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American Constitutional Law and Restrictions on the Content of Private International Broadcasting[†]

I. Freedom of Information v. Intrusion Broadcasting

America has traditionally championed freedom of information as a principle among nations, and the position was well expressed by Holmes:

. . . the best test of truth is the power of the thought to get acceptance in the competition of the market, and the truth is the only ground upon which [men's] wishes safely can be carried out.¹

Yet the principle of freedom of information is not an American monopoly. It exists in the organic law of many countries, in the Declaration of Human Rights of the United Nations, and in major United Nations recommendations and resolutions.

This principle is presently under serious attack. Nations which would restrict this principle have urged that the resources necessary to place a broadcasting satellite in orbit limit this capability to a few nations which become, in George Orwell's phrase, more equal than others. Fear has been expressed that broadcast satellites, particularly television satellites, may be used as a means of "intruding" into the internal affairs of nations by disseminating political propaganda, by misguiding public opinion, by introducing materials customarily or legally proscribed in the recipient nation, by fomenting strife, and by imposing different cultures, and political or social systems on others.

It has been urged by the U.S.S.R., France and several Latin American and other countries participating in the Working Group on Direct Broadcast Satellites of the United Nations Committee on the Peaceful Uses of

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¹Abrams v. U.S., 250 U.S. 616 at 630 [1919].

Outer Space, and in other international forums, that steps be taken to prevent the misuse of broadcasting satellites. France, at the 1963 Space Conference, suggested a complete prohibition of broadcasting from satellites in the same manner that the Radio Regulations of the International Telecommunication Union (ITU) presently prohibit broadcasting from objects outside national territories. Recently, France has suggested a detailed code governing program content, while other proposals would prohibit international satellite broadcasting without the explicit prior consent of the recipient governments, and urge the formation of a new international regulatory body.

The question of the legal régime governing satellite broadcasting is beyond the scope of this paper, except perhaps to note that such a régime is already in existence.² This paper is concerned with the Constitutional issues presented by an agreement by which the United States undertakes to restrict transmissions by its citizens.

II. The Constitutionality of Restrictions on the Content of Private International Broadcasting

The possibility of direct international television broadcasting by satellite to ordinary home receivers, while no less than fifteen years away according to expert opinion, has given rise to demands by some countries for recognition of a right in recipient countries to control what their people receive.³ A

²The principle of freedom of information is not without restrictions. Freedom of speech does not include a cry of "fire" in a crowded theater, and the various texts which proclaim the free flow of information specify limits on its exercise. For example, the United Nations Charter acknowledges the principle of non-interference in the internal affairs of sovereign states. Article 20 of the International Covenants on Civil and Political Rights forbids all incitement to war, while Article 2 of the draft Convention on Freedom of Information does not extend this freedom to areas in which to do so would threaten national security, jeopardize the community of nations, incite civil or international strife, pillory the founders of religion; instigate crime; threaten public health, morals, or personal rights, honor and reputation and the proper administration of justice.

Various U.N. resolutions condemn propaganda which undermines rapport between nations; e.g. Resolution 110 (II) of the U.N. General Assembly (November 3, 1947), incorporated into the Outer Space Treaty condemns propaganda likely to threaten the peace. The general contents of the Outer Space Treaty, signed by the U.S.A., U.K. and the U.S.S.R., allay fears concerning broadcasting satellites. Further, the regulations of the International Telecommunication Union forbid harmful interference by sound or television broadcasts.

While not exhaustive, the foregoing are indicative of laws and regulations already in existence. Against such a background one notes that the U.N. Working Group on Direct Broadcast Satellites (2nd Session) reported that those laws and regulations already in existence form the basis of a customary law of satellite broadcasting, which take into account the free flow of information, the freedom of space, and the rights of recipient nations.

³Although international broadcasting exists today without satellites, satellites make worldwide intercontinental television broadcasting possible for the first time. Television's greater impact has given rise to fears of unwanted transmissions and demands for recipient protection. One need only reflect on the recent World Cup Football matches which were seen via satellite by 700,000,000 people to get an idea of the potential of this mode of communication.

recipient country would always be free to prevent the reception of unwanted broadcasts by jamming penalizing listening or watching, or other internal means, but the anticipated inadequacy of such means has led to demands that the broadcasts be restricted at their source.

While such demands are not entirely crystallized at this stage, they generally are couched in terms of international agreements⁴ under the terms of which a transmitting country will not broadcast, or permit its people to broadcast, certain types of undesirable material. Continuing demands for such an agreement raise the question of the extent to which the United States might constitutionally enter into a treaty to restrict the content of international broadcasts by satellite.

The question is as original as satellite communications themselves,⁵ and does not lend itself to facile constitutional analysis. Acknowledging this limitation, as well as the vagaries of a changing international situation, the variable nature of the restrictions, and possible constitutional developments, one may nonetheless extrapolate on the constitutionality of such an agreement.

It is clear that limitations of the type already mentioned would raise at least a grave First Amendment question. Review of the relevant materials indicates that the United States has the right to license international broadcasting to serve some public interest (thereby limiting transmissions), and to prohibit direct calls for war. It apparently lacks the right, at least in the absence of a clear and present danger, to censor broadcasts under loosely worded standards such as those already mentioned.

Clearly, the First Amendment applies to broadcasting, but because of the medium's intrinsic scarcity, it is also clear that radio may be regulated under a reasonable public-interest standard. The United States Supreme Court said, in *National Broadcasting Company v. U.S.*:

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio is inherently unavailable to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it, must be denied.⁶

⁴Thus, there could be bilateral or multilateral treaties enforced through prior censorship, or through criminal and/or administrative sanctions. Some form of international body to administer agreed standards is also conceivable.

⁵The Federal Communication Commission's rules now require international broadcast stations to render a service which "will reflect the culture of this country and which will promote international goodwill, understanding, and cooperation" 47 CFR 73.788. The validity of this requirement has not been reviewed judicially. Nor has the prohibition in 18 U.S.C. § 953 against communications to foreign governments intended to influence their relations with the United States.

⁶319 U.S. 190, at 226-227.

With respect to the application of the First Amendment to the licensing scheme of the Communications Act, the court said in the same case:

The question here is simply whether the Federal Communications Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of 'public interest'), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.⁷

Since not every speech medium is "necessarily subject to the precise rules governing any other particular method of expression,"⁸ the courts have permitted a degree of control over radio program content that might well be invalid if applied to other media. In domestic radio, the protected public interest is that "of the listening public."⁹ Such protection may extend not only to prohibitions against speech plainly beyond the protection of the First Amendment,¹⁰ but also to requirements of fair treatment of political candidates and controversial issues of public importance.¹¹

To insure fairness and protect the public health, the Commission may also require broadcast licensees to carry anti-smoking material.¹²

It may also classify stations for particular uses, and limit transmissions accordingly.¹³

⁷*Id.* at 226.

⁸*Burstyn v. Wilson* 343 U.S. 495, 502-503.

⁹*Supra* note 6 at 215; *Federal Communications Commission v. Sanders Brothers Radio Station* 309 U.S. 470, 475.

¹⁰Obscenity and Indecency, 18 U.S.C. § 1464; Lotteries, 18 U.S.C. § 1304; Rigged Contests, 47 U.S.C. § 509(a). *See Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284; *New York State Broadcasters Association v. United States*, 414 F. 2d 990 (C.A. 2, 1969).

¹¹47 U.S.C. §315, *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367.

¹²*Banzhaf v. Federal Communications Commission*, 405 F. 2d 1082 (C.A.D.C., 1968). *cert. den.*, 396 U.S. 842, 90 S. Ct. 50.

¹³*Lafayette Radio Electronics Corp. v. United States*, 345 F.2d 278 (C.A. 2, 1965); *California Citizens Band Association, Inc. v. United States*, 375 F.2d 43 (C.A. 9, 1967). *cert. den.*, 389 U.S. 844.

This classification authority has not been invoked to limit broadcast stations beyond the requirement of a public purpose. However, for the wide extent of permissible Commission interest under the Communications Act in program service, *see Johnston Broadcasting Co. v. Federal Communications Commission*, 175 F. 2d 351 (C.A.D.C., 1949) (consideration of programming in comparative hearing); *Bay State Beacon, Inc. v. Federal Communications Commission* 171 F. 2d 826 (C.A.D.C., 1948) (consideration of programming in comparative hearing); *Simmons v. Federal Communications Commission* 169 F. 2d 670 (C.A.D.C., 1948). *cert. den.* 335 U.S. 846 (denial of license where applicant proposed indiscriminately to take all network programs offered).

However, as the Court of Appeals stated in *Banzhaf*, the power to look at content in the broadcast field can be carried too far, and the courts have stated more than once that the Commission's proper concern is not with the political, economic or social views of an applicant. *National Broadcasting Co. v. United States*.¹⁴ This clearly appears to be a constitutional limitation as well as one flowing from the Communications Act, and it is as clear that the type limitation suggested by some countries would be unconstitutional if applied to domestic radio in the United States.

Despite the fairly wide scope of legitimate governmental concern with the use made of radio facilities, this concern does not extend to the prohibition of social and political material that might stir dissatisfaction or dissension, or conflict with national policy. The constitutionally protected interest in robust discussion of public affairs would be sufficient to preclude any such general restrictions on the use of radio.¹⁵

Indeed, even when the prohibition of conduct has only an indirect impact upon speech, it must be narrowly drawn to accomplish its purpose with as little effect as possible on free speech.¹⁶ And, of course, the constitutional protection does not depend on an evaluation of the popularity or social utility of the ideas offered.¹⁷

The question then, is whether the international character of the speech would affect the validity of an attempted restriction;¹⁸ and it does not admit of a precise answer.

The power of the United States to conduct its foreign affairs is plenary. It extends to "matters of the sharpest exigency for the national well being

¹⁴*Supra*, note 6 at 226; *Johnston Broadcasting Co. v. Federal Communications Commission* 175 F. 2d 351, 359 (C.A.D.C., 1949).

¹⁵*See Terminiello v. Chicago*, 337 U.S. 1 (striking down a statute which punished speech stirring people to anger, inviting public dispute, or bringing about a condition of unrest) as unconstitutional; *New York Times Co. v. Sullivan*, 376 U.S. 254 (protecting false and defamatory statements made against public officials where actual malice was not shown); *Stromberg v. California*.

It is recognized that in *KFRB Broadcasting Association v. Federal Radio Commission*, 47 F.2d 670 (C.A.D.C., 1931), the Commission was sustained in denying a renewal of license to a station regularly carrying diagnoses and prescriptions of medicine (sold by the station owner) for ills described to the station only by mail, and in *Trinity Methodist Church South v. Federal Radio Commission*, 62 F. 2d 850 (C.A.D.C., 1932), *cert. den.*, 284 U.S. 695, 288 U.S. 599, a renewal was denied because the station continually engaged in defamatory attacks on public figures and religious groups. However, the first of these cases went on the grounds of the public health and use of a station for a private, rather than a public purpose, and emphasizing the value of robust public debate. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254; *Anti-Defamation League v. Federal Communications Commission*, 403 F.2d 169 (C.A.D.C., 1968), *cert. den.*, 394 U.S. 930.

¹⁶*Winters v. New York*, 333 U.S. 507; *Ashton v. Kentucky*, 384 U.S. 195.

¹⁷*N.A.A.C.P. v. Button*, 371 U.S. 415, 445.

¹⁸The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, signed on January 27, 1970, requires activities in space to be in accord with the charter of the United Nations.

that an act of Congress [alone] could not deal with.”¹⁹ It thus has been held sufficient to sustain a general restriction against travel to certain areas,²⁰ despite the First Amendment’s implications. However, that a treaty in conflict with a specific constitutional limitation upon the power of the government cannot stand. Thus, in *Reid v. Covert*,²¹ it was held unconstitutional for dependents of military personnel overseas to have been tried for murder under the court-martial procedures of the *Uniform Code of Military Justice*, although such trials had been held in accordance with executive agreements between the United States, Great Britain and Japan. The court-martial proceedings did not include safeguards to which the defendants would have been constitutionally entitled had they been tried in the United States. The government contended that this practice was necessary to carry out the United States’ obligations. The Court stated:

The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.²²

The Court also stated:

If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.²³

In a more recent, non-capital case, this principle was applied to hold improper the dismissal of an armed-forces civilian employee because an unconstitutional search of his living quarters, authorized under a treaty between the United States and Japan, had led to his discharge. *Powell v. Zuckert*, 366 F. 2d 634 (C.A.D.C., 1966).²⁴

The resolution of a conflict between an assertion of the treaty-making power and an assertion of the right of free speech would undoubtedly

¹⁹*Missouri v. Holland*, 252 U.S. 416. See also, *United States v. Curtiss-Wright Corp.*, 299 U.S. 304.

²⁰*Zemel v. Rusk*, 381 U.S. 1.

²¹354 U.S. 1.

²²*Id.*, at 16.

²³*Id.*

²⁴See also, *Downes v. Bidwell*, 182 U.S. 244, 277, which held that shipments from Puerto Rico could be subject to duties even though such duties are prohibited between states, but:

There is a clear distinction between such prohibitions as go to the root of the power of Congress to act at all, irrespective of time or place, and such as are operative only throughout the United States or among the several states.

Thus, when the Constitution declares that no bill of attainder or ex post facto laws shall be passed, and that no title of nobility shall be granted by the United States, it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the First Amendment. . . ”

depend on the precise nature of the restriction upon speech and the context of the existing international situation. Since the purpose of licensing an international service in the first place would differ from the purpose in licensing a domestic service,²⁵ i.e., the listening and viewing public would be not the public of the United States, but rather that of a foreign country, the basis of regulation would also be shifted, presumably to our relations with the countries involved. This is indicated by the Commission rule relating to international stations, now in effect. The licensing of international stations for specific purposes consistent with our national interests abroad may raise no serious constitutional issue.

However, the attempt, once the service is authorized to proscribe somewhat vaguely defined categories of programs, raises a more serious question. It is doubtful whether the shift to the international forum would work such a significant change in the impact of the First Amendment as to permit broad restrictions upon the right of Americans to express their ideas freely, at least in the absence of some serious international situation. Of course, if the safety of the United States were endangered there might well be an adequate basis for stopping all international broadcasting to certain countries, or for some other, more particularized, action.²⁶

III. Conclusion

Thus, in sum, the constitutionality of any limitation on the content of international broadcasts would have to be determined in the context of the international situation at the time, and of the nature of the limitation. Absent special considerations, it appears that a broad prohibition in the kind of terms already suggested by several other countries would raise serious constitutional questions, and would probably not be sustained.

Two points made above should be emphasized: (1) That "a treaty in conflict with a specific constitutional limitation upon the power of the government cannot stand;" and (2) that the impact of the international context upon the power to regulate specific content, or to "proscribe. . . categories of programs," may not work significant changes in the strictures of the First Amendment except in extreme cases in which the security of the United States might be endangered.

²⁵It is noteworthy that in *Wrather-Alvarez Broadcast v. Federal Communications Commission*, 248 F. 2d 646 (C.A.D.C., 1957), the court held that in applying 47 U.S.C. § 325, which requires Commission consent for the transmission of a program to a foreign station for rebroadcast into the United States, the Commission should consider the character of the foreign station's programming before authorizing an American network to send its programs. No free speech issue was raised in that case.

²⁶*See Zemel v. Rusk*, 381 U.S. 1; *Communications Association of America v. Douds*, 339 U.S. 399-400; *Schenck v. United States*, 249 U.S. 47, 52; *see also Hirabayashi v. United States*, 320 U.S. 81, *Korematsu v. United States*, 323 U.S. 214.

That a treaty may not stand against a specific constitutional limitation could hardly be more explicitly stated than in the passage from *Reid v. Covert*.²⁷ Neither a general power to conduct foreign affairs, nor an implied power associated with some other power could override the First Amendment: "The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens"²⁸ of fundamental constitutional rights by negotiating treaties to accomplish what could not be accomplished by legislation. The question then is the second one set forth above, i.e., the extent to which foreign affairs considerations and problems arising from the content of international satellite direct broadcastings interact as to permit regulation of the latter by treaty or otherwise consistently with the First Amendment.²⁹

Consideration of this question should proceed from several hypotheses: (1) it is only the "scarcity" of broadcasting that permits the existing scope of its regulation; (2) Americans will be subject to the regulatory jurisdiction of the United States, and will be protected by its Constitution even though they broadcast through devices in outer space beyond United States jurisdiction; and (3) courts will make an independent evaluation of the impact of such broadcasting on foreign affairs problems, without regard to existing international agreements or the advice of the executive pro or con as conclusive.³⁰

It is entirely possible, indeed probable, that the courts will assess the impact of the First Amendment upon the range of regulatory measures that may legally be applied to international direct broadcasting from satellites by almost exactly the same standards as apply in purely domestic cases.

A number of recent cases suggest that the courts are tending toward the view that, in a world which technology is shrinking in size and making more interdependent economically and politically, what happens in the "international" sphere can have just as great an impact upon United States citizens as what happens in the "domestic" sphere, and therefore should be judged by the same standards so far as United States governmental action is concerned other than in exceptional circumstances.³¹

Thus, the courts could decide that the power of regulation created by

²⁷*Supra* note 21 at 16-18.

²⁸*Cf.* *Afroyin v. Rusk*, 387 U.S. 253, 268.

²⁹Obviously, precedents for regulating obscene speech or other "unprotected" activities should be put aside in considering the central problem.

³⁰*See Reid v. Covert*, *supra* note 21; *ICC v. New York N.H. & H.R. Co.* 372 U.S. 744, 763-64 (1963); *Cf. Zschernig v. Miller*, 389 U.S. 429, 434-41; *Id.* at 443 (1968) (concurring opinion of Stewart, J.).

³¹*See Baker v. Carr*, 369 U.S. 186, 211 (1962); and *U.S. v. First National City Bank*, 379 U.S. 378, 384-85 (1965); and *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

“scarcity” is no broader when Americans are broadcasting to foreigners than when they are broadcasting to other Americans. A judicial approach of this kind might easily be prompted by some international act prohibiting or limiting, in some objectionable way, whole categories of broadcasts such as political commentary or popular culture. Narrow kinds of limitations might, of course, create greater prospects that courts would consider the foreign “public interest” in permitting different kinds of regulations. But, regardless of the kinds of limitations in an international act, and assuming that serious foreign-relations problems short of war could be demonstrated credibly to courts, courts would seem to have little motive to empower the Executive or Congress to narrow First-Amendment rights. They are much more likely to leave restrictions to the options open to the foreign countries themselves to control what their people receive by jamming or by regulating the capacity and use of community and home receivers.³²

Whatever judicial result might ultimately be reached, we should recognize that there is high risk for the constitutionality of international obligations to impose restrictions upon program content. Observing such obligations is a matter of primary importance to the United States both as a party to more international agreements than any other country and as a supporter of a strong peaceful system of international order.

³²*Cf.* *Shelton v. Tucker*, 364 U.S. 479, 488: In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved.