Appendix B

Media Access to and Use of Remote Sensing Data: A Legal Overview*

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The Constitutional Status of Newsgathering

Although the Supreme Court stated in *Branzburg v. Hayes, a* 1972 journalists' privilege case, that "[it is not] suggested that news gathering does not qualify for first amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated, [,]"[1] the Court has not yet decided whether newsgathering activities receive the same constitutional protection as traditional speaking and publishing activities. The only Supreme Court cases that address this issue per se involve media access to prison inmates, and thus are not directly analogous to a mediasat.

In two 1971 companion cases, Pell v. *Procunier*[2] and *Saxbe v, Washington Post* Co.,[3] the Court rejected arguments that the first amendment guaranteed the press the right to interview individual prisoners. (The press had argued that they had a constitutional right to interview any willing inmate, which could only be abridged if prison authorities made an individualized determination that interviewing a particular inmate would constitute a clear and present danger to prison security or another substantial interest of the prison system.)

This decision was affirmed 4 years later, in *Houchins v. KQED,*[4] a 3-I-3 decision that indicated that the press should at times be given preferential treatment, including under the circumstances presented in that case (where television station KQED sought access to a local jail to document allegedly unsafe and unhealthy conditions).

The Pell v. *Procunier* Court cited with approval the following statement from *Zemel v. Rusk,* < a 1965 case that upheld the right of the State Department to refuse to issue passports for travel to Cuba under specified circumstances:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased information flow, For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

Again, none of these cases are analogous to a mediasat situation where various companies and organizations are likely to launch such satellites or attempt to utilize government civilian satellites on a space-available basis. Denying the press access to such activities would seem clearly to run counter to these cases.

U.S. restrictions on newsgathering are less likely if the U.S. media should choose to buy its data from foreign remote sensing systems such as the French SPOT. Here the issue is not the constitutionality of such attempts but rather their practicality. In the absence of an intergovernmental agreement, U. S. laws could not be used to influence the data acquisition practices of foreign governments.

A more difficult problem is presented in attempting to determine what restrictions could properly be placed on use of the information that is so acquired.

The Doctrine of Prior Restraint

The doctrine of "prior restraint" holds that, except in extraordinary situations, any procedure used to suppress protected speech must rely on a post-publication sanction rather than on a pre-publication restriction. The leading case in point is Near v. *Minnesota,'* a 1931 decision that struck down an injunction barring publication of a local newspaper, which had been adjudged a public nuisance because it had printed allegedly defamatory articles about some public officials.

In *Near v. Minnesota,* the Supreme Court stated, "NO one would question but that a government might

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[1]408 U.S. 665, 681 (1972). The decision required certain journalists to testify before grand juries about people to whom they had promised confidentiality while investigating alleged criminal activities which were the subject of subsequent news articles.

[2]417 U.S. 817 (1974).

[3]417 U.S. 843 (1974).

[4]438 U.S. 1 (1978).

[5]381 U.S. 1, 16-17 (1985), cited at 417 U.S. 834.

, 283 US 697 (1931)

prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports *or* the number and location of troops."[7]

The concern most frequently expressed in connection with potential mediasat activities involves national security. One commentator has summarized SPOT's potential in this context as follows:

> If Iraq says it attacked a port in Iran, but Iran denies it, satellite imagery could resolve the dispute. What does the closed Soviet city of Gorki look like, or Kharq Island or the hijacked Achille Lauro cruise ship? Did an Afghan village *really* burn down? Satellite imagery could provide the answers. . . The next time a Grenada erupts, it may matter less that reporters and cameramen are not invited along; the spacecam will have it covered.[8]

Perhaps the most famous prior restraint case is that involving the so-called "Pentagon Papers, " a 1971 Supreme Court decision, New York Times Co. v. *United States,*[9] The "Pentagon Papers" came from a classified 47-volume Pentagon study, officially entitled "History of U.S. Decision Making Process on Vietnam Policy, " which described the origins of United States' involvement in the Vietnam war. The material had already been widely circulated and all of it was at least 3 years old. The government originally sought to have publication curtailed under Section 793 of the Espionage Act; '" but when this statute was held inapplicable, they also argued that "inherent [constitutional] powers" to safeguard national security entitled them to an injunction prohibiting publication, However, their arguments were rejected in a 6-3 decision. The ruling itself is a brief per *curiam* decision but each Justice elaborated on his views in a separate concurring or dissenting opinion. Of the six concurring opinions, Justices Black and Douglas, both of whom held an absolutist view of the first amendment,[11] each stated that in his view **prior** restraints were never permissible. Justice Brennan thought that prior restraint was permissible to the extent described in *Near v. Minnesota,* but added that "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result . "[12] Justice Stewart, joined by Justice White, stated that, in the absence of applicable statutes, he would permit prior restraints on publication only if necessary to prevent "direct, immediate, and irreparable damage to our Nation or its people."[13] Finally, Justice Marshall found prior restraint inappropriate in this case because it had not been authorized by Congress.

The only case that upheld a prior restraint in this context is a 1979 decision by the United States District Court for the Western District of Wisconsin, *United States v. The Progressive, Inc.*[14] In that case an injunction was issued against a magazine which was planning to publish an article that contained a detailed discussion of hydrogen bomb technology.

The *Progressive* court relied primarily on the Pentagon Papers case, noting that several of the majority Justices in that decision had indicated that they might be more favorably inclined toward the government's position if there was a specific statute, that is, a congressional enactment, that barred the challenged publication. The court noted that there was such a statute in the *Progressive* case, 42 U.S.C. Section 2274. The court also indicated that in its view the government had met the standard laid down in the Pentagon Papers case by Justices Stewart and White, in that the publication would result in "grave, direct, immediate and irreparable harm to the United States."[15]

When the United States invaded Grenada in 1983, the government imposed a total news blackout on the operation. Media representatives were prohibited from accompanying the invasion forces in the initial landings on the island and members of the press who attempted to travel independently to the island were prevented from reporting news of the invasion. The ban was lifted some days later, after the island had been secured and most of the fighting had ended.

The press subsequently challenged the ban and sought a permanent injunction against any future such ban. However, the challenge was dismissed as moot by the United States District Court for the District of Columbia,[16] which held that the plaintiffs had not shown that they personally faced a specific, imminent threat of irreparable harm, as required before the conduct of vital governmental functions, requiring the exercise of discretion in a myriad of unpredictable circumstances, will be enjoined. The court explained:

> The invasion of Grenada was, like any invasion or military intervention, a unique event. Its occurrence required a combination of geopolitical circumstances not likely to be repeated. In addition, it required a discretionary decision by the President of the United States as Commander-in-Chief to commit United States forces. The decision to impose a temporary press ban was also a discretionary one. It was made by the military commander in the field of operations because the

[7] 283 U S at 716 (footnote omitted)

[8] Mauro, ' The Puzzling Problems of Pictures From Space, *Washington Journalism Review* (June 1986) 15

[9] 403 Us. 713 (1971),

[10] 18 U.S.C. Sec. 793(e).

[11] The first amendment in pertinent part provides, 'Congress shall make no law abridging freedom of speech, or of the press. Justices Black and Douglas interpreted this language *[no* law] literally and thus consistently voted against any press restrictions

[12] 403 U.S. at 725-26.

[13] *Id.* at 730

[14] 467 F. Supp. 990 (W D. Wis), *dismissed mem* 610 F 2d 819 (7th Cir 1979).

[15] 467 F.Supp at 996

[16] *Flynt v Weinberger, 588* F. Supp. 57 (D. D C *1984).*

> safety of press representatives could not be guaranteed and in order to ensure that secrecy was maintained, thereby protecting the safety of United States troops and promoting the success of the military operation. [17]

The court also stated that a permanent injunction against future press bans of this nature "would limit the range of options available to the commanders in the field in the future, possibly jeopardizing the success of military operations and the lives of military personnel and thereby gravely damaging the national interest."[18]

It is likely that future cases of this nature, including those involving images from space, would be resolved on a case-by-case basis under reasoning comparable to that set forth in the district court's decision in *Flynt v. Weinberger*.

No special rules would be needed to govern the use of imagery obtained from foreign satellites. Attempts to limit the media's use of such imagery would be subject to the same constitutional scrutiny as attempts to limit imagery obtained from U.S. satellites. Material of a foreign origin which was aired or printed in the United States would, however, be subject to the same constitutional and other restrictions as would material of a U.S. origin. For example, attempts to limit its publication would be subject to the rules on "prior restraint. " Similarly, the dissemination of such information could serve as the basis for a defamation suit in the United States. Most important, it could violate various national security laws if sensitive information were disclosed.

The Land Remote-Sensing Commercialization Act of 1984, its legislative history, and the proposed regulations intended to implement it[19] all speak to national security concerns in general terms and thus provide little guidance as to how particular matters would be handled. For example, the Act's congressional findings state that "land remote sensing by the Government or private parties of the United States affects international commitments and policies and national security concerns of the United States;"[20] and its declaration of purposes notes that a purpose of the law is to "maintain the United States' worldwide leadership in civil remote sensing, preserve its national security, and fulfill its international obligations. "[21] Those seeking a license to operate private remote-sensing space systems must agree to "operate the system in such manner as to preserve and promote the national security of the United States."[22]

The proposed regulations similarly require applicants to submit "adequate operational information regarding the applicant's remote-sensing space system on which to base review to ensure compliance with national security and international requirements."[23] The accompanying commentary states that the National Environmental Satellite, Data, and Information Service (NESDIS) recognizes that some prospective applicants may want greater certainty as to when a license might be denied or conditions imposed to protect national security or foreign policy interests, but explains that this is not feasible because "individual judgments [will be] made in a context affected by rapidly changing technology and [therefore] must be made on a case-by-case basis."[24] The EOSAT contract similarly provides that the company will comply with all national security requirements .25

The Secretary of Commerce is to consult with the Secretary of Defense on all matters arising under the Land Remote-Sensing Commercialization Act that affect national security,[26] and with the Secretary of State on all such matters that affect international obligation.[27] Those **secretaries** are responsible for determining which conditions come within their respective areas of concern, and notifying the Secretary of Commerce promptly of any such conditions. Again, no specific information is provided to limit or clarify precisely what is covered by this broad language.

In sum, it appears that the standard of "grave, direct, and irreparable harm to the United States" as cited in the Pentagon Papers and *Progressive* cases would be utilized in deciding whether pre-publication restraints were appropriate with regard to Landsat-generated materials. Because the government and the press are likely to disagree about when this possibility exists, judicial intervention would seem necessary to determine what, if any, restraints could appropriately be applied to particular sets of circumstances as they arise.

Subsequent Sanctions

The fact that material can constitutionally be broadcast or printed does not mean that those responsible cannot subsequently be sanctioned for that action. Several Federal laws could be applied to the publication or other release of classified information, depending on its content, even where the doctrine of prior restraint

[17] *Id* at 59
[18] *Id* at 60
[19] 51 *Fed Reg* 9971 (Mar 24 1986)
[20] 15 U S C Sec 4201(4)
[21] 15 U S C Sec 4202(b)
[22] 15 U S C Sec 4242(b)(1)
[23] Proposed 15 CFR Sec 960.6 Specific technical information and marketing plans for the data received, must be included to help the licensing agency make its determination
[24] 51 *Fed Reg* 9972 (Mar 24 1986)
[25] EOSAT hearing, *supra* n 10, at 58 (The text of the contract is not provided)
[26] 15 U S C Sec 4277(a)
[27] 15 U S C. Sec 4277(b)

precluded the government from prohibiting its dissemination.

Federal espionage laws are codified at chapter 37 of the Federal criminal code.[28] Specific prohibitions include gathering, transmitting or losing defense information;[29] gathering or delivering defense information to aid a foreign government;[30] photographing defense installations;[31] using aircraft for photographing defense installations;[32] publishing or selling photographs of defense installations;[33] and the disclosure of classified information .34 Most of these statutes do not require a specific intent to injure the United States, but only that the person taking the proscribed action have "reason to believe" it will have a harmful impact.

Several Justices writing in the Pentagon Papers case indicated that these laws could be invoked against those who published classified material; see, for example, the following statement from Justice White's concurring opinion:

> The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 makes it a crime to publish certain photographs or drawings of military installations. Section 798, also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint .35

Justice Marshall similarly expressed the view that prosecutions under these laws would be acceptable if publications were found to have violated their prohibitions.[36] Even Justice Douglas, well known for his opposition to any press restrictions, indicated that he might be persuaded to apply Federal espionage laws to the press under carefully drawn circumstances, as when war had been declared pursuant to a declaration of war (Vietnam was an undeclared war) .[37] The three dissenting Justices (Chief Justice Burger, Justice Harlan and Justice Blackmun) supported the imposition of a prior restraint in this case, so they presumably would also have supported post-publication sanctions against those who published the challenged material.

Other Federal laws that might encompass certain land remote-sensing activities include .50 U.S.C. Section 783, which prohibits the communication of classified information by a government officer or employee, or the receipt of classified information by a foreign agent or a member of a Communist organization; and 42 U.S. C. Section 2274, the statute utilized in the *Progressive* case, a provision of the Atomic Energy Act which prohibits the communication of restricted data which may be utilized to injure the United States or to secure an advantage to any foreign nation.

On the other hand, it is difficult to generalize as to how these laws would apply to particular Landsat activities. For example, the prohibition on gathering or transmitting defense information applies to "whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation," takes any proscribed action .38 Those presenting satellite-generated material could argue that their intent was not to gather or transmit defense information, or that they had no reason to believe that it would be used to harm the United States, On the other hand, some prohibitions would seem clearly to apply to these activities, such as those against photographing defense installations,[39] and publishing or selling photographs of such installations.[40] Even here, however, some questions would likely remain. For example, would the incidental inclusion of a defense facility in a series of satellite photographs encompassing many images come within the purview of these prohibitions? What if the system operator lacked the sophistication to identify the prohibited image, but a purchaser using more advanced techniques 'was able to do so? It is simply impossible to answer such questions at this time.

Material generated by remote sensing activities which is broadcast or published is subject to the same restrictions as is similar material which comes from more conventional sources. For example, to the extent that it is obscene or defamatory, it can be challenged on those grounds. However, as technology becomes more advanced, a potential problem involving the right of personal privacy could develop—if it has not already.

A person who appears in public ordinarily waives his or her right to privacy, as long as the resulting photographs or commentary are accurate. 'l Aerial recon-

[28] 18 U.S. C Sects 7Q2 to 799.
[29] 18 U. S C Sect 7Q3.
[30] 18 U S.C. Sect 794.
[31] 18 U.S. C Sect 795.
[32] 18 U S.C Sect 796.
[33] 18U.S C Sect 797.
[34] 18 U S C Sect. 798
[35] 403 U S at 735-37 (White, J , concurring)(footnotes omitted)
[36] *Id* at 745 (Marshall, J , concurring]
[37] *Id* at 720-22 (Douglas, I concurring)
[38] 18 U S C. Sec 793(a)
[39] 18 U S C Sec. 795.
[40] 18U.S. C Sec. 797.
[41] I. Hanson, *Libel and* Related *Torts,* Sec 260 (1969). An action willlie it a misleading impression is given, however, as in the case of an innocent child whose picture is used to illustrate an article on juvenile delinquents *Metzger v Dell Publishing Co , 207* Misc 182, 136 N Y.S 2d 888 (Sup 1955)

naissance is an accepted law enforcement technique, most recently affirmed by the Supreme Court in a 1986 decision *California v. Ciraolo.* " On the other hand, a person is protected against publicity given concerning facts of his or her private life.[43] If, in fact, land remote-sensing satellites were capable of determining which newspaper a person is reading in his or her backyard, the potential for invasion of privacy would seem to be quite high. Again, this possibility would not serve as the basis for prohibiting printing or broadcasting such material, but such dissemination could lead to later lawsuits by those who felt their privacy had been invaded.

International Considerations

At the international level, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies [Outer Space Treaty]," which was signed in 1967, declares that space "shall be free for exploration and use by all States, " and that it "is not subject to national appropriation. " Although states have not agreed on the definition of where outer space begins, " they have agreed that civilian land remote-sensing satellites operate in outer space and not within the boundaries of any country.

While all countries have **laws** against espionage, there is no rule or principle of international law that prohibits a nation from observing activity within another nation from beyond that country's territory.[46] Indeed, the United States has consistently adhered to an "open skies" policy, which states that no nation has the right to control or prevent remote-sensing of its own territory. This does not mean that no legal questions exist with regard to the practice of remote sensing from space.

In 1971, the United Nations' Committee on the Peaceful Uses of Outer Space [COPUOS] established a working group on remote sensing to develop a set of rules governing the operation of these systems. In **1987,** COPUOS agreed on a set of 15 principles that would serve as voluntary guidelines for national remote sensing activities .[47] Although no requirement that prior consent be obtained before one country could survey another's resources is included, the guidelines promote international cooperation and access to data on a nondiscriminatory basis.[48] Interestingly, much of the concern in this area has arisen not in the United States or the Soviet Union, but among lesser developed countries who fear that they will be at an unending disadvantage if their needs and desires are not taken into account at this relatively early stage of the planning process,'" While it is likely that over time a consensus will be reached as to some of these issues, national self-interest may make this a long and drawn-out process, one in which the end results remain uncertain. Major deviations from the present practice could, of course, affect the media's ability to access and report on certain items generated by use of this technology.

Conclusion

There is apparent agreement on the usefulness of land remote-sensing techniques in gathering a wide range of information, where such gathering and dissemination is not likely to be challenged (primarily environmental and geological data). Questions arise when the material so gathered can be seen as a threat to national security, personal privacy, or other protected interests.

At this time it appears that courts would likely uphold the right of the media to operate and/or utilize land remote sensing satellites, and the media would be allowed to broadcast or print any information which **was so** obtained unless a pre-publication restriction was justified to prevent direct, immediate, and irreparable damage to the United States or its citizens (the standard employed in the Pentagon Papers case). However, the media could subsequently be penalized for releasing information found to violate national security or other pertinent statutes.

At the international level, there is currently no restriction on observing and photographing a country from outside its borders, including by satellite, from space. However, future international agreements may limit somewhat the complete freedom which is currently enjoyed in this context .50

This entire situation involves a rapidly evolving technology, which is sought to be handled by a much more slowly evolving state of the law. As such, it will likely remain unsettled for the foreseeable future.

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[42] 54 U S L W 4471 (1986)

[43] I Hanson, *supra* n 15, Sec 252

[44] Jan 27 1967, 18 U S T 2410, T I A S No 6347, 610 U N T S. 205

[45] "Note Explorations in Space Law An Examination of the Legal Issues Raised by Geostationary, Remote Sensing, and Direct Broadcase Satellites, *N Y L Sch J Rev* 1 9(1985) 724.

[46] *Id* a t 723-24

[47] Principles relating to remote sensing of the Earth From Space," United Nations General Assembly A RES 41/65 22 January 1987

[48] Principles XII and XIII

[49] Stewart, "The New World Information and Communication Order in Light of U S Media Practice 16 *New York University J International & Pol* 635 (1984)

[50] Note, Explorations in Space Law *supra* n 45 (en t ire article