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Human law is law only by its accordance with right reason, and by this means it is clear that it flows from Eternal law. In so far as it deviates from right reason it is called an Unjust law; and in such a case, it is no law at all, but rather an assertion of violence.

Saint Thomas Aquinas1

Our liberty depends on freedom of the press, and that cannot be limited without being lost.

Thomas Jefferson2

I like the dreams of the future better than the history of the past.

Thomas Jefferson3

I. INTRODUCTION

The media's potential avenues for gathering information for television network news seem unlimited today. When one thinks back to a not too distant (at least in the scheme of history) nineteenth century when the wireless represented a miraculous advance in the press' ability to process and transmit information over long distances, the

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1 Saint Thomas Aquinas, Summa Theologiae 1a-2a, Q XCI1 (c. 1260).
3 Id. at 156.
fact that the media can now readily glean information from outer space borders on the impossible. In the past several decades the U.S. government's development of satellite technology to do just that, collect information from a bird's eye view in space, has improved at an impressive rate. For example, the recent Hollywood movie "Patriot Games." Anyone who saw the film will not forget the scene where actor Harrison Ford and several other Central Intelligence Agency (CIA) staffers watched a live satellite image from Libya, where several U.S. military special operatives killed approximately a dozen terrorists, while the CIA group sat comfortably in a Langley, Virginia office five thousand miles away. Although pure speculation, the belief endures that the U.S. national security apparatus controls space satellites that may not be able to read Pravda, but at least can allow you to recognize the title on the front page. The potential commercial applications of such technology, known as remote-sensing satellite imagery, appear staggeringly broad.

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6 Jay Peterzell, Eye in the Sky, COLUM. JOURNALISM REV., Sept.-Oct. 1987, at 46. Specific examples of the commercial potential for remote-sensing are abundant today: remote-sensing has been used to (1) map Brazil, (2) shorten a pipeline in Bolivia, (3) help find copper deposits in Pakistan, and (4) provide information on an earthquake in Armenia, just to name a few examples. Hamilton DeSaussure, Remote Satellite Sensing Regulation by National and International Law, 15 RUTGERS COMPUTER & TECH. L.J. 351, 351-52 (1989).

Frequently, however, commercial potential in remote-sensing is accompanied by potential problems, not the least of which is national sovereignty. In space, no one can hear you scream, but additionally no one can assist a sovereign nation to extend its tangible borders, boundaries, or demarcation lines. Several countries, lesser developed ones in particular, have expressed concerns over how remote-sensing satellites of other countries affect their sovereignty. Luc Frieden, News-gathering by Satellites: A New Challenge to International and National Law at the Dawn of
vironmentally related geographical studies, agricultural studies, land management, and terrain mapping are just a few of the more general commercial applications already actively utilized.\(^7\)

Recently, a limited commercial form of such technology has generated a significant amount of interest in this country and overseas: the sale of remote-sensing imagery both to the news media for use in television broadcasts, and to the print media for newspaper use.\(^8\) Governments worldwide have grown increasingly concerned over several perceived threats caused by the commercial use of this satellite imagery by the media, especially threats to (1) national security,\(^9\) (2) individual privacy,\(^10\) and (3) nation-state sovereignty.\(^11\) Commercial revenue from the promulgation of satellite imagery continues to grow, so the concerns of independent nations increase in scope as access to imagery becomes more widespread.\(^12\)

This paper will explore the controversies arising from the promulgation of remote-sensing satellite imagery technology, and will address in particular the "Pandora's Box" that such technology may reveal in the near future.

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\(^7\) Asker, *supra* note 4, at 51. Probably the most widespread commercial application of remote-sensing technology is geographic information systems, or GIS. *Id.* at 47. "GIS is a broad term covering systems that use computer hardware and software to manipulate and analyze a wide variety of data organized geographically." *Id.* The main applications of GIS are to combine all sorts of empirical data with geographical information to solve complex global management and planning puzzles; GIS currently represents a $5.3 billion global industry. *Id.* With the growing awareness and sense of urgency over the fragile nature of our planet's ecosystem, the utility of remote-sensing for GIS-related purposes seems only limited by how quickly the technology can be rendered practical in particular industries and scientific endeavors.


\(^9\) See Frieden, *supra* note 6, at 117.

\(^10\) See generally Frieden, *supra* note 6, at 341-43.


This "Pandora's Box," when opened, reveals a looming struggle between the United States military and media over the media's First Amendment right to secure all imagery possible through a remote-sensing satellite and also to broadcast that imagery at will. In the not too distant future, the media probably will have the capability to broadcast such imagery after acquisition from a media-owned and controlled satellite.\(^\text{13}\) The military argues vehemently that national security remains a critical exception to any media right to gather news through satellite remote-sensing and that the military has a continuing right to exercise "prior restraint" over remote-sensing imagery which threatens the United States' critical strategic interests.\(^\text{14}\) The parameters of this article will extend only to U.S. law, as constitutional considerations have minimal effect on international remote-sensing deliberations.\(^\text{15}\)

The article will be divided into five sections: (1) the technological development of remote-sensing, especially the U.S. Landsat program and the potential for a media-owned, remote-sensing satellite commonly referred to as

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\(^{13}\) See Frieden, supra note 6, at 106.

\(^{14}\) See Reimer, supra note 4, at 332-38. At the same time, the military continues to attempt to reassure the media and general public by stating that it will impose limitations on space news gathering only in situations which clearly threaten the national interest. James R. Asker, Congress Considers Landsat 'Decommercialization' Move, AVIATION WK. & SPACE TECH., May 11, 1992, at 18 [hereinafter Congress Considers].

\(^{15}\) It should be noted that no multilateral treaty regulating commercial remote-sensing has been enacted by the United Nations or any other geopolitical organization. U.N. Resolution 41/65, "Principles Relating to Remote Sensing of the Earth From Space," represents the only tentative attempt to initiate remote-sensing regulation. Harry Feder, The Sky's the Limit? Evaluating the International Law of Remote-Sensing, 23 INT'L L. & POL. 599, 601-02 (1991). The principles are a first step towards international regulation of U.N. member states' remote-sensing use, but only a first step, because the principles lack the specific content necessary to establish a framework for more binding U.N. action in the future. DeSaussure, supra note 6, at 357. International law in the remote-sensing field thus remains nebulous and insubstantial. For further exploration of the international legal question posed by remote-sensing technology, see Feder, supra; Frieden, supra note 6, at 103; Bradley D. Gallop, The Final Frontier: A Proposed Legal Order for an American Space Settlement, 14 HASTINGS CONST. L.Q. 715 (1987); Hayward, supra note 12, at 157.
"Mediasat," (2) the historically volatile relationship between the military and the media in regard to restraints on media coverage of military activity, from World War I until the present day, (3) the escalation of military/media tensions in the recent Persian Gulf War, including limitation of satellite imagery, (4) a look at the media's poorly defined, limited First Amendment right to gather news along with the controversial "prior restraint doctrine," and finally, (5) a review of the potential of remote-sensing for news gathering, coupled with policy suggestions to attempt to avoid military/media conflict over such use.

II. THE BIRTH AND EXPONENTIAL ADVANCES IN REMOTE-SENSING TECHNOLOGY, GOVERNMENTALLY AND COMMERCIALLY

Remote-sensing exists today as an extremely sophisticated form of space photography which has developed in the last few decades. In its most simplistic form, it involves the utilization of advanced photographic equipment as an appendage on the base of a satellite in low, sun-synchronous orbitals. The necessary supplementary equipment, which remains in fixed positions on the earth's surface in the form of ground relay stations, digitally records impressions of the earth's surface from the satellite photographic transmissions and converts those impressions into imagery. The imagery can be utilized for several different purposes, including news gathering.

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17 Id. at 3. "An orbit is sun-synchronous when the spacecraft is constantly interspersed between the earth and the sun. With respect to remote sensing, this type of orbit is essential to ensure that the sensor is always looking down at the earth during daytime when imagery can be taken." Id. at 2 n.2.

18 Reimer, supra note 4, at 323. Remote-sensing's primary use in the informational technology field consists of geological imagery of the earth's surface, both for commercial and scientific purposes. See supra note 7 for a discussion of geographic information systems (GIS). Imagery use in news broadcasts, which was
One difficult part of this process is developing the imagery into pictures that are clear and concise enough to provide benefits to the purchasers for use in their varied industries. Depending on the sophistication of the remote-sensing equipment involved, the images can be graphically extensive and extremely detailed.

A. LANDSAT'S BEGINNINGS

Originally, the government did not provide an outlet for the commercial potential of remote-sensing technology, and all remote-sensing benefits remained unique to the federal government. However, with the launch of the first Landsat satellite by NASA in 1972, the commercial era of remote-sensing began. The only problem was that most commercially useful aspects of remote-sensing require fairly high resolution. While Landsat satellites initially provided resolution of eighty meters, today's commercial satellite imagery can photograph an automobile driving down the street in Provo, Utah, or a moose herd galloping across frozen Arctic tundra. Classified military technology is believed to be even more efficient.

not even discussed when the technology first developed, helps illustrate just how many undiscovered applications of this technology remain. Reimer, supra note 4, at 323-24.

See Feder, supra note 15, at 600. For instance, the media has had a difficult time assessing the utility of some forms of remote-sensing, because such imagery can only be recognized by experts in the field. U.S. Congress, Office of Technology Assessment, Commercial News Gathering From Space—A Technical Memorandum 23 (1987) (OTA-TM-15C-40) [hereinafter OTA Memorandum]. Media representatives agree that the more extensive the imagery is, the greater utility it has for widespread use. Id.

Aamoth, supra note 16, at 2; Jones, supra note 4, at D1. Some up-to-date commercial satellite imagery can photograph an automobile driving down the street in Provo, Utah, or a moose herd galloping across frozen Arctic tundra. Classified military technology is believed to be even more efficient. Mauro, supra note 5, at 17; Jones, supra note 4, at D1, D4.

With remote-sensing a relatively nascent technology in the latter twentieth century and considering the tense geopolitical landscape of the Cold War era, it is not overly surprising that the U.S. Government did not allow for commercial use of the technology until well after its development.

Landsat began in September, 1969 as a NASA program to explore the development of satellite imagery from space and analyze its potential benefits to society in general and the U.S. government in particular. Christopher C. Joyner & Douglas R. Miller, Selling Satellites: The Commercialization of Landsat, 26 HARV. INT'L L.J. 63, 66 (1985). NASA launched the first Landsat satellite, Landsat 1, in 1972 and the launch of several other satellites has followed in the years thereafter. Id. at 64-67.

Aamoth, supra note 16, at 3.

When resolution is described by analysts in meter measurements, what they
commercial satellites provide up to two meter resolution.\textsuperscript{25}

Experts believe that for satellite imagery to have widespread, practical commercial use, especially for news gathering, the images must have a minimum of five meter resolution capability.\textsuperscript{26} Coincidentally, or not so coincidentally, that is similar to the level of resolution believed to threaten U.S. national security when a satellite is pointed in the "wrong" direction.\textsuperscript{27} The "wrong" direction refers to remote-sensing equipment pointed at a military base, a geographical region with large troop placements, a region with a large number of naval vessels, aircraft or types of military equipment, a nuclear weapons facility, or another type of military installation. The key factor remains whether the government classifies the area as vital to national security. Supposedly, a 1979 classified executive directive from then President Carter restricted commercial remote-sensing to the ten meter resolution level.\textsuperscript{28}

Confusion over such issues led Congress to the realization that it needed to provide more clear direction concerning procedures for commercial application of remote-sensing. Congress enacted the Land Remote Sensing Commercialization Act of 1984 (Landsat Act) for this very purpose, as well as to further the continued commercialization of the technology.\textsuperscript{29}

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\textsuperscript{25} Jones, supra note 4, at D4; Joyner & Miller, supra note 22, at 65; Reimer, supra note 4, at 324.

\textsuperscript{26} Reimer, supra note 4, at 324.

\textsuperscript{27} Joyner & Miller, supra note 22, at 65.

\textsuperscript{28} Mauro, supra note 5, at 17. Any resolution greater than ten meters theoretically had to be excluded from commercial use, due to national security implications of such precise imagery. Id. Clearly, such a directive has become hopelessly obsolete, as the Soviets are now aggressively marketing two meter resolution imagery. Jones, supra note 4, at D1.

\textsuperscript{29} Aamoth, supra note 16, at 6. See generally 15 U.S.C. §§ 4201-92 (1988), re-
B. THE LANDSAT ACT

The Landsat Act provides guidelines in an attempt to insure a smooth transfer of many benefits of remote-sensing technology to the private sector, including allocation of responsibility for marketing and selling the satellite imagery produced by the program. One key restriction to the program's commercialization was that U.S. national defense and foreign policy interests had to be completely protected by the seller and purchaser of the imagery.

The Act recognized that remote-sensing can affect U.S. national security concerns and that even with a primary goal of private sector responsibility for the program in the future, "certain Government oversight must be maintained to assure that private sector activities are in the national interest."

The Act also requires the Secretary of Commerce, as the head of the federal agency provided with initial primary responsibility for the program, to consult with the Secretary of Defense on all national security issues and with the Secretary of State on all matters involving foreign relations. The Commerce Secretary cannot issue a commercial remote-sensing license unless the use of the technology passes the Department of Defense's test for national security and the Department of State's test for maintaining proper foreign relations.

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33 Id. § 4277.
34 See id. § 4241. The problem with these “tests” to protect national security and foreign relations is that they are never clearly defined in the Landsat Act or any other document, and are left chiefly to the discretion of the Executive Branch, or more specifically, the State and Defense Departments. With such vague requirements for license approval and such great discretion given to the Executive Branch, it would not be too difficult to prevent an undesirable license applicant from obtaining a license.
The Act never actually provides a concrete definition of what is meant by national security, despite national security being a critical factor in government approval of any licensed utilization of the system by a private entity. National security represents a generic term in the Act included without much clarification as to its specific meaning. Additionally, a congressional official claimed that the attorneys who drafted the Act did not consider the ramifications of media use of satellite imagery, especially from the perspective of news gathering being a threat to national security.35 "'We never looked at it in those terms,' one congressional official [said]. 'The whole First Amendment thing [was] an afterthought. We smacked our heads and realized [we had] left something out.'"36 With such naiveté as to a critical element of the national security aspects of the Act, the great concern over the potential national security dangers of media use of remote-sensing technology is not surprising; such concern centering on the prospects for a wholly-owned and controlled media satellite.37

C. THE CLARIFICATION OF THE PRIVATIZATION PROCESS, AND FURTHER EMPHASIS OF NATIONAL SECURITY CONCERNS

Due to private sector confusion over what licensing and regulation of remote-sensing really entailed under the Landsat Act, the government in 1988 issued regulations to clarify the process.38 Although the government did provide private entities interested in remote-sensing a higher level of guidance concerning the stipulations of commercial licensing, the term "national security" was given continued emphasis, yet was still not satisfactorily explained. After the first subsection of the regulations expressly affirm that national security remains a primary

35 Peterzeli, supra note 6, at 46.
36 Id.
37 Id.; Mauro, supra note 5, at 16.
38 15 C.F.R. § 960.1-.16.
purpose of the original Landsat Act, the regulations then go on to state that:

To the extent . . . there is a tension between the policies of promoting the commercial use of remote-sensing systems and the policies of promoting national security interests as determined by the Secretary of Defense . . . the Secretary of Commerce may, in his or her discretion, undertake reasonable efforts to satisfactorily resolve the matter in favor of commercialization. Although at face value this provides some comfort to commercialization proponents, the terminology “reasonable efforts” seems open to different interpretations. Later in the regulations, the government provides that the Department of Defense, Department of State, or other relevant federal agencies (e.g. NASA) shall have the power to review all commercial satellite licensing applications, and shall be able to prevent any license grant until all potential national security concerns are addressed and satisfied by the license applicant. The Defense Department, with its much larger budget and greater political clout, will almost always prevail over the Commerce Department in disputes over whether a remote-sensing license threatens national security. Direct White House intervention could override such a Defense Department power play, but since matters of this nature are usually left to the discretion of individual federal agencies, any such White House action would be highly unlikely.

An additional factor impinging on uninhibited use of satellite commercial imagery apart from the Landsat Act

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39 Id. § 960.1(a).
40 Id. § 960.1.
41 In these clarifying regulations, similar to the Landsat Act, the Executive Branch has great discretion to determine whether remote-sensing imagery should be licensed to certain commercial entities. Further, whether the Secretary of Commerce has used reasonable efforts under 15 C.F.R. § 960.1 to promote commercialization over security concerns will be viewed differently by an ACLU lawyer on the one hand, and a Colonel in the National Security Administration (NSA) on the other hand. Great potential for disputes remain, even after promulgation of the regulations.
42 Id. § 960.9, 960.9(e)(1)-(2).
or its regulations is the Espionage Act, which provides for criminal prosecution of those entities that: (1) gather defense information which threatens national security, (2) assist a foreign government by providing them with U.S. national security information, (3) photograph defense-related institutions, (4) distribute or sell such photographs, or (5) broadcast classified information. Punishment for violations of the Espionage Act range from small fines and minimal incarceration to large fines and the death penalty. These espionage provisions, which clearly regulate activities that may or may not involve purposeful spying, bestow considerable latitude on the federal government in protecting the national interest while at the same time impose potentially heavy restraints on commercial remote-sensing.

The key element of the Espionage Act's system for punishment of violations from this article's perspective is that the Act includes post-broadcast sanctions alone; there is no provision or allowance for prior restraint of broadcast materials. Thus, the Espionage Act cannot impinge upon First Amendment rights of news gathering or broadcasting through remote-sensing technological capabilities because it only regulates after the fact, it does not prevent information gathering before the fact. The Espionage Act discourages activity that could or does violate national security, while at the same time allowing for the free propagation of satellite imagery by commercial entities.

The vague provisions of the Landsat Act clearly demanded clarification of the satellite licensing process through the regulations. At the same time, the continued heavy emphasis on national security in the regulations, combined with the severe criminal penalties provided for in the Espionage Act, weighs against aggressive expans-


Id.

Id. §§ 793-98.

Id.

Id.
sion of domestic remote-sensing commercialization. From the media’s perspective, commercial satellite news gathering could be imperiled before a satellite can even get off the ground through a licensing process firmly controlled by the Defense Department.48

D. EOSAT, SPOT, SOYUZKARTA, AND THE ACCELERATION OF COMMERCIALIZATION

Once the Landsat Act had furnished a blueprint for the gradual privatization of the Landsat program and clarification of the actual provisions of the Act had been provided by the regulations,49 a commercial entity had to win the contract to market the technology and sell the imagery. The American Earth Observing Satellite Company (Eosat), a partnership of Hughes Aircraft and General Electric (RCA), won the first contract and has been selling remote-sensing imagery since the mid-1980's.50 Eosat currently provides imagery ranging up to a resolution of thirty meters, which is normally of no utility in media situations.51 By the end of 1994, however, Eosat plans to have a satellite available that will provide remote-sensing imagery with five meter resolution, a sufficient news gathering tool to effectuate widespread satellite news gathering capabilities among various media entities.52 Although the Landsat program overseen by Eosat ran into budgetary difficulties in the last few years which threatened its commercial and governmental viability, it seems to have recently regained its stability through a renewed funding commitment from former President Bush's Administra-

48 See infra notes 180-82 and accompanying text. Recently the U.S. government transferred full oversight and licensing control over the commercialization process from the Commerce Department to the Defense Department.


50 Laurie McGinley, Satellites May Give Journalists Powerful Tool, Lead to Showdown on National Security Issue, WALL ST. J., July 2, 1986, at 58; Reimer, supra note 4, at 323.

51 OTA Memorandum, supra note 19, at 2.

52 Frieden, supra note 6, at 108.
It must remain stable in order to continue to be commercially competitive, as commercial remote-sensing satellites now can be found in several countries. One primary competitor of Eosat operates from France, the French System Probatiore d'Observation de la Terre (Spot). Spot offers its customers ten meter resolution, much better than that currently provided by Eosat, and has recently acquired several impressive new clients, including International Business Machines (IBM). Spot plans to have five meter resolution available by the end of 1994, the same resolution goal held by Eosat. The only entity now making five meter resolution or better commercially available is a Russian venture, Soyuzkarta, which markets and distributes its remote-sensing imagery through Spot.

E. THE THREAT OF FOREIGN ADVANCES IN REMOTE-SENSING AND THE GROWING POSSIBILITY OF A MEDIA SATELLITE (MEDIASAT)

1. Foreign Advances

An issue that has recently emerged centers on how, or if, the U.S. government can limit commercial foreign remote-sensing dissemination and distribution if it threatens national security. If Spot and Soyuzkarta market ten,

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54 Countries and coalitions now offering remote-sensing satellite imagery commercially include: the United States, France, the European Community, Japan, Russia, India, and a handful of others.
55 James R. Asker, supra note 4, at 47.
57 Id. To show how rapidly commercial remote-sensing technology is becoming available to the general public, the Russians now aggressively market two meter resolution imagery! Jones, supra note 4, at D4. Apparently however, Soyuzkarta is reluctant to attempt to use such resolution capabilities over sensitive U.S. military installations. Commercial Remote Sensing Faces Challenges, supra note 56, at 59. Seemingly, this reluctance stems from a desire to steer clear of either a diplomatic incident or possibly even an American attempt to shoot down any satellite attempting such a bold fly-by of a sensitive U.S. installation. Id.
five, and even two meter resolution imagery, and the government cannot regulate those entities, how then can the government justify preventing a domestic Mediasat or Eosat from distributing equivalent level imagery under particular circumstances? Besides France and Russia, additional civil remote-sensing systems are springing up in several countries across the globe. The negative foreign policy implications of attempting to restrict foreign satellite imagery are not at a cursory level of review worth the diplomatic effort involved, as the remote-sensing technology gap between the United States and other countries continues to diminish over time. The stifling of the domestic remote-sensing industry could be the only accomplishment of domestic restrictions if foreign imagery marketing continues unabated and accessible to the U.S. media. Experts have maintained, however, that U.S. economic and political pressure, as well as continuing technological and logistical constraints, will suffice to prevent foreign imagery from being a national security hindrance. The relational aspect between the domestic and

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58 See supra note 54 (listing countries with commercial remote-sensing capabilities).

59 Attempts by the United States to bludgeon other countries into taking its position on an issue or geopolitical event have repeatedly backfired in the past (e.g. Japan and trade issues, the United Kingdom and the Vietnamese boat people issue, India and intellectual property rights). Trying to limit another foreign sovereign’s commercial ventures from expanding their remote-sensing capabilities almost certainly is doomed to failure. A better approach would be to subtly suggest that foreign commercial entities restrict their satellite image gathering to regions of the globe that do not violate treaties or critical U.S. strategic and security interests. This is a reasonable and apparently conceivable way to protect security and ease the possibility of diplomatic tensions at the same time. Additionally, with the French and Russians marketing imagery with much better resolution than is commercially available in the United States, attempts to limit propagation of foreign imagery seem pointless; efforts could be better spent trying to improve the domestic competitive position in this fast rising industry.

60 OTA Memorandum, supra note 19, at 34.

61 Id. at 5-6. As domestic imagery is more readily accessible to U.S. media entities, and as access to and distribution of foreign remote-sensing imagery can be limited through careful diplomatic negotiation, it seems logical that the domestic remote-sensing industry remains the more likely candidate to be closely regulated by the national security apparatus of the federal government. The key for the fledgling domestic remote-sensing industry is to that insure the U.S. government only regulates and does not stifle the industry. Furthermore, the U.S. government
international remote-sensing market and any threats to national security from the international market will simply have to be discussed and sorted through over time.

The availability of five meter or better imagery resolution through foreign or domestic commercial sources makes numerous Defense Department officials uncomfortable; to wit, a television national security analyst has stated that the media "does not want to do the [United States] harm, but if [he] were a military planner, [he] would be quite worried." A NASA consultant cryptically joked that if a foreign or domestic commercial satellite company went after imagery in the wrong global regions, the company might "find its satellite mysteriously disabled." Security tensions have only mounted with the disappearance of prior technological limitations on resolution enhancement with the availability of five and even two meter resolution from the Russians. If the media decides it needs to control such a high level of resolution imagery itself without having to purchase it from a separate commercial entity, it may launch its own satellite.

2. Mediasat

A media remote-sensing satellite (Mediasat) could soon be a reality. Potential constraints on such a satellite are: (1) government regulatory approval, (2) cost, and (3) the utility of the technology. Cost and utility stand as the more challenging hurdles. As long as a proposed Mediasat meets the government’s initial national security concerns and standard regulations, licensing apparently will be no more than a technicality. As stated previ-

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63 Id.

64 OTA Memorandum, supra note 19, at 2.
ously, however, the government is wary of the motives and operational capabilities behind a media-controlled satellite, and an apparently sound media satellite license application could run into more government opposition than can be foreseen on the face of the application itself.

Cost represents a nebulous and potentially more prohibitive factor than licensing stipulations. Cost estimates for a remote-sensing media system, including two satellites and all related components and ground stations, range from fifty million dollars to nearly five hundred million dollars, along with ten to fifteen million dollars in yearly operational costs. Keeping the actual cost near the low end of these estimates is a necessity for any realistic venture, considering that yearly revenues from such a satellite are uncertain. The technology and industry are so young that no one knows the level of interest in such imagery or what the average cost of individual imagery production will be in the years to come.

Other problems threaten the utility of the technology. Even with two satellites in geo-synchronous orbit, most current remote-sensing technology can be stymied by cloud cover and other atmospheric variables: no clear skies, no pictures. Additionally, remote-sensing satellites cannot hold their positions over particularly news-worthy regions of the globe and produce more than a few images because the satellites must continue their orbitals. News organizations also must have these images within six to eight hours for them to be of current interest for most news programs; sometimes delays be-

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65 See supra notes 13-14 and accompanying text (explaining licensing).
66 Most experts believe that two satellites are mandatory for the media to have the proper orbital coverage to access imagery in all areas of the globe. Otherwise the system would not be efficient enough to be worthwhile, because the media, in a remote sensing system, must pick up imagery of critical events anywhere in the world on short notice. This kind of comprehensive global coverage cannot be accomplished with only one satellite. Id.
67 Id.; Peterzell, supra note 6, at 48; Brender, supra note 4.
68 OTA Memorandum, supra note 19, at 11.
69 Reimer, supra note 4, at 323.
70 Aamoth, supra note 16, at 3, n.4.
Beyond this time frame occur either because of domestic security concerns, or because the ground relay stations are located abroad and the foreign government will not release the pictures in time.\textsuperscript{71} Obstacles to a Mediasat remain daunting, but the enthusiasm in the media grows proportionally for such a satellite system as the cost estimates shrink.\textsuperscript{72} Cost estimates will continue to shrink as time passes and improvements in satellite imagery progress. Mediasat has a chance to become a reality before the dawn of the millennium.

III. THE HISTORICAL VOLATILITY IN THE MEDIA/MILITARY RELATIONSHIP

The parties with the greatest potential for conflict in the growing realm of commercial remote-sensing technology have to be the military and the media, whose relationship has been volatile for decades. Military/media strains will play a central role in determining how remote-sensing technology is utilized in the future. From a commercial perspective, it is imperative that some sort of understanding between the two entities develops as to the boundaries for use of remote-sensing technology in media broadcasts or stories. The relationship to date has been unpredictable both in peacetime and in war, varying in each historical time period depending on the relative social strengths of the two entities and whether cooperation or conflict better served their individual agendas.\textsuperscript{73}

\textsuperscript{71} Reimer, supra note 4, at 323.
\textsuperscript{72} Frieden, supra note 6, at 106.
A. World War I

World War I represents the first large-scale international conflict in which the United States engaged its young men in battle. The war not only represented a military testing ground, but also a testing ground for how the military and media would relate in wartime. Initially, the military precluded the media from all but an extremely limited role in covering the conflict; news control and censorship were widespread, especially from the battlefield sites themselves.\(^{74}\) As the war progressed, and the U.S. military role in the war was comparatively short as compared to the British, French, and Germans, the reporters became more and more bold, eventually visiting front lines unescorted and gathering news as they pleased.\(^{75}\) Censorship of the reports issued by war correspondents did not vanish, however, even though access to the battlefield became widespread. The press, despite this ongoing censorship, achieved a gradual increase in freedom of movement in World War I,\(^{76}\) setting the stage for the golden era of military/media relations, World War II.

B. World War II

The cooperation, trust, and mutual respect between the military and the media during World War II has not been equalled in any other U.S. conflict in this century. Once again, widespread censorship was passively accepted by the media, but in return, the media had complete freedom of movement, access to military brass on the front lines

\(^{74}\) Cross & Griffin, supra note 73, at 996.
\(^{75}\) Id.
\(^{76}\) For example, by the end of World War I correspondents had freedom of movement with no military escort, could visit the trenches right on the front, and even could cross-over such trenches during major Allied advances or movements. Id. at 996.
and in Washington, and even went along on dangerous military operations.\textsuperscript{77} In fact, the only limitation reporters had to their right to gather information was the number of war correspondents: there were simply not enough to cover every operation.\textsuperscript{78} The censorship the military did impose usually was voluntary. The responsibility not to report sensitive information rested with the individual correspondents.\textsuperscript{79} The media followed this policy for the simple reason that it shared the goals of the military. Both believed the American war effort to be in the national interest, and both believed violation of press restrictions could endanger lives and hamper military efficiency.\textsuperscript{80} The level of trust between the two entities would not reach such heights for the remainder of the century.

\section*{C. Korea and Vietnam: The Gradual and then Rapid Erosion of Trust}

The Korean War started from a media perspective much the same as World War II, with mostly voluntary censorship of stories by the media.\textsuperscript{81} Gradually the system shifted. Voluntary restrictions became too vague which resulted in stories being printed which the high command viewed as security violations.\textsuperscript{82} These voluntary restrictions were replaced by full government enacted censorship similar to World War I.\textsuperscript{83} Although this censorship began in strict form, it loosened as the war progressed to stalemate at the thirty-eighth parallel in 1953. Unlike the two world wars, however, the press began to chafe at the constraints placed on its news gather-

\begin{footnotesize}
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\item \textsuperscript{77} Frenznick, \textit{supra} note 73, at 319.
\item \textsuperscript{78} LaMarche, \textit{supra} note 73, at 49.
\item \textsuperscript{79} Homonoff, \textit{supra} note 73, at 377.
\item \textsuperscript{80} Cross & Griffin, \textit{supra} note 73, at 999.
\item \textsuperscript{81} \textit{Id.} at 1000.
\item \textsuperscript{82} Homonoff, \textit{supra} note 73, at 379. To illustrate violations, the press released information about the Army’s retreat to the Naktong river too early, and revealed the Army’s arrival at several strategic locations. \textit{Id.}
\item \textsuperscript{83} \textit{Id.}
\end{itemize}
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ing capabilities which left a poor foundation for the military/media relationship in the next American military struggle, Vietnam.\textsuperscript{84}

Vietnam represents a watershed event in American history on many levels, and one of those levels is the military/media relationship. The media had unlimited battlefield access during the war, no domestic censorship, and censorship in Vietnam itself remained voluntary.\textsuperscript{85} As a trade-off for these liberal media restrictions, the media had to agree not to reveal sensitive aspects of military operations, including troop movements, casualties and like matters.\textsuperscript{86} The government, in effect, had acknowledged the legitimacy of what the media had to do in Vietnam: provide the American people with visual access to the conflict in Southeast Asia so as to disclose the nature of the conflict our military engaged in with the Vietnamese.\textsuperscript{87}

Unfortunately for future military/media relations, the combination of media misgivings about the purpose of the war, media doubts concerning the accuracy of the information it received from the military, negative stories heard consistently on the evening news, and military belief that the media could not be trusted and was, in effect, an additional adversary, led to a fallout in the relationship.\textsuperscript{88} In short, the military to a large degree believed, and some still believe today, that the media lost the Vietnam War through the destruction of American domestic support.\textsuperscript{89} The media both during and following Vietnam took a more independent, less trustworthy stance toward the U.S. government and military. This stance lead to rip-

\textsuperscript{84} Id. at 1001.
\textsuperscript{85} Homonoff, supra note 73, at 379.
\textsuperscript{86} Id.
\textsuperscript{87} Cross & Griffin, supra note 73, at 1002.
\textsuperscript{88} Id.
\textsuperscript{89} LaMarche, supra note 73, at 50. "The guys who are general[s] today were majors and colonels in Vietnam and they were the ones who hated the press most." Jacobs, supra note 73, at 676 (citing Neil A. Lewis, Government's Strict Orders Limit Reports, N.Y. Times, Jan. 18, 1991, at A11 (quoting Winant Sidle, the last U.S. military spokesperson in Saigon during the Vietnam War)).
ple effects in later military/media relations that no one could have predicted at the time.\(^9\)

**D. Grenada and Panama: The Aftershock of the Vietnam War Era and Further Erosion of Military/Media Relations**

The legacy of the fallout in the military/media relationship which arose in the Vietnam War first appeared in “Operation Urgent Fury,” the invasion of the island of Grenada. The Grenada operation only endured for military purposes for two days. Although a colossal press gathering arrived in nearby Barbados immediately following public realization that the military had implemented a liberating invasion of Grenada, the media had no access to the island until the fighting ended, and even then, the government at first only allowed seven reporters to land on the island.\(^9\)

Journalists who attempted to circumvent the ban and arrive on the island themselves were intercepted by the Pentagon. A few were even detained incommunicado by the Navy for an extended time.\(^9\)

Broad press access to Grenada did not occur until a week after the attack itself, and by then the novelty of the invasion had grown stale.\(^9\)

The main justifications the Reagan Administration gave for the prolonged exclusion of press members from the theatre of operations was the need for surprise and the military’s inability to insure the media’s safety.\(^9\)

Considering reporters were along for D-Day and numerous other operations of far greater danger and importance, these justifications lack substantial merit.\(^9\)

A subsequent lawsuit, *Flynt v. Weinberger*,\(^9\) challenged the military’s restrictive access policies in Grenada, but failed

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\(^9\) Cross & Griffin, *supra* note 73, at 1003.

\(^9\) Id. at 1004.

\(^9\) LaMarche, *supra* note 73, at 51.

\(^9\) Cross & Griffin, *supra* note 73, at 1005.

\(^9\) Frenznick, *supra* note 73, at 323 n.56.

\(^9\) Homonoff, *supra* note 73, at 400-01.

\(^9\) 762 F.2d 134 (D.C. Cir. 1985).
on grounds of mootness.\textsuperscript{97} From the military’s perspective, a lesson had been learned by the damage the media had caused to the war effort in Vietnam. Such damage would not be allowed to recur in any later conflict, beginning with Grenada.

After a post-Grenada commission recommended the creation of a press pool to both grant and control media access to military operations,\textsuperscript{98} the 1989 Panama invasion presented an almost immediate opportunity to test the effectiveness of this and other commission recommendations. The official press pool arrived in Panama scant hours after the fighting had begun, but only had access to actually gather news concerning the operation the day after the invasion had begun, long after the pool’s arrival.\textsuperscript{99}

\textsuperscript{97} Id. at 135. In \textit{Flynt}, Larry Flynt, the publisher of Hustler magazine, brought a suit against Caspar Weinberger individually and as Secretary of Defense for the limited access the press had to the Grenadan theatre. \textit{Id.} at 135. Flynt and the other plaintiffs appealed to the D.C. Circuit for injunctive and declaratory relief, claiming that their First Amendment right to gather news near the battlefront had been violated by the military’s restrictions on the free movement of the press, and urged the court to preclude the military from further restricting their movements in covering the conflict. \textit{Id.} The court, in a terse opinion, affirmed the district court’s denial of the plaintiff’s claim by ruling that the controversy had been rendered moot by the short duration of the conflict, and declared that injunctive and declaratory relief, if ever appropriate, had been overtaken by the rapid flow of events. \textit{Id.} The court’s dismissal of the case is a disappointing result from the standpoint of clarifying the media’s First Amendment right to gather news in certain situations, a constitutional issue which the Supreme Court itself has never clarified completely. See \textit{infra} notes 123-50 and accompanying text. Determining the parameters of the media’s constitutional right to gather news will be an important inquiry for determining how effective a remote-sensing satellite can be as a tool for news gathering from outer space. The \textit{Flynt} court’s refusal to rule on the issue leaves its resolution for another case at another time.

\textsuperscript{98} Frenznick, \textit{supra} note 73, at 324. The commission was headed by retired Major General Winant Sidle to attempt to review and to repair any damage done to the military/media relationship by the lack of access to Grenada and heavyhanded military control of the Grenadan theatre. LaMarche, \textit{supra} note 73, at 51. The makeup of the commission was bereft of any members of the major media bodies, who claimed it would be a conflict of interest on their part to participate. \textit{Id.} The effectiveness of the commission’s determinations, which included the establishment of a Department of Defense Media Pool and the encouragement of voluntary press cooperation in preventing the publication of sensitive military information, was questioned at the time and was to be further tested in the next two major military actions, the deposition of Manuel Noriega of Panama, and the attempted deposition of Saddam Hussein of Iraq. \textit{Id.}

\textsuperscript{99} Frenznick, \textit{supra} note 73, at 325.
The military did not provide needed transportation, prevented non-pool reporters from arriving and generally delayed extensive press access to the field of operations until the critical fighting had already taken place. The military had once again disrupted the media's effectiveness through delay and lack of cooperation. The military muzzling of the media in Grenada and Panama, regardless of questions of intentionality, was, in retrospect, fairly predictable considering the lingering bad memories the military carried from its relationship with the media in Vietnam, and from the mutual distrust in the relationship. Following those two conflicts came the critical conflict, both from the perspective of its recent nature and its implications for remote-sensing, the Persian Gulf War.

IV. THE PERSIAN GULF WAR AND LIMITATIONS ON NEWS GATHERING

Unhappily, considering the massive strains imposed on the military/media relationship in Grenada (Flynt v. Weinberger) and Panama, the situation took a turn for the worst in the Persian Gulf War. The media went into the war with a major handicap in regard to its ability to exercise its right to gather news: following Vietnam, Grenada, and Panama, the majority of the American people had come to agree with the military that the press was at times irresponsible and inaccurate, and also not to be fully trusted or respected in its coverage of U.S. military engagements. In the Gulf War,

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100 Id.
101 The conclusions and recommendations of the Sidle Commission thus produced no practical results or strides forward in the military/media relationship during the Panama invasion. LaMarche, supra note 73, at 52.
102 762 F.2d 134 (D.C. Cir. 1985); see supra notes 96-97.
103 The tense nature of the relationship can be illustrated well by the margin of error for each group: "[W]hen the military makes a mistake, people die. When the press errs, it prints a correction on page 3." Jacobs, supra note 73, at 691 n.108. Such an overwhelming difference in the repercussions from mistakes among the two groups cannot help but lead to tension. The military is under a far greater level of pressure to avoid mistakes.
104 In June, 1992, only 31% of the American people believed television report-
for the first time . . . the public was able to witness the bitter, contentious struggle between the military spokes-

persons seeking to guard operational secrets and zealous reporters trying to meet deadlines and placate editors. Viewers saw reporters asking naive, rude or repetitive questions, and "jostling for whatever tiny flakes of fame [which might] settle on their shoulders like some Pulitzer Prize dandruff."\(^{105}\)

The incompetent reporters\(^{106}\) who asked the inappro-

\(^{105}\) Jacobs, supra note 73, at 676 (quoting Henry Allen, The Gulf Between Media and Military, WASH. POST, Feb. 21, 1991, at D1). At the time of the Gulf War, to further illustrate popular approval of both military behavior and resistance to media behavior in press briefings, 78% of Americans believed that the military was informing the public of any relevant information it could without endangering lives or national security, and 79% approved of the military's use of censorship in the distribution of war information. Jacobs, supra note 73, at 676 n.9 (citing Alex S. Jones, Poll Backs Control of News, N.Y. TIMES, Jan. 31, 1991, at C24).

\(^{106}\) At the time of the Gulf War, the United States had not been in a full-scale extended military engagement since Vietnam, nearly two decades earlier. Although the military almost certainly performed their tasks to a higher level of proficiency than they did in that prior conflict, the same cannot be said of the media. Years of peacetime had left military issues, strategies and weaponry a poor candidate for primetime television news until the war, and the quality of reporting and knowledge of day to day military matters revealed in that reporting suffered as a result. See generally John T. Correll, Nitwit News, A.F. MAG., Apr., 1991, at 6 (discussing the media's performance during the Gulf War); Letters to the Editor, WASH. POST, Mar. 6, 1991, at A18 (commenting on the media in the Gulf War); Special Transcript: Inside Washington (television broadcast, Mar. 2, 1991) (commenting on the the media and national affairs in general); Henry Allen, The Gulf Between Media and Military; In Briefing Room Skirmishes, The Officers Score a Lopsided Victory, WASH. POST, Feb. 21, 1991, at D1 (raising the opinion that the military outperformed the media during the Gulf War). "Competent reporters do not ask for troop movements, plans for attacks or operational information. Should an incompetent reporter blunder into such questions, he is quickly stiff-armed. Even so,
priate and belligerent questions in the Gulf War spoiled the broth, so to speak, from a public relations standpoint for the rest of the media professionally performing their jobs during the war. The relative unpopularity of the media, coupled with the heightened tension with the military, definitely could carry over from the Gulf War to disrupt the smaller realm of remote-sensing. News gathering by remote-sensing, which the military limited to a substantial degree to military use alone during the war, was one activity specifically affected by these tensions.\textsuperscript{107}

A. LIMITATIONS ON MEDIA ACTIVITIES DURING THE GULF WAR AND THE DANGERS OF MILITARY POWER TO ENFORCE SUCH LIMITATIONS

Restrictions on news gathering during the Gulf War were widespread, extremely prohibitive and to a large degree unchallenged because of the military's titanic popularity. First, the military prohibited the release of specific numerical information relating to weapons, supplies, troops and equipment.\textsuperscript{108} Second, information concerning future plans, operations or strikes remained under lock and key.\textsuperscript{109} Most importantly from this article's perspective, the military banned the gathering of information through satellite photography and imagery that related to military security, troop strength and location of various military forces.\textsuperscript{110} The military also imposed several other specific restrictions. Although national security concerns apparently justified most of these restrictions, the passiv-

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\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
ity of the media during the war apparently allowed the prohibition on news gathering to extend too far.\textsuperscript{111} Almost no one would dispute that publication of satellite remote-sensing imagery revealing certain military activities during the war would have impeded the coalition effort and breached national security. During the war, however, the military seemed to be drawing on the powerful approval of the American public and the mostly unchallenged restraints it placed on the media in Grenada and Panama to unilaterally and omnipotently clamp down on much of the media’s news gathering capability.\textsuperscript{112}

If this trend which has been building ever since Grenada continues unabated, it raises alarming questions because the power of restraint enables the military to significantly impair media activity by falsely crying national security or war necessity instead of crying wolf, like was done instead in the past. Public approval can be a dangerous asset when wielded aggressively, and one of the dangers illustrated in the Gulf War was the military’s level of discretion to impair media news gathering.\textsuperscript{113} The military seems destined to abuse its ability to restrict media news gathering unless more concrete standards of when such restrictions are proper can be established by either joint agreement between the military and media or by an objective, non-partisan, quasi-judicial body.

\begin{footnotes}


\textsuperscript{113} One need only look to Adolph Hitler’s Germany, Saddam Hussein’s Iraq or Emperor Hirohito’s Japan to see how much a nation’s people can suffer when an overwhelmingly popular government leads its nation down the wrong path, especially a path of aggression.
\end{footnotes}
1. *Nation Magazine v. United States Department of Defense*

Following the war, the media brought an action to challenge the military's broad-based restraint of its access to the battlefield. In *Nation Magazine*, the plaintiff press members asserted that they were not challenging the military's right to protect legitimate national security level information, they were instead contesting the military's grant of only limited battlefield access to the media. The trial court stated that because the First Amendment right of freedom of the press was a serious issue, that it was loath to hear any case involving the First Amendment unless the issue in the particular case was clearly defined, which it was not in *Nation Magazine*. The court quickly determined that any claim for injunctive relief was moot, as the restrictions on press movements in the Middle East had long since been removed by the time the district court heard the suit.

The harder question was whether to grant the plaintiffs declaratory relief, which was still feasible. Judge Sand ruled that the court should refrain from "evaluating a set of regulations that are currently being reviewed for possible revision, to determine their reasonableness in the context of a conflict that does not exist and the precise contours of which are unknown and unknowable." The court wanted such a serious constitutional issue decided only when it existed in a "clean-cut and concrete form." In *Nation Magazine* the issue was not clear-cut because the conflict that led to the lawsuit had concluded, and so the court dismissed the case.

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114 762 F. Supp. at 1561.
115 None of the major dailies, weeklies or networks decided to join the plaintiffs in the suit, believing the chances of a successful lawsuit were slender.
116 Id. at 1562.
117 Id. at 1570.
118 Id. at 1575.
119 Id.
120 *Nation Magazine*, 762 F. Supp. at 1575. The *Nation Magazine* case was strikingly similar to *Flynt*. Both plaintiffs were media members prohibited from full access to the battlefield in military campaigns, and both sought injunctive and
Even though the trial court dismissed the *Nation Magazine* case, the fact that a second First Amendment case involving news gathering in a wartime setting (*Flynt* was the first) could develop and proceed to trial illustrates the military/media tension. The way the case concluded leaves the military stranglehold on media news gathering rights seemingly intact for the current time. The potential for the military in particular and the U.S. government in general to abuse its apparent ability to restrict press activity looms ominously for the future of remote-sensing. If the military restricted ground level news gathering in the desert as well as stratospheric level news gathering from satellites with remote-sensing image resolution between ten and thirty meters, the military's reaction to a five meter resolution Mediasat circling above a secret military installation, passing over a critical logistical area in an active military operation, or attempting to monitor U.S. compliance with a nuclear weapons treaty will be explosive, and aggressively geared to eliminate press access to such information. It appears a ready conclusion that the military and media need to either determine for themselves, or have a court determine for them, what exactly are the parameters of the media's First Amendment right to gather news, and what exactly constitutes the military's right to promote the national interest and to guard against violations of national security.

V. THE MEDIA'S FIRST AMENDMENT RIGHT TO GATHER NEWS AND CONSTITUTIONAL LIMITATIONS THERETO

The recent heightened tension between the military and media seems to portend poorly for avoidance of military/media conflict in the remote-sensing field in the upcoming years. The media remains keen on the idea of launching its own news gathering satellite, while the mili-

declaratory relief. The court referred to *Flynt* several times in its argument. *Id.* at 1562, 1569-70.
tary and defense establishment, as evidenced by the recent Gulf War, appears confident in its ability to prevent the flow of information when it perceives the need to do so. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or the press." The difficulty of the First Amendment remains in applying the broad provisions of the passage and their implications to twentieth century circumstances, such as media news gathering from remote-sensing satellites, many miles above the earth's surface. The founding fathers could not have fathomed a man-made device travelling many miles above the earth's surface and producing images of the earth, images which the media could use to report the news. Although the Supreme Court has never ruled specifically on the constitutional status of news gathering through remote-sensing satellites, there have been several cases which have loosely defined the parameters of the media's right to explore potential news sources through information collection.

A. BRANZBURG v. HAYES

The Supreme Court's central decision analyzing the status of news gathering remains Branzburg v. Hayes, a 1972 case in which the Court analyzed whether a reporter had to answer a grand jury subpoena and respond to questions relating to sources the reporter had acquired in a criminal investigation. The key issue the Court addressed was whether "the burden on news gathering resulting from compelling reporters to disclose confidential information outweigh[ed] any public interest in obtaining the information" in a grand jury setting. The Court, in

121 U.S. Const. amend. I.
122 Although there are no Supreme Court decisions directly relevant to this inquiry, if there were they would have to have been decided in the last few decades, as remote-sensing technology has only been commercially available since the early 1970's.
124 Id.
125 Id. at 681-82.
an opinion by Justice White, did "not question the significance of free speech, press, or assembly to the country's welfare."126 Nor did "it suggest that news gathering [did] not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."127 The Court went on to state, however, that "it is clear that the First Amendment does not invalidate every incidental burdening of the press . . . . The prevailing view is that the press is not free to publish [or withhold] with impunity everything and anything it desires to publish [or withhold]."128

The Court expounded on this theme of limitations on the media's right to gather news by stating that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."129 Justice White gave several examples of situations in which the press was properly excluded from gathering information for news distribution or publication: (1) grand jury proceedings, (2) Supreme Court deliberations, (3) meetings of private organizations, (4) scenes of a crime, and (5) general disasters from which the public is denied access.130 The Court's specific holding clearly set out that the media's right to gather news and to withhold or publish any information thus acquired was subservient to the public's right to see that media members gave full disclosure to grand juries in criminal proceedings, regardless of any confidential sources of the media.131 In a more general sense the Court has never held that news gathering should warrant the same level of protection, or the same exalted constitutional status, as traditional speaking or publishing activities.132

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126 Id.
127 Id. (emphasis added).
128 Branzburg, 408 U.S. at 682, 683.
129 Id. at 684.
130 Id.
131 Id. at 690.
132 OTA Memorandum, supra note 19, at 35. Freedom to speak and freedom to publish information or express editorial commentary are fundamental liberties inherently necessary to a democratic society, and fitfully are given absolute protec-
At first blush the decision in *Branzburg* bodes poorly for the media's ability to gather news through remote-sensing satellites, at least from an absolutist First Amendment standpoint. Clearly, the general public does not have access to information gleaned from photographic equipment mounted onto the base of a satellite. The Court states that unless the public can also access such information, the media does not have a superseding, absolute right to gather it in all situations.¹³³

B. **PELL v. PROCUNIER, SAXBE v. WASHINGTON POST CO., & HOUCHINS v. KQED**

*PELL v. Procunier*¹³⁴ and *Saxbe v. Washington Post Co.*,¹³⁵ companion 1974 cases, remain the only decisions to address directly the constitutional status of news gathering.¹³⁶ The cases both involved challenges to regulations prohibiting the media from interviewing specific inmates in state or federal prisons. The Court followed its reasoning in *Branzburg* in both cases by holding that because the general public had no right of access to individual prisoners, save for relatives, ministers, attorneys and like persons, that the media had no First Amendment right to gather news from specific inmates.¹³⁷ The regulations limiting press access to randomly selected inmates in both cases had a primary purpose of maintaining order in prisons, a legitimate correctional goal. "In the expert judgment of [penal officials], . . . hostility and resentment [would have resulted] among inmates who were refused . . .

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¹³³ *Branzburg*, 408 U.S. at 684.
¹³⁶ Reimer, *supra* note 4, at 329.
¹³⁷ *Pell*, 417 U.S. at 834.
interview privileges granted to their fellows." The proposition 'that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court.' The media had no right of special access not shared by the general public.

The Court affirmed Pell and Saxbe four years later in Houchins v. KQED, Inc., a case in which a sheriff prohibited a local radio station from entering certain areas of his jail, photographing any parts of the jail, or interviewing any of the inmates. The Court reiterated the argument of Pell and Saxbe: the media had no right of access to the jail to gather news beyond any right enjoyed by the general public to so enter the jail. Although dissenters raised the argument that no access at all had been allowed in Houchins, differentiating the case from its cited predecessors, the majority rejected that argument, upholding the media's lack of access to the jail.

The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter those institutions, gather information, and take pictures for broadcast purposes. The First Amendment does not guarantee a right of access to sources of information within government control.

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138 Saxbe, 417 U.S. at 849.
139 Id. at 850 (quoting Pell v. Procunier, 417 U.S. 817, 834-35 (1974)).
141 Id. at 2.
142 Id.
143 Id. Presumably, information within government control could include imagery gleaned from satellites utilizing remote-sensing technology; because at any time, if the government feels that the commercial entity holding the license has violated its license, the government can halt information gathering, revoke the license, and seize imagery which "violates" the license granted. 15 C.F.R. § 960.14-.16.
C. ZEMEL v. RUSK, RICHMOND NEWSPAPERS INC. v. VIRGINIA & GLOBE NEWSPAPER CO. v. SUPERIOR COURT

In Zemel v. Rusk the Supreme Court did not address media news gathering as a constitutional issue. The case involved the State Department's rejection of a U.S. citizen's application for validation of his passport for travel to Cuba, and his contention of the decision. Chief Justice Warren's opinion, however, discussed compelling reasons to limit any right to gather information:

[T]o the extent that the Secretary [of State]'s refusal to validate passports for Cuba acts as an inhibition, (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data 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.

The Supreme Court in Pell and Houchins quoted the above passage from Zemel approvingly, illustrating clearly that news gathering by the media or any other entity or individual will be given some First Amendment protection, but not the same level of protection given to traditional publishing or speaking activities. It appears that the Supreme Court will grant news gathering by commercial satellites or a media-controlled Mediasat some level of constitutional protection, but just how much remains open to speculation.

The constitutional status of news gathering became
murkier still in *Richmond Newspapers Inc. v. Virginia*¹⁴⁷ and *Globe Newspaper Co. v. Superior Court.*¹⁴⁸ The Supreme Court in both cases held that both the media and general public had a right of access and a right to gather news in the courtroom during criminal trials.¹⁴⁹ The *Globe Newspaper* Court specifically stated that exclusion from access to government affairs could only be upheld upon illustration of a "compelling government interest."¹⁵⁰ A key distinction between *Richmond Newspapers* and *Globe Newspaper* on one hand and *Branzburg* and *Pell* on the other, apparently lies in the fact that the general public does have access to a criminal court and the proceedings therein, while it does not enjoy similar access to a prison. These cases emphasize that the media's right to gather news will depend on what the facts are in each particular case and what exactly the media attempts to investigate.

As the Court currently interprets the First Amendment following *Branzburg*, there are definite limitations on news gathering. Exactly to what extent the Court would allow limitations on the media's news gathering right in the context of remote-sensing remains to be seen, as no case law addressing remote-sensing currently exists. Comparing access to prisons, jails, and courtrooms (*Branzburg, Pell, Saxbe, Houchins*) to access to remote-sensing satellite imagery is a rather inexact pursuit. The two categories are so different as to render any projections on how the Court would rule on a remote-sensing case as "shots in the dark." One can only say that the Court will have to look at the precedent laid out in *Branzburg, Pell, Saxbe, Houchins* and the few other cases which represent the Court's only venture into ruling on the constitutional status of news gathering. The general limitations on news gathering present the government in general and the military in particular with the opportunity to preclude broad-

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¹⁴⁷ 448 U.S. 555 (1980).
¹⁴⁹ *Id.* at 610-11; *Richmond Newspapers*, 448 U.S. at 579-80.
¹⁵⁰ *Globe Newspaper*, 457 U.S. at 607.
cast of remote-sensing imagery before it actually airs, instead of imposing sanctions after the fact, under the Espionage Act for instance. The chief rationale used to impose these restrictions would be as exceptions to the doctrine of prior restraint.

VI. PRIOR RESTRAINT DOCTRINE AND WITHHOLDING SATELLITE PICTURES

Any government attempt to prevent the media from airing remote-sensing satellite imagery would involve prior restraint of that information before actual broadcast. A consistent theme in Supreme Court constitutional adjudication remains that prior restraint of the media’s right to gather and broadcast information “comes to the Court with a ‘heavy presumption’ against its constitutional validity.”

Several arguments favoring the prior restraint doctrine are: prior restraints (1) shut off expression before it has a chance to be heard; (2) require adjudication in the abstract; (3) improperly affect audience reception of messages; and (4) unduly extend the state’s power into the individual’s sphere of action. The general public holds a higher level of disdain for prior restraints of information, because such restraints allow information to be withheld before the fact, instead of simply punishing improper disclosure after the fact, as may be accomplished through sanctions. The difficulty with the doctrine remains in its inconsistent application in the Supreme Court, leaving uncertainty as to when prior restraint may be constitutionally utilized by a government entity.


152 Id. at 59.

153 See infra notes 154-77 and accompanying text.
A. Near v. Minnesota & The Genesis of Confusion

The Supreme Court first addressed potential exceptions to the prior restraint doctrine in Near v. Minnesota. Near was a 1931 case involving a Minnesota law permitting the prevention of publication of printed information which the state believed to be a nuisance. In dicta, the Court discussed an exception to the strong prohibition against prior restraint of printed material:

[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases:
When a nation is at war many things that might be said in 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. 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.

Unfortunately for the attempts to solve the remote-sensing constitutional question, that remains the only statement by the Court on what would constitute a national security exception to the prior restraint doctrine. A lot has happened socially and technologically since 1931: the U.S. has developed and placed several types of nuclear weapons into its military arsenal, put a man on the moon, and created literally thousands of additional technological marvels. The Near standard is hopelessly inadequate. The establishment of the national security exception in Near cannot provide appropriate guidance as to what constitutes a national security threat today. Chief Justice Hughes, who wrote the opinion in Near, could not possibly have imagined the horrifying prospect of our country facing a senile Deng Xiao Peng of China with an inter-

154 283 U.S. 697 (1931).
155 Id. at 716 (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).
156 Although the Soviet (now Russian) nuclear threat has diminished considerably following diplomatic triumphs of recent years (including the recent, tentative
continental ballistic missile (ICBM) capable of ending thirty million lives at his fingertips. Although obviously the above represents a partially inaccurate state of affairs in today's geopolitical strata, the prospects of a similar scenario involving a third world country with nuclear weapons is not too far fetched, or even worse, may be in our immediate future. Remote-sensing technology could gather imagery from U.S. military installations at a time of global crisis, such as one resembling the sketchy scenario above. At such a time, would the U.S. military have a right to exercise prior restraint over such imagery before it appears on the six-thirty news, revealing to Deng of China or Moammar Qadaffi of Libya exactly what critical U.S. military bases are doing to meet the potential threat? Under the frightening scenario that has been outlined above, almost assuredly yes. However, with the hopelessly inadequate standard of Near, predictions of constitutionality are just that, predictions. One positive aspect of a potential constitutional challenge to a militarily imposed prior restraint on a remote-sensing satellite image is that the Supreme Court would issue to the public and private sector an updated, more comprehensive statement of what generally will entail a national security exception to the prior restraint doctrine, both in war and in peacetime. Until then, the Near standard develops more questions than it answers.

157 In addition to the PRC and North Korea, Iraq, Israel, Pakistan, India, Argentina, and a handful of other nations are all widely believed to already hold or be close to a nuclear capability of some sort.
The most famous prior restraint decision remains New York Times Co. v. United States, better known as the Pentagon Papers Case, which involved an attempt by the Pentagon to exercise prior restraint over a classified paper discussing the Vietnam War. The Court, in a 6-3 per curiam opinion, held that the military could not prevent publication of the paper by the New York Times and Washington Post. The paper had already been widely circulated, which clearly influenced the Court’s decision. Justice Stewart’s opinion, which Justice White joined, seems to be the clearest exposition of a modern day national security exception on the record. Stewart asserted that “the maintenance of an effective national defense require[s] confidentiality and secrecy.” He later stated that the Executive Branch must have “confidence[ity necessary to carry out its responsibilities in the fields of international relations and national defense.” Stewart concluded that to authorize Executive Branch prior restraint, disclosure must seriously threaten “direct, immediate, and irreparable damage to our Nation or its people.” Unfortunately, Justice Stewart’s views cannot have as compelling an impact as would be necessary to establish a clear national security exception, because only Justice White joined in his opinion.

158 403 U.S. 713 (1971).
159 Id. at 714.
160 Id. at 713 n.3. Justice Douglas noted in his concurring opinion that numerous uncontrolled copies of the document in question had been freely distributed to the public and that the information in the papers was historical, and not of current scientific value.
161 Id. at 728 (Stewart, J., concurring).
162 Id. at 730 (Stewart, J., concurring).
163 Id. (emphasis added).
164 Stewart’s views, although not binding, have been cited by the Court in later cases and are the most widely accepted statement of a general scenario which could lead to the imposition of a constitutionally valid prior restraint. See supra note 163 and accompanying text.
United States v. The Progressive, Inc.\textsuperscript{165} stands as the primary case clarifying what would entail a modern day national security exception to the prior restraint doctrine. In Progressive, the military successfully prevented a magazine from publishing detailed information regarding the construction of a hydrogen bomb. The court accepted the government's argument that in some instances, especially those mandated by Justice Stewart's "direct, immediate, and irreparable damage" test, the government must have a right to exercise prior restraint over media publication of information damaging to national security.\textsuperscript{166} The key element of the court's analysis was the strong case of grave harm to the United States or harm to its vital interests through publication of the article. Following the conclusion logically flowing from its own analysis, the court granted a preliminary injunction over the subject matter of the article.\textsuperscript{167} The analysis of the court eventually had no practical effect and the injunction became moot after publication of the article in other periodicals. The Justice Department did not choose to pursue the later publishers of the article.\textsuperscript{168}

Another case, United States v. Marchetti,\textsuperscript{169} illustrates well the inherent confusion in the poorly defined national security exception to the prior restraint doctrine. Marchetti was a CIA staffer, and following his employment at the Agency he decided to write a book detailing his work. The CIA brought suit to enjoin publication of the book, and a district court granted the injunction.\textsuperscript{170} The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's injunction grant by stating that: (1) "nothing in the Constitution requires the government; to divulge information;"\textsuperscript{171} (2) the government can protect its inter-

\textsuperscript{165} 467 F. Supp. 990 (W.D. Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).
\textsuperscript{166} Id. at 999.
\textsuperscript{167} Id. at 1000.
\textsuperscript{168} Reimer, supra note 4, at 336.
\textsuperscript{169} 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).
\textsuperscript{170} Id. at 1311.
\textsuperscript{171} Id. at 1316.
nal security and communications where "disclosure may reasonably be thought to be inconsistent with the national interest"; and (3) "the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that . . . prior restraints . . . are approvable." The 

The Marchetti decision by Chief Justice Haynsworth of the Fourth Circuit represents an expansion of the national security exception far beyond the Pentagon Papers standard set up primarily by Justice Stewart in New York Times. Judge Haynsworth asserted that the publication need only potentially threaten national security, as opposed to both Justice Stewart's view that publication must seriously, immediately, and certainly threaten national security, and other justices' views in dicta in New York Times that prior restraint is never proper under any circumstances. The Marchetti court in effect uses an ad hoc balancing test to decide whether to recognize a national security exception to the prior restraint doctrine: does the government interest in national security outweigh the competing media interest in publication? The lighter test imposed in Marchetti leads to a limited presumption that the courts may accept a national security exception in more instances, especially since the Supreme Court refused to accept certiorari in the case. Such an ad hoc test would make it much simpler for the military to exercise prior restraint over media satellite imagery because the military would only have to prove the possibility of a threat to national security, not the certainty of a threat.

The cases dealing with the national security exception to the prior restraint doctrine cover the entire spectrum

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172 Id. at 1315 (emphasis added).
174 New York Times, 403 U.S. at 730 (Stewart, J., concurring); id. at 714-24 (Black & Douglas, J.J., concurring).
175 Bennett, supra note 173, at 132.
176 Marchetti, 466 F.2d at 1309.
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of viewpoints. Justice Black and other justices in New York Times would have overruled prior restraint in all cases, while Chief Justice Haynsworth in Marchetti would have accepted prior restraints when publication only might harm the national interest. How this broad range of views would apply in a future Supreme Court hearing a challenge to military prior restraint of the media’s use of remote-sensing imagery remains open to speculation. As is the case with the news gathering issue, there are simply no cases addressing the national security exception to the prior restraint doctrine in the context of remote-sensing. Popular opinion currently favors military discretion over any absolute right of the media to gather news, the makeup of the Court has swung sharply, if not decisively towards an ideologically conservative composition in recent years, and national security becomes harder to define with each increase in technology, especially in weaponry.

One point stands out: the problem with national security threats in general, and remote-sensing national security threats in particular, would be made much simpler with a clear, well-reasoned Supreme Court decision mapping out exactly what the national security exception to prior restraint entails today. Until the Court issues such a decision, the outcome of a media challenge to governmental prior restraint of a television network’s attempt to broadcast controversial remote-sensing imagery remains unpredictable. The case law does foretell that any such decision will be fact sensitive as well as sensitive to the ideological makeup of the Court. Only time will tell, if ever.

177 Henry Allen, The Gulf Between Media and Military, WASH. POST, Feb. 21, 1991, at D1 (80% of the American people in the Gulf War approved of military restrictions on the media’s reporting of the War, and 60% said they thought there should be more restrictions); Alex S. Jones, Poll Backs Control of News, N.Y. TIMES, Jan. 31, 1991, at C24) (79% of Americans in the Gulf War viewed military censorship as a good idea, and 59% said they only had a fair amount of confidence that the media reported the War in an accurate manner, hardly a compelling vote of confidence for the press).
VII. IMPENDING CONFLICT: MILITARY/MEDIA TENSION AND THE CATALYST OF REMOTE-SENSING TECHNOLOGY

A. GENERAL CONCERNS ABOUT LOOMING MILITARY/MEDIA CONFLICT

The point has been made that the military/media relationship currently stands on shaky ground. If the media in the near future can access Landsat or Spot imagery with resolution of five meters or less, or even more provocatively have its own Mediasat with similar resolution, conflict between the military and the media over a media right to gather news in certain global regions and a military right to impose prior restraint over broadcast of certain imagery is almost inevitable. The two entities’ agendas do not run parallel; for the military, the goal must be to preserve national security at all costs, and it will view this aim best served by stifling any publication or broadcast which may adversely affect national security. See generally Marchetti, 466 F.2d at 1309; Thomas, supra note 62.

The media on the other hand will view its right to gather news to be limited, if at all, only by the narrowest of exceptions, and will assert that in almost every case it should be able to access news and not be subjected to military imposition of prior restraint. See generally Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985).

B. TRANSFER OF LANDSAT OVERSIGHT

One development which hinders potential cooperation or compromise on remote-sensing access levels is the recent transfer of governmental oversight of the Landsat program from a branch of the Commerce Department, the National Oceanographic and Atmospheric Administration (NOAA), to the Defense Department and NASA. Cynical media observers of the Landsat/Eosat program would equate this development with the proverbial fox guarding the henhouse. The Assistant Air Force

178 See generally Marchetti, 466 F.2d at 1309; Thomas, supra note 62.
180 Congress Considers, supra note 14, at 18; Reimer, supra note 4, at 322.
Secretary for Space attempted to allay such concerns by claiming that the military would only seek a delay in Landsat imagery release in wartime, but conjectures by administration officials as to future Landsat policies for the release of satellite imagery seem rather pointless. Any military oversight of Landsat will become irrelevant for the media anyway if it launches its own Mediasat. If the media does so, several options for government inhibition of such are apparent: the government could limit (1) the resolution of the satellite, (2) the images the satellite can collect, or (3) the images the media might disseminate. Any of the above limitations would meet media resistance.

As discussed earlier, the fast-developing foreign commercial market for remote-sensing presents one outside factor which could make a domestic remote-sensing dispute redundant. Remote-sensing abroad continues to develop at an astonishing rate, and if the media can acquire foreign imagery that it is precluded from accessing at home in a timely fashion, it destroys the utility of any domestic regulation. The difficulty in any such regulation is exemplified by the Russians, currently marketing two meter resolution imagery. By marketing their imagery, the Russians make it arduous to justify regulation of any domestic imagery with lower resolution capabilities. However, it is hard to predict whether foreign imagery with such resolution will become available for broadcast in a rapid enough manner to threaten national security in a substantive sense anytime in the near future. Additionally, even if such imagery were to develop, it is hard to imagine the U.S. Government not anticipating that possibility by entering into a treaty with the country in question to limit the foreign remote-sensing satellite's access to

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181 Congress Considers, supra note 14, at 18.
182 OTA Memorandum, supra note 19, at 35.
183 See supra notes 58-61 and accompanying text.
184 Jones, supra note 4, at D1.
185 Id. Currently, two meter Russian imagery is only available after a forty-five day waiting period, presumably far too long a time to have any consequentially negative effect on national security in almost all cases. Id. at D4.
sensitive image gathering regions of the globe. Although technological advancements in remote-sensing satellites abroad could make the constitutional issues presented here irrelevant, it is doubtful this will occur. The lack of access to certain imagery, the lack of cooperation from foreign governments, the time constraints on the utility of imagery for the media, and the threat of Espionage Act sanctions for breaches of U.S. national security make media use of potentially destructive imagery from overseas as doubtful as the use of the same sort of domestic imagery. Progression of foreign imagery technology probably will not provide an easy escape from this ongoing constitutional debate.

VIII. PROPOSALS FOR DISPUTE RESOLUTION

Although it seems inevitable that the first attempt by the military to restrict or forbid media access to certain satellite imagery will result in a constitutionally based conflict over remote-sensing, alternatives are available. A sensible proposal would be to form an oversight board to rule on any conflicts over imagery access. The board would be made up of: (1) Executive Branch representation (the Defense Department, the State Department, the Commerce Department, the White House and NASA), (2) congressional representation from both the House and Senate, (3) media representation from both the print and television mediums, and finally, (4) private sector representation from entities marketing the imagery and involved in the industry overall. The board would necessarily be composed of members available for last minute emergency meetings, and a quorum should be

186 For similar suggestions, see Frieden, supra note 6, at 190-93; Reimer, supra note 4, at 349; Don Sneed & Kyu Ho Youm, First Amendment Rights in Space: An "Emerging" Constitutional Issue, 11 COMM. AND THE LAW 45, 50 (1989). The problem with oversight boards and compromise suggestions is that at this point, they have been casually addressed and rarely given more than a surface level perusal. Hopefully, the different alternatives to conflict avoidance over remote-sensing will be debated in a more substantive manner in the near future. This article attempts to make a humble beginning in that direction.
made up of two-thirds of the board members. Decisions by the board could only be superseded by direct presidential intervention. The clear difficulty with this proposal rests with the timing necessary to impart such a board’s decisions with relevance and applicability. Due to most remote-sensing imagery becoming redundant for media purposes within the span of a single day, the odds are long of a controversy being recognized and a board actually meeting within that time frame. However, if such a framework can be implemented, a board could facilitate the avoidance of litigation. In the alternative if the board simply cannot meet on a time frame quite that constractive, it could issue opinions after the fact, generating guidance so that if the military does overstep its regulatory powers the overstep will be corrected immediately.

A second proposal also involves a board, but with dramatically different member composition. The board would be composed of participants from the legal profession, including judges, attorneys, and legal scholars. The board’s purpose would be not so much to rule on media use of imagery under potentially unreasonable time constraints, but to analyze any restricted imagery after the fact and issue advisory opinions as to whether the board believes the government exercised a valid constitutional prior restraint, or whether the restraint was illegitimate and a violation of the prior restraint doctrine (similar to the latter half of the first proposal above). The effectiveness of such a system would only become apparent after the board issued several advisory opinions, when observers could judge whether the government has followed the board’s recommendations and released imagery the board viewed as disseminative under the prior restraint doctrine. If the government appears to be ignoring the board, litigation over a particular restrained image would probably ensue soon thereafter.

A third proposal would be to simply allow the media to

187 OTA Memorandum, supra note 19, at 10.
exercise self-restraint in their utilization of imagery from a commercial satellite or from a Mediasat. The media historically has a fairly good record of self-restraint from publication of images or stories which threaten American lives or national security. However, considering the current strain and lack of trust between military and media, this proposal does not present a likely candidate for implementation.

Finally, since few satellite images actually threaten or potentially threaten national security, it might be best to leave the status quo as is, wait for conflict to arise, and hope that the Supreme Court issues an opinion which clarifies the whole situation. With the law inconclusive in regard to news gathering and prior restraint doctrinal exceptions, this may stand out as the best possibility of all. In addition to this, a panel of legal scholars could issue a body of commentary on the whole situation, to perhaps provide the Court with a starting point from which to attack the issue in an actual dispute. The problem rests in uncertainty; no one knows when such a case might develop, and while everyone involved in the controversy bides time, the law remains nebulous and potential violations of media rights could arise. The board consisting of relevant interested parties presents the best possibility; optimistically, a method for obtaining and issuing board rulings in a timely manner could be developed after a board is actually formed to deal with this issue. Otherwise litigation, hopefully rising to the Supreme Court level, will be the vehicle most likely to assist in clarifying the issue.

188 Frieden, supra note 6, at 192.
189 Homonoff, supra note 73, at 382. Besides the security violations, or perceived violations in the Korean War discussed in note 82, the media has only on rare occasions been even accused of threatening national security in wartime with improper disclosures.
190 A prime illustration of continuing tension is the uproar over the media’s visible role in the landing of U.S. marines on the beaches of Somalia in late 1992. Much less attention would have been paid to the media’s involvement in the landing if the military and media strains were not so evident.
191 See generally supra notes 123-77 and accompanying text.
IX. FINAL THOUGHTS

The problem inherent in the dilemma over remote-sensing is simple: two vital elements of our national fabric have collided with each other. The media's right to gather information to empower and maintain a well-informed public has to be a well-protected one in our society. A free press separates us from the vast majority of the world's nations, and has so separated us for centuries. An unlimited media right to gather information, however, must at times conflict with the more vital national interest in preserving our way of life, defending American borders, preserving the peace, and protecting the young men and women in the government's service from the release of information which could threaten their lives, and even more seriously, threaten the interests of their country.

Media news gathering and information distribution cannot harmoniously coexist with the government's sworn duty to preserve national security and further the national interest at all costs. Fortunately, true national security issues arise infrequently, offering hope that these two interests will not conflict except intermittently. Justice Stewart's opinion in the *New York Times* case indicates that restrictions on remote-sensing imagery would be utilized only to prevent direct, immediate and irreparable damage to the U.S. government or its people.\(^1\) No one wants to see the government overstep its regulatory power in the area of remote-sensing technology, and at the same time no one wants to see information damaging to national security released by negligent or irresponsible media members. Middle ground on this issue can be found. It will chiefly require the cooperation and commitment of the military and media to a system where only under the gravest of circumstances will national security interests threaten to encroach on remote-sensing imagery distribution. In those instances where there is a dispute over potential distribution, an agreed upon, objective system for

\(^{192}\) *New York Times*, 403 U.S. at 730; Reimer, *supra* note 4, at 348.
arbitration already exists to manage the dispute. As Luc Frieden eloquently puts it:

The Orwellian threat of "Big Brother," whether it comes from a public or private source, can be avoided if the media are aware of their increasing power and consequent social responsibility, and if they exercise self-restraint and responsible judgment regarding information that can create irreparable harm to a person or to a state.\(^{193}\)

An addition should be made to Frieden's statement: if a dispute over satellite imagery restraint develops and an arbitralional body is appointed to decide the issue, the President of the United States must be able to exercise veto power over any decisions made by the arbitralional body concerning a national security dispute, to retain Executive Branch autonomy over such issues. Presidential power would be a last resort, and not something the President would utilize when his Secretary of Defense has a simple dispute with the media. With the high level of discretion the Executive Branch possesses under the Landsat Act and the subsequent regulations to license and regulate commercial remote-sensing activity,\(^{194}\) Close attention must be paid by such an arbitralional body to Executive Branch actions. Close scrutiny prevents the Defense Department or any other Executive Branch body from abusing its stewardship of the licensing or regulatory process.

The struggle over uninhibited media access to remote-sensing technology should not overshadow the multifaceted, dramatic potential the technology holds for increasing information flow, furthering the level of understanding of our planet and its resources, and in general improving the quality of life through technological advancement. Worldwide revenues from commercial remote-sensing activities in toto approached one hundred million recently,\(^{195}\) and the industry continues to grow at

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\(^{193}\) Frieden, supra note 6, at 192.


\(^{195}\) Asker, supra note 4, at 46.
a rate that would make Wall Street portfolio managers swoon, twenty to thirty percent a year.\textsuperscript{196} Although the conflict appears to be with us for the near future, when considering how dramatically the benefits of the technology outweigh the detriments, a solution appears inevitable. The military and media will establish a modus vivendi with each other at some point in regard to remote-sensing out of necessity. The stakes are too high and the alternatives too costly for any other result. Whether such a relationship develops voluntarily between the parties or under judicial compulsion, possibly from the Supreme Court itself, remains a question only the passage of time will answer.

\textsuperscript{196} Id. Although reliable estimates are not available, some have predicted that by the year 2000, remote-sensing could generate several billion dollars a year in revenue. DeSaussure, supra note 6, at 352 (citing Remote Sensing: New Applications Gain Acceptance, AVIATION WK. & SPACE TECH., Feb. 15, 1988, at 63).
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