NATIONAL SECURITY AND THE FIRST AMENDMENT

The first amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." Since the adoption of the Constitution, the Supreme Court has repeatedly affirmed the depth and breadth of its commitment to these few powerful words, even when confronted with serious national security concerns. Although it would be possible to write a treatise on the legal issues that a mediasat could generate, this paper is concerned with merely outlining the issues related to two narrowly drawn questions:

1. Are there restrictions that the government could impose in the interests of national security that would pass constitutional muster?
2. Is the licensing scheme established in the 1984 Remote Sensing Act a reasonable exercise of U.S. domestic and international responsibilities and is it consistent with the first amendment ?

Mediasat Restrictions and the First Amendment[41]

Before one can assess the constitutionality of mediasat restrictions, it is important to consider the legal status of newsgathering. In *Branzburg v. Hayes,* the Supreme Court held that newsgathering qualifies for some first amendment protection, because "without some protection for seeking out the news, freedom of the press could be eviscerated. "[42] But, the Court in *Branzburg* did not say—and has never said—that newsgathering is due the same degree of protection afforded traditional speaking and publishing activities. Indeed, the Court has upheld restrictions on newsgathering where reporters sought access to government facilities or government information not generally available to the public .43 The degree of protection ultimately granted to news gathering activities will determine which restrictions the U.S. Government could properly place on a mediasat. Unfortunately, until the Supreme Court has occasion to rule on this specific issue, it will not be settled decisively.

As noted above, should the U.S. Government desire to inhibit a media-owned satellite from gathering potentially sensitive information it could—either permanently or during a crisis—attempt to limit: 1) the resolution of the satellites sensors, 2) the images that the satellite is allowed to collect, or 3) the images the media may disseminate. If news gathering is granted the highest degree of first amendment protection, all such restrictions might well be regarded as impermissible "prior restraints" on free speech. The doctrine of "prior restraint" holds that advance limitations on protected speech may not be "predicated on surmise or conjecture that untoward consequences may result ."[44] Prior restraints are allowable only if necessary to prevent "direct, immediate, and irreparable damage to our Nation or its people. "[45] If newsgathering is given full first amendment protection by the Supreme Court, U.S. Government restrictions would have to meet the strict tests required of allowable "prior restraints. " On the other hand, should the Court decide that news gathering was deserving of some lesser degree of protection, the government would have considerably more latitude to limit mediasat activities.

But even if the government could not meet the strict "prior restraints" test, it could still enforce post-publication sanctions.[46] Federal espionage laws prohibit gathering or transmitting defense information, photographing defense installations, publishing or selling photographs of defense installations and the disclosure of classified infor-

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[41] This paper discusses only the first amendment issues raised by a mediasat. Media owned satellites would, of course, be subject to all the domestic laws and regulations (e. g., Federal Communication Commission regulations, Space Launch Act of 1984) that would apply to other satellites, In addition, treaties that have been signed and ratified, such as the *1967* Outer Space Treaty and the 1972 Liability Convention, are legally binding on private sector activities.

[42] 408 U.S. 665, 681 (1972).

[43] See: *Pen v. Procunier, 417* U.S. 817 (1974), and *Saxbe v. Washington Post Co,,* 417 U.S. ***843 (1974).***

[44] Justice Brennan concurring in, New *York Times Co. v. United States* (The "Pentagon Papers" case), ***403*** U.S. 713, ***724*** (1971**).** The ruling in *New York Times* was a brief *per curium* decision, but each Justice elaborated on his views in a separate concurring or dissenting opinion. See ***also: Near v.*** *Minnesota, 283* U, S. 697 (1931),

"Justices Stewart and White, concurring, New *York Times Co. v. United States,* Id.; To date, the only case which upheld a prior restraint in this context is a 1979 decision by a U. S. District Court, *United States v. The Progressive, Inc.(467* F. Supp. 990 (W, D. Wis.)). In that case the court issued an injunction against a magazine that was planning to publish a detailed description of hydrogen bomb technology.

[46] Although they do not involve issues of "prior restraint," post-publication sanctions must still be consistent with the first amendment.

mation.[47] Should the media violate any of these laws by disseminating satellite images, the government could—subject to the limitations of the first amendment—prosecute those responsible."

If the media do not own the satellite system, but rather rely on a commercial company such as EOSAT to provide it with data, it would be less clear whether the media could successfully argue that licensing restrictions violate their first amendment rights. Should the U.S. Government ask EOSAT to stop distributing raw data for a few days during a crisis and EOSAT agreed, the news media might have a case against EOSAT for breach of contract, but its case against the U.S. Government for infringing its first amendment rights would be less clear.

If the media were buying their data from a foreign satellite system and the foreign government decided, for political or national security reasons, to halt or delay delivery of the data, the media would have no constitutional protections. They might, of course, be able to proceed with a breach of contract action.

The 1984 Landsat Act

Under current international law" and in consideration of valid concerns about the national security[50] and the public welfare,[51] there seems little doubt that the U.S. Government has the right, and indeed, the duty, to exercise its supervision over the space ventures of its citizens. In light of these serious concerns, some form of licensing and regulation is required. The question, then, is whether the specific licensing system requirement in the 1984 Landsat Act is a proper exercise of government authority.

Among its other provisions, the Landsat Act requires those seeking an operating license to "operate the system in such manner as to preserve

[47] *18 U.S.C . 792* to *799.*

[48] *Most of these statutes* require that the person taking the proscribed action have "reason to believe" it would have a harmful impact. This would raise a number of difficult issues. For example, would it be a violation to include accidently a defense installation in a series of satellite photographs, or to include information that was not visible to the media but which was visible to a foreign power using sophisticated processing techniques?

4* Outer Space Treaty, Article VI, Supra, Note 32; Some authors have suggested that a state's responsibilities under article VI are extensive:

> (W)hile no one would doubt the need for government control over space activity at its present stage, Article VI would prohibit, as a matter of treaty obligation, strictly private, unregulated activity in space or on celestial bodies even at a time when such private activity becomes most commonplace Although the terms "authorization" and "continuing supervision" are open to different interpretations, it would appear that Article VI requires a certain minimum of licensing and enforced adherence to government-] reposed regulations. *Manual of Space Law,* Jasentuliyana and Lee (eds.) (Oceana Publishing, 1979), vol. 1, p. 17.

[50] A rocket that can put a payload into polar orbit can also deliver a warhead to any point on the Earth. As with other technologies on the Munitions Control List, the government has a valid interest in closely monitoring foreign access to this technology.

[51] Launch vehicles and payloads present a potentially extreme safety hazard to the citizens of this and other countries. In addition to current international law, common sense would dictate that the U.S. Government should play some role in ensuring that launch activities and payload do not cause injury.

Box H.—Mediasat and Personal Privacy

The media's rights under the first amendment are not the only rights that a mediasat would call into question. As remote sensing satellites become more sophisticated, it is possible that the average person's expectation of privacy could be eroded. Satellites are currently capable of spotting certain crimes, such as environmental pollution. Eventually, satellites may be able to perform other law enforcement functions such as identifying and locating marijuana fields. In the far future, satellites may be able to monitor the activities of individuals.

Under current law, a person is protected against publicity given to facts of his or her private life. Although this "right of privacy" is sometimes hard to define in specific terms, it seems clear that its protections are reduced when a person appears in public. * Mediasat could alter the current understanding of what the law regards as "appearing in public." Recently, in *Califoria v. Ciraolo* the Supreme Court decided that aerial reconnaissance was an acceptable law enforcement technique and that activities taking place in the defendant's back yard were in "plain view" even though they were surrounded by a 10 ft. high fence. Applying *Ciraolo's* logic broadly, one could argue that citizens have no right of privacy for any activity that might be seen from an airplane or by a satellite.*****

● **I. Hanson, *Libel and Related Torts, sec.* 260 *(1%9).***
***106* S.Ct. *1s09* (1966).**
● ** Ctiaolo was a criminal law case involving a warrantless search. The case's reasoning may not be relevant to civil suits involving invasion of privacy.**

and promote the national security of the United States."[52] Some attorneys[53] have argued that the licensing provision of the Landsat Act should be declared invalid because these provisions are neither "susceptible of objective measurement,"[54] nor drafted with the "narrow specificity,"[55] required of statutes affecting first amendment interests.

Given both the government's valid national security interest in regulating the use of launch vehicles and payloads, and the necessarily changing nature of national security concerns, it is difficult to assess how courts might respond to this argument. The references to national security in the 1984 Remote Sensing Act are certainly very general. However, a court might choose instead to focus on the specific facts of each case or on past Government actions in granting or denying licenses. The court could also decide that the regulations supporting the statute are sufficiently specific to supply both the necessary "objective measurement" and "narrow specificity. "

Should a court decide that the licensing provisions of the act were not invalid on their face, then the news media might still argue that the government's use of license denials or license-imposed system limitations was unconstitutional. As discussed above, the freedom the government would have to impose restrictions would be directly related to the court's final determination of the constitutional status of news gathering activities.

[52] 15 U.S C 4242(b)(1)

[53] See: Robert J. Aamoth, "From Landsat to Mediasat," *American Enterprise, the Law and the Commercial Uses of Space* (Washington, DC: National Legal Center for the Public Interest, 1985), vol. II, p 1

[54] *Keyishian v. Board of Regents*, 385 U.S 589, 604 (1967)

[55] *Hynes v Mayor of Oradell*, 425 U S 610, 620 (1976).