the rule? Simply stated, the Supreme Court has consistently held that content-based restrictions will be upheld only if (1) the underlying governmental interest is compelling; (2) there are no

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ice discretion to deny permits to canvassers who were "not of good character"); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (invalidating ordinance requiring written permission from City Manager to distribute literature).

81. *Schneider v. State of New Jersey*, 308 U.S. 147, 164 (1939).

82. See Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 214-31 (1982). See also Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) [hereinafter Stone, *Content Regulation*].

83. See, e.g., Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) [hereinafter Redish, *Content Distinction*].

84. It is, according to Professor Stone, "the most pervasively employed doctrine in the jurisprudence of free expression." Stone, *Content Regulation*, *supra* note 82, at 189 (footnote omitted).

less burdensome means of promoting the restrictions; and (3) the restrictions in fact achieve the government's objective.<sup>85</sup>

To understand why the rule has relevance to our discussion, recall the substance of the satellite launch Regulations. They call for review by the Secretary of Commerce, and ultimately the Department of Defense, to determine whether the launch permit applicants "will operate the satellite system in a manner consistent with national security and the international obligations of the U.S."<sup>86</sup>

On its face, this may seem like a restriction devoid of the taint of content regulation. It does, after all, apply equally to all applicants, regardless of political persuasion, at least as written, thereby distinguishing it from restrictions on speech specifically designed to keep one viewpoint, such as Marxism or anarchism, out of the public forum.<sup>87</sup>

In spite of this facial content neutrality, it should still be fairly clear that the Regulations do restrict dissemination because of content, although in a slightly more subtle fashion than the anti-anarchism statutes at issue in the classic "viewpoint restriction" cases. This is because a particular item of information, not to mention an entire class of "confidential" information, is just as much "content" as a particular viewpoint; restrictions aimed at particular items or classes of information are therefore as suspect as those designed to silence a particular political viewpoint. The critical element linking the two is that they are both quite distinct from content-neutral restrictions, such as the classic "time, place, and manner" regulations consistently upheld by the Supreme Court, which restrict speech because of its incidental, non-communicative effects (e.g., disruption).<sup>88</sup> Indeed, Professor Stone lists

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85. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

86. 15 C.F.R. § 960.11(a) (1988). See also *supra* note 19, (detailing further requirements of the Regulations); 15 U.S.C. § 4241(b) (Supp. IV 1986) ("No license shall be granted . . . unless the Secretary determines in writing that the applicant will comply with . . . any applicable international obligations and national security concerns of the United States.")

87. See, e.g., *Yates v. U.S.*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951). See also Stone, *Content Regulation*, *supra* note 82, at 197-200. Of course, the point made in the text assumes equality in the administration of the Regulations, an assumption that may not be warranted and that furthermore overlooks the wide latitude granted to officials in the license review process. See *supra* notes 72-81 and accompanying text.

88. Although the "time, place, and manner" label has been criticized, the substance of the content-neutral/content-based distinction has been defended by a number of commentators. The most oft-cited restatement of the distinction was made by John Hart Ely, who said that the essential inquiry is whether the purpose of the regulation in question is to impede the "communicative impact" of the expression. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975).

the types of restrictions that have been found to turn on the content of expression; the list includes "laws and judicial orders prohibiting the publication of 'confidential' information, ranging from the Pentagon Papers to inculpatory facts about a criminal defendant. . . ."89

Could the Regulations survive the heightened three-part scrutiny given to content-based restrictions? We will proceed one step at a time in answering this question.

As to the first requirement, regulations calling for withholding specific information directly related to the defense of the nation, such as the paradigmatic case of a sailing schedule for troop ships in time of war,<sup>90</sup> undoubtedly embody a compelling interest sufficient to justify a prior restraint. But the same cannot be said of the speculative, wholesale foreclosure of an entire news source such as media satellite photos. As Justice Brennan made clear in his concurring opinion in *New York Times Co. v. United States*:

The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.<sup>91</sup>

Thus the harm from publication of information which the *New York Times* already had on hand was too speculative; surely the harm from merely acquiring the means to gain access to potentially damaging information, i.e. acquiring satellite capabilities, is far more speculative than the potential harm claimed by the government in *New York Times Co. v. United States*.

The second hurdle for content-based restrictions is that they must be the least burdensome means of furthering the government objective. The Regulations obviously fail to clear this hurdle. They give the Commerce Department, acting through the NOAA, discretion to deny a satellite photo license at the time the license is applied for. The Regulations consequently bestow on the government the power to foreclose publication of a vast body of information, and they grant that power *at the outset*. Even apart from the wide discretion thus given the NOAA -- itself an unconstitutional feature of the Regulations<sup>92</sup> -- the regulatory

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89. Stone, *supra* note 82, at 199.

90. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). See also *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in a time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.").

91. 403 U.S. 713, 725-26 (Brennan, J., concurring).

92. See *supra* notes 72-81 and accompanying text.

regime flouts constitutional standards by overlooking a number of less burdensome alternative restrictions. The NOAA has not attempted to define precisely what types of satellite photos would be off-limits, nor has it drafted regulations calling for consultation on a case-by-case basis where arguably sensitive material is involved.<sup>93</sup> Instead, it has taken a blunt approach, conditioning approval of the entire system on an *a priori* assessment of the likelihood that it will be used to access sensitive information. Given the wide variety of far less burdensome alternatives, many of which were detailed in submissions made by media groups prior to promulgation of the Regulations,<sup>94</sup> the licensing scheme as adopted runs afoul of an important First Amendment principle; it restricts information because of its content, without tailoring the restrictions as narrowly as possible.

To satisfy the third prong of the content-based restriction test, the government must also show that the restriction in fact advances the government's objective. Arguably, this is not the case with the Regulations. Foreign satellite services are capable of supplying all the photos the U.S. media might need, if under less than ideal conditions.<sup>95</sup> Thus the objective of the Regulations, to restrict access to sensitive information, is something of a dead letter; it can hardly be said that it is served by regulations whose only effect is to dictate that the U.S. media must restrict their purchases of satellite services to foreign suppliers.<sup>96</sup>

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93. See *supra* notes 18-21 and accompanying text.

94. See, e.g., Comments of Radio-Television News Directors Association, American Society of Newspaper Editors, National Association of Broadcasters, National Broadcasting Company, Inc., Society of Professional Journalists, Sigma Delta Chi and Turner Broadcasting System, Inc., In the Matter of the Licensing of Private Remote Sensing Space Systems, Before the Department of Commerce, Docket No. 51191-5191 (May 23, 1986) (on file with authors), at 20-27; Statement of the Radio-Television News Directors Association Concerning Technical Amendments to the Land Remote-Sensing Act of 1984 Before the Senate Committee on Commerce, Science, and Transportation (January, 1986), at 6-10; Brender, *New Technology*, *supra* note 15, at 15-16.

95. Indeed, classified restrictions on the resolving power of U.S. civilian satellite systems have led one U.S. government agency to seek Presidential permission to buy commercially available Soviet satellite photos because of their greater resolution. See *Short-sighted on Long Shots*, *New York Times*, Oct. 4, 1987, at E22, col. 2.

96. See *Hynes v. Mayor of Oradell*, 425 U.S. 610, 629 (1976) (Brennan J., concurring) ("Under the [house-to-house solicitation] ordinance, no authentication of identity need be submitted, and therefore the requirement can be easily evaded. In that circumstance, the requirement can hardly be justified as protective of overriding governmental interests since evasion can easily thwart that objective." (footnote and citations omitted)).

## V. UNCONSTITUTIONAL CONDITIONS ON THE EXERCISE OF A CONSTITUTIONAL RIGHT

Apart from the First Amendment doctrines analyzed above, another principle of constitutional law would seem to be applicable to the Regulations. This is the well-established doctrine that the government may not condition the receipt of its benefits upon the nonassertion of constitutional rights.<sup>97</sup>

This doctrine may come into play where the government claims that outer space in some sense "belongs" to it and that it is entitled to restrict press access to space in the same manner that it restricts press access to military bases and the Oval Office. Such a claim would be rather dubious given the existing multinational uses of outer space and the provisions of the 1967 Outer Space Treaty which bar national sovereignty over outer space and provide that space shall be considered the "province of all mankind."<sup>98</sup> Yet if such a claim were upheld, it would not be sufficient to bypass First Amendment protections.

A well-known example of the application of the "unconstitutional conditions" doctrine is *Frost & Frost Trucking Co. v. Railroad Commission of California*,<sup>99</sup> where a trucking company challenged a California statute making the grant of highway licenses conditional upon the licensee-company's assumption of common carrier status. (Common carriers assumed public duties and obligations from which private carriers like *Frost* had been exempt prior to the statute). Justice Sutherland, writing for the Court, struck down the state legislation, stating:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not

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97. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1967) (state may not deny unemployment benefits to person who refuses to work on Saturday for religious reasons); *Frost & Frost Trucking Co. v. Railroad Comm'n of California*, 271 U.S. 583 (1926). See also *Speiser v. Randall*, 357 U.S. 513 (1958) (government may not act indirectly to produce a result which it could not command directly); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-8 (1978). But cf. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1448-49 (1968) (criticizing the conceptual underpinnings of the unconstitutional conditions doctrine).

98. 1967 Outer Space Treaty, *supra* note 25, articles I & II.

99. 271 U.S. 583 (1926).

impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.<sup>100</sup>

The situation of the news media with respect to satellite photographs is precisely the situation envisioned in this passage. The media has the right to publish any photo it wishes, unless publication would produce a direct, imminent threat of harm to national security. The satellite licensing scheme in effect makes media applicants relinquish their full-blown right in this respect, in exchange for the governmental privilege of a satellite license.<sup>101</sup> If, as the Court in *Frost* held, the government "may not impose conditions which require the relinquishment of constitutional rights,"<sup>102</sup> it is apparent that this license requirement cannot be used to indirectly achieve an end that the First Amendment would prevent it from achieving directly. Otherwise, the government's power over privileges of using outer space could be wielded so as to effectively limit a vital constitutional right, the wide and free dissemination of news to the public.

## VI. EFFECTS ON NATIONAL SECURITY

It is easy to get caught up in the constitutional dimensions of the mediasat issue. But placing the constitutional concerns aside for a moment, it is ironic that by making the development of mediasats less attractive the Regulations may have a negative effect on national security overall. The reason is that they might deny intelligence and defense officials the opportunity to access mediasat images, something that those officials might find very helpful. Military and intelligence agencies currently make extensive use of commercial satellite imagery, and during the launch hiatus resulting from the Challenger explosion turned to SPOT and EOSAT images as a way of eking out scarce satellite resources of their own.<sup>103</sup> A mediasat, with its higher resolution, would undoubtedly serve this purpose more satisfactorily, and even in normal times the reconnaissance capabilities of a mediasat might be helpful to the intelligence community, extending its reach at little or no additional cost.<sup>104</sup> In

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100. *Id.* at 593-94.

101. This is because the Regulations require the Secretary to impose conditions necessary to satisfy concerns raised by the Departments of Defense and State. 15 C.F.R. § 960.12(d)(1) (1988).

102. 271 U.S. at 594.

103. *Private Cameras in Space Stir U.S. Security Fears*, New York Times, Aug. 25, 1987, at C1, col. 3.

104. There would be no question as to intelligence agencies' right of access to the data provided by a mediasat because the Land Remote-Sensing Commercialization Act,

addition, mediasat facilities could serve as a backup in the event that U.S. reconnaissance satellites were shot down or lost accidentally in time of crisis. If the regulatory risks of operating an independent satellite system are excessively high, however, media organizations are unlikely to go forward with it and the defense and intelligence communities will not have these options.

## VII. WHAT SHOULD BE DONE?

We are certainly not the first to see defects in the Regulations. To date, a number of media groups have suggested detailed revisions to the Regulations.<sup>105</sup> The crux of these proposals is that the Regulations must define with some certainty the circumstances that will justify a prior restraint on publication of satellite-derived stories or images. As the Radio and Television News Directors Association suggests, the definition must be grounded in the test of *Near v. Minnesota*: only information akin to "the sailing dates of transports or the number and location of troops"<sup>106</sup> will be withheld from publication. That is, only during periods of active or imminent hostilities, or in other very limited circumstances,<sup>107</sup> will the government be permitted to block publication.

There are other possible approaches. We are of the opinion that existing espionage laws, which prohibit photography of secret defense installations, are adequate to prevent harm to national security as a result of media satellite photography.<sup>108</sup> Traditionally, a major means of preserving secrecy of U.S. installations has been to deny media access to the physical locations involved, or to condition such access on

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15 U.S.C. § 4271 (Supp. III 1985), requires that data from privately operated systems be made available for purchase by the public.

105. See, e.g., *supra* note 94 and accompanying text.

106. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

107. For example, information on the location and configuration of nuclear missiles would probably have to be restricted in some way. Also, it might not be unreasonable to require mediasat operators to equip their satellites with data encryption devices, so as to prevent hostile powers from monitoring satellite transmissions for potentially damaging information and thus benefitting even from information that media organizations decide not to publish.

108. See 18 U.S.C. §§ 795-797 (1982 & Supp. 1986) (prohibiting photography of "vital military or naval installations or equipment"). See also Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1069-73 (1973). Note that 18 U.S.C. § 796 specifically forbids the use of "an aircraft or any contrivance used, or designed for navigation or flight in the air, for the purpose of making a photograph, sketch, picture, drawing, map, or graphical representation of vital military or naval installations or equipment . . . ." This prohibition, which the military evidently feels is adequate for control of aerial photography (it has not been amended since 1948), could easily be extended to cover satellite photography with far fewer ill effects on First Amendment values than the scheme embodied in the current Regulations.

acceptance of supervision or censorship, particularly during wartime. Such methods are of little use in the context of news media satellites, however, because they can overfly any point. Physical exclusion is thus not possible, except in the brute-force sense of preventing such satellites from operating at all. Since such a ban on news media satellites would be (as we have argued) unconstitutional, it is necessary to regulate satellite photography in a manner that prevents photography of such subjects where such prevention is legitimate under traditional First Amendment principles, and nowhere else.

The espionage laws, or something very much like them, are capable of doing just that. It is already illegal to photograph "vital military or naval installations or equipment" from an aircraft.<sup>109</sup> Legislation or regulations forbidding the imaging of such items (described with reasonable clarity) from satellites would be just as effective and would avoid the necessity of having the Secretary of Commerce determine in advance whether a licensee is trustworthy.

Conceivably, unusual circumstances may arise in which outright censorship, even involving prior restraint, may be justified. Any scheme for imposing such censorship, however, should meet the test first announced in *Freedman v. Maryland*,<sup>110</sup> which requires: (1) that the censor must bear the burden of proving that the material in question may constitutionally be suppressed; (2) that any restraint prior to judicial review be limited to the preservation of the status quo and be for the shortest time compatible with sound judicial administration; and (3) that a prompt final judicial determination must be assured.<sup>111</sup> The current Regulations obviously fail this test, since they allow the Secretary to make determinations which the satellite operator bears the burden of appealing.<sup>112</sup>

Under a better system, the Secretary's initial determination of whether the applicant will comply with national security requirements should be based upon a straightforward evaluation of the applicant's history and character: has she, for example, violated the espionage laws in the past, or violated other laws such that it might be reasonable to assume a real risk of noncompliance with rules against, for example, imaging U.S. troops in the field? (Speculation based on an applicant's political views, or history of criticizing the government, should of course be discouraged.) Where an already-operating system is believed to threaten national security, the Secretary of Commerce should proceed by seeking

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109. 18 U.S.C. § 796 (1982 & Supp. 1986).

110. 380 U.S. 51 (1965).

111. *Id.* at 58-69.

112. See notes 18-21 and accompanying text.

an injunction (with any immediate restriction accomplished via temporary restraining order) under a *Freedman*-like procedure. A new set of Regulations along these lines would accommodate all legitimate national security concerns without infringing on vital First Amendment rights.

Although military planners might well prefer to exclude news media satellites and reporters from reporting on many topics, and might have their jobs made appreciably easier by that exclusion, they may do so only when the interests involved are of sufficient immediacy and importance for the exclusion to pass muster under the First Amendment. The fact that the information in question is being gathered via a novel technology is irrelevant: the First Amendment was not drafted in contemplation of many new technologies, from motion pictures to offset printing presses to personal computers, yet over time it has come to encompass them all. Nor is it sufficient to assert, as some have done, that we live in a perpetually dangerous world and cannot afford to limit the discretion of national security officials by imposing First Amendment restrictions on their actions.<sup>113</sup> The choice between taking every conceivable action to promote "national security" ends, and balancing those ends against the importance of preserving essential freedoms, has already been made. It is embodied in the First Amendment.

## CONCLUSION

In a way, the advent of civilian imaging technology brings the history of space surveillance full circle. In the earliest days of enthusiasm for space, satellites were one of the benefits identified by early visionaries, private citizens, who encountered more than a little difficulty in selling their ideas to governments. But now that the technology has matured to the point that private interests might be able to afford it, the

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113. This view was stated by Major General Jack Thomas (USAF-Ret.), a panelist at a symposium sponsored by George Washington University's Space Policy Institute, November 4, 1987 (notes on file with authors). His attitude represents the fruition of the fears expressed by one Senator during the debates over the Espionage Acts:

War is the natural enemy of freedom and democracy. We have already conferred practically autocratic powers financially; we doubtless shall in the future, where imperative necessity demands it, accord extraordinary and unheard-of powers to our President; but we must stop short of successful assault upon democracy's basic principles. No free people should be subjected to undefined and indefinable laws. To subject a people to unwritten penal statutes, resting from day to day in the bosom of any one man, however exalted, in nebulous and elastic language, even where no evil intent exists by construction of any one official, however highly respected, to make felons of our people, is an excursion into autocracy in America that cannot be justified or excused by our desire to destroy autocracy in Europe.

55 CONG. REC. at 841 (1917) (remarks of Senator Johnson).

To permit the assumption of sweeping "emergency" powers on the basis that the world is an unsafe place and that we are in some sense always in a state of war is to ensure the triumph of autocracy here at home whatever our fortunes abroad.

U.S. government has begun drawing a line around space and declaring it off-limits, or at least subject to a level of regulation that would not be tolerated on earth.

And there is irony here on another level as well. The United States has long championed an "Open Skies" approach to space reconnaissance; this was in fact an important element shaping early U.S. space policy. While this approach has been taken to mean that space overflight should be open to spacecraft from all countries, satellite technology has now become sufficiently routine to put space within the reach of entities other than countries: private firms, for example, including the media.<sup>114</sup> As a consequence, for the first time the United States is being forced to decide just how open it really wants the skies to be.

In that sense, this is just another in a long line of problems posed by new information technologies from the time movable type was invented to the present. The instinct of governments confronted by new technologies is generally to bring them under control (or at least to try), especially when those technologies are closely related to matters of power and politics.<sup>115</sup> That instinct is generally wrong, though, at least in nations such as ours which have a tradition of free expression. The proper course is to remain faithful to the tradition, even in the context of new technologies.

Fortunately, as we hope we have shown, the First Amendment is flexible enough to accommodate new situations and technologies without

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114. Private groups favoring arms control may in the future be able to acquire their own satellites as well, as technology matures and costs fall over the next twenty years or so. Indeed, Arthur C. Clarke, whose record of successful predictions is not to be sneezed at (he is, among other things, the inventor of the geosynchronous communications satellite), has predicted that private intelligence satellites will make large-scale war virtually impossible, while greatly facilitating arms control. A. CLARKE, 2061 (1987) at 18.

115. See I. POOL, TECHNOLOGIES OF FREEDOM 14-18 (1983); D. BOORSTIN, THE DISCOVERERS 542-74 (1983). See generally L. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 214-15 (1987):

We should remember that in its infancy, and for almost two centuries thereafter, print was regulated with varying degrees of strictness in England . . . . The rulers didn't know what to make of this new technology, and the easiest way to make sure it did not get out of hand was to keep it under royal scrutiny. After all, it was "unique" and might well upset the status quo.

So too, I think, with American broadcasting . . . . The *New York Times* and the *Washington Post* are powerful, too, but we don't regulate them because of that . . . . We fear broadcasting because we don't understand it as well as we do print. The fear may be irrational, but it is there nevertheless. It does not justify regulation, but it does explain it. It also explains why we can expect that as newer technologies become available to the public there will be an intense desire to keep them under control.

Given the likely importance of new communications media, bringing them "under control" could be disastrous for the prospects of maintaining any serious system of freedom of expression.

sacrificing important interests. In this instance, an approach consistent with the First Amendment would be to identify subjects and occasions for which media satellite imaging would be inappropriate -- troop ship departures and secret military installations, for example -- and to prohibit publication of such images, rather than threatening to place a blanket ban on media access to satellite technology. Such an approach would recognize that maintaining the open society guaranteed by the Constitution is itself an important aspect of "national security."