Private International Broadcasting from the United States: Toward an Understanding of a Content Standard

Laura J. Holland

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International radio broadcasting from the United States began prior to 1912 and continues today, albeit in a much more sophisticated manner. The U.S. Department of State sponsors the majority of international broadcasts through the Voice of America (VOA). In addition, a growing number of private individuals broadcast internationally. Although these private broadcasts are regulated by the

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2 Early international radio communications were merely signals in Morse code. As time passed, the human voice was transmitted and eventually messages were broadcast in the native language of the receiving country. See generally D. Browne, International Radio Broadcasting, The Limitless Medium (1982).
3 VOA was created pursuant to the United States Information and Educational Exchange Act of 1948, Pub. L. No. 80-402, 62 Stat. 6 (codified as amended at 22 U.S.C. §§ 1431-1480 (1982)) [hereinafter Smith-Mundt Act]. The objectives of the Smith-Mundt Act were "to enable the Government of the United States to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries." Id. § 2. These objectives were to be achieved by creating "an information service to disseminate abroad information about the United States, its people, and policies promulgated by the Congress, the President, the Secretary of State, and other responsible officials of Government having to do with matters affecting foreign affairs . . . ." Id. § 2(1).
4 Currently there are nine private stations in operation. They include: KNLS in Anchor Point, Alaska; KYOI in Agingan Point, Saipan, Northern Marianna Islands; WRNO in New Orleans, Louisiana; KGEI in Redwood City, California; KFBS in Marpi, Saipan, Northern Marianna Islands; WYFR in Okeechobee, Florida; KTWR in Agana, Guam; WINB in Red Lion, Pennsylvania; and KCBI in Denton, Texas. In addition, there are nine new stations under construction. Two have construction permits on file with the Federal Communications Commission (FCC), and four have submitted requirements for future planned stations. Federal Communications Commission, Unofficial List of Mailing Addresses of FCC Licensed High Frequency Broadcast Stations (Oct. 1985) (unpublished document); Personal interview with Charlie Breig, Supervisory Engineer for High Frequency Broadcasting at the FCC (Oct. 22, 1985) [hereinafter Breig interview]. If all 15
Federal Communications Commission (FCC), VOA is not.

The private broadcaster has the unique power to directly impart information to a foreign country. Therefore, a balance must be struck between his or her first amendment right to free speech and potential applicants are licensed, there will be 24 privately owned stations in the United States.

6 See U.S. CONST. amend. I. When the United States entered World War II the Office of Censorship issued broadcasting guidelines for international radio operators. The preface to these guidelines provides an example of the attempt to balance national security concerns and free speech protection:

American short wave stations bear a particular responsibility in the application of censorship to the radio broadcasting industry. The fact that their broadcasts reach—and are intended to reach—every part of the world makes it doubly necessary that they continue to exercise the utmost caution and the most expert judgment as to the character of the material they transmit. Their special task is to see that, while acting as an unofficial but indispensable arm of the Government in keeping their world-wide audience truthfully informed, no information be divulged that might conceivably be of value to the enemy.

It is of prime importance that all who have any part in short wave broadcasting keep constantly in mind that the fact that news or other material appears on the news agency wires or in the newspapers or other periodicals does not automatically make it appropriate for short wave broadcast. A considerable volume of such news is not appropriate for transmission abroad. When in doubt as to this, short wave stations are asked to consult a representative of the Office of Censorship.

Memo to Short Wave Station Managers from the Office of Censorship, Code of Wartime Practices for American Short Wave Broadcasters, (Feb. 3, 1942) (unpublished document). The perceived power of private broadcasters to effect national security is best illustrated by noting some of the information the Office of Censorship prohibited the licensees from broadcasting: for example,

No material should be broadcast which divulges any information, directly or indirectly, concerning the following subjects unless such information is specifically released for short wave by a competent federal authority:
(a) Meteorological data, including weather forecasts, temperature readings, barometric pressure, wind direction and all other data relating to weather conditions;
(b) The assembly, movement, composition, disposition, employment, equipment or personnel of U.S. or allied armed forces at home or abroad;
(c) The location, arrival and departure, concentration, movement, cargo, employment or identity of all naval or merchant vessels or aircraft in international traffic, and their personnel; instructions regarding guides to navigation and the location of lights and buoys; the number, size, type, and location of naval and merchant ships under construction and advance information concerning dates upon which launchings are to be staged or vessels put in commission, and the specific location of the launchings; the number, size, character, and location of any floating drydocks in service or under construction;
(d) The laying of mines or mine fields;
(e) The location, employment, protection, and strength of any harbor defense or other fortifications, naval bases or military establishments wherever located;
(f) The disposition, movement, composition, employment, equipment, performance, and personnel of Army and Navy aircraft units;
(g) The fact or the result of experiments with war equipment and materials, particularly new inventions;
(h) Specific information about war contracts, such as the exact type of production, production schedules, dates of delivery, or progress of production; estimated supplies of strategic and critical materials available; or Nation-wide
the general concern for national security. The FCC attempts to achieve this balance by imposing a programming content standard on the international broadcaster. The language of the current standard, however, is vague and the FCC has not provided any guidance in defining the standard. Hence, it is questionable that free speech or national security are protected, and even more uncertain as to whether the content standard is a constitutionally permissible regulation by the FCC.

This Comment examines the radio programming content standard imposed on private international broadcasters in the United States. Generally, the history of private broadcasting will be examined. Generally, the history of private broadcasting will be examined.

“round-ups” of locally published procurement data except when such composite information is officially approved for publication. Specific information about the location of, or other information about, sites and factories already in existence, which would aid saboteurs in gaining access to them, disclosing the location of sites and factories yet to be established, or the nature of their production. Any information about new or secret military designs, or new factory designs for war production.

(i) The movements of the President of the United States, high-ranking naval, military, or diplomatic officials of the United States and its allies;
(j) Actual or attempted sabotage, or treason;
(k) Matters which, in the best judgment of the managements of the broadcasting stations, might prejudice the conduct of the foreign relations of the United States.

Id. at 2-3.

7 “National security” as used herein refers to the ability of a nation to avoid harmful interferences in its domestic and foreign policy interests from forces outside its borders that have gained advantageous information from individuals within the nation. National security issues are particularly important during wartime. Consequently, the power to control the free flow of information is greater during those times. See generally Schenck v. United States, 249 U.S. 47 (1919). Although examples of the need for national security during wartime are cited herein, this Comment primarily addresses national security concerns during peacetime.

8 47 C.F.R. § 73.788 (1985). This standard applies only to private international broadcasts. Government sponsored international broadcasts are not affected.

The content standard was not enacted for the explicit purpose of balancing national security and free speech. It is, however, one criterion used by the FCC in determining whether a license will be granted or renewed. See generally Garay, WRNO Worldwide: A Case Study in Licensing Private U.S. International Broadcast Stations, 26 J. OF BROADCASTING 641, 649 (1982) (statement by former FCC Chairman Charles Ferris). Consequently, the ultimate denial of free speech in radio, i.e. denial of a license to broadcast, may occur if a potential licensee’s programming poses too great a threat to national security. To avoid complete denial of free speech, the content standard may be seen as a programming guideline that will not endanger national security. Hence in practice the standard works as a balancing factor. The content standard is particularly important because it is a subjective standard as opposed to the other requirements for an international broadcasting license that are more objective. For instance, an applicant must be legally, technically, and financially qualified and possess adequate technical facilities to carry forward the services proposed. 47 C.F.R. § 73.731(a)(4) (1985).

9 See G. Smith & W. Watkins, FCC BROADCAST AGENDA No. 51868 (July 24, 1970) (George S. Smith was Chief of the Broadcast Bureau & William H. Watkins was Chief Engineer).

10 This author has not located any court decisions concerning the meaning of the international content standard. The current supervisory engineer of international broadcasting stated he was not aware of any FCC interpretations. Breig interview, supra note 4.

11 While this Comment focuses on the history of private international broadcasting from the United States, it is helpful to note the development of international broadcasting...
amined and specifically the origin of the content standard in the United States will be traced. Finally, by reference to the FCC's power over domestic broadcasters and the U.S. government's power to protect national security, some illustrative interpretations of the international broadcasting content standard are suggested.

I. Beginnings of International Broadcasting

In 1901 Guglielmo Marconi transmitted the first international radio signal. His accomplishment inspired others to experiment with long distance communication. These early experiments, however, were conducted on the low frequency band, using increasingly higher powered transmitters. The high frequency band was completely unexplored and its superiority for long distance communication unknown.

By 1912, Marconi's contribution to broadcasting had been widely publicized and duplicated in the United States. Consequently, the low frequency band was crowded with signals from amateur transmitters. As a result, naval communications were severely hampered. The U.S. Navy sought congressional assistance to alleviate the amateur interference, and Congress responded with the first Act to Regulate Radio Communications (Act).

in other countries. Broadcasts from other countries are generally government sponsored. Therefore, international broadcasting developed quite differently outside the United States. See generally J. Redding, American Private International Broadcasting: What Went Wrong — and Why (1977) (published on demand by University Microfilms International).

For example, Reginald Aubrey Fessenden and Ernst F.W. Alexanderson whose contributions to international broadcasting are detailed in D. Browne, supra note 2, at 1. The signal was sent from Southwestern England and received in Newfoundland. It was merely a single transmission and not really a broadcast. Id.

See generally E. Barnouw, supra note 1, at 18-19.


E. Redding, supra note 11, at 45-46.

Id. at 53.

Until the 1920s, radio communication meant Morse code transmissions. The work of Reginald Aubrey Fessenden and Ernst F.W. Alexanderson led to transmission of voice over radio. J. Redding, supra note 11, at 44. E. Barnouw, supra note 1, at 19-20.

"Amateurs" in this context refers to non-military individuals who worked to improve international radio signals. Some operated rudimentary radio equipment from their own basements while others worked in groups, with equipment similar to that used by Marconi. E. Barnouw, supra note 1, at 25-35.

"[S]o many official messages were blotted out that naval authorities became increasingly testy." Id. at 31-32. The original value of radio was thought to be in ship to shore communication. The U.S. Navy was "convinced" of the benefits of wireless radio transmission. J. Redding, supra note 11, at 44. The radio was so indispensably a part of the Navy that the Wireless Ship Act of 1912 required "large passenger vessels to carry radio equipment capable of exchanging messages at a distance of a hundred miles." S. Head, Broadcasting in America, A Survey of Television and Radio 155 (2d ed. 1972).

E. Barnouw, supra note 1, at 31; J. Redding, supra note 11, at 53.

although intended to restrict amateur participation in international broadcasting, actually expedited the development of international broadcasting by private individuals.23

There were three important provisions of the Act. Section 15 stated that "'[n]o private . . . station not engaged in the transaction of bona fide commercial business . . . shall use a transmitting wavelength exceeding two hundred meters.'"24 This provision forced amateurs out of the low frequency band25 and was the impetus for experimentation with high frequency. Section 4 of the Act provided that the "Secretary of Commerce and Labor may grant special temporary licenses to stations actually engaged in conducting experiments for the development of the science of radio communication . . . ."26 This section allowed the government to control the number of broadcasters by requiring each to secure a license granted at the Secretary's discretion. Perhaps the most important impact of section 4, however, was the language casting the amateur broadcaster's role as one of experimentation and development.27 Finally, section 2 of the Act stated that "'[t]he President of the United States in time of war . . . may cause the closing of any station for radio communication . . . or may authorize the use or control of any such station or apparatus by any department of the Government . . . .'"28 This provision led to the discovery of radio power in times of war.29

On April 6, 1917, President Wilson declared war on Germany.30 Pursuant to section 2 of the Act of 1912, the Navy took control of the operating facilities of all radio stations.31 As a result, many young men were trained by the Navy to operate international radio facilities.32 After the war, these Navy-trained broadcasters returned

23 See infra note 25 and accompanying text.
24 1912 Act, supra note 22, at § 15.
25 To fully understand the relationship between length of waves and the frequency on which they are transmitted see exhibit A, supra note 15. Anything transmitted on a wavelength of less than 200 meters is on the high frequency band.
26 1912 Act, supra note 22, at § 4.
27 In 1912 amateurs viewed themselves as experimenters. Therefore, this provision was probably no more than a restatement of the obvious. The experimental classification, however, meant that these stations could not commercially profit from their broadcasts. Some authors consider this classification to have been a major handicap in the development of private international broadcasting. See J. Redding, supra note 11, at 55-56, 70-76, 79, 81; infra notes 37-40 and accompanying text.
28 1912 Act, supra note 22, at § 2.
29 "Radio power in times of war" has two separate meanings. In World War I the power of radio was in ship to shore communication and in dissemination of war reports. See generally E. Barnouw, supra note 1, at 40 (calendar account of the duties of the radio operator); J. Redding, supra note 11, at 48. During World War II the power of radio was in propaganda. See generally C. Rolo, Radio Goes to War, The Fourth Front (1940). See infra notes 67-73 and accompanying text.
31 J. Redding, supra note 11, at 57. The Navy took control of domestic as well as international stations.
32 Id. at 48-49.
home and continued to make advancements in international broadcasting on the high frequency band.\textsuperscript{33}

Finding it too expensive to equip an international radio station independently, many Navy-trained radio operators sought to use their skills in already established stations. The FCC had granted international broadcasting licenses to General Electric (GE) and Westinghouse, who were mainly interested in the stations as outlets for testing new radio equipment they manufactured.\textsuperscript{34} Most Navy-trained operators went to work for one of these companies after World War I.\textsuperscript{35} Thus it was natural that GE and Westinghouse became leaders in the development of high frequency broadcasting through the 1930s.\textsuperscript{36}

These early international radio stations were classified as experimental with the purpose of advancing the science of radio. Because the stations were prohibited from making any commercial profit on their broadcasts,\textsuperscript{37} they were operated in the least expensive manner possible.\textsuperscript{38} Because it was far cheaper to simply relay domestic programs than to create programming suited specifically to international audiences,\textsuperscript{39} the programs broadcast on international radio between World War I and World War II were predominantly relays of domestic programs.\textsuperscript{40}

The legal aspects of international broadcasting were not significantly altered by the subsequent Radio Act of 1927\textsuperscript{41} and the Federal Communications Act of 1934 (Communications Act).\textsuperscript{42} Although these acts addressed programming for domestic radio, international radio was still classified as experimental.\textsuperscript{43} Therefore, the programming content did not appear to be terribly important. The presidential power to control stations in time of war was also continued in both Acts.\textsuperscript{44} The 1927 Act created the Federal Radio Commission to oversee both domestic and international broadcasting.\textsuperscript{45} This agency, however, was replaced by the FCC in the 1934 Act.\textsuperscript{46}

\textsuperscript{33} Id.
\textsuperscript{34} Id. at 70-71.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} See supra note 27 and accompanying text.
\textsuperscript{38} J. Redding, supra note 11, 70-73.
\textsuperscript{39} The references to programs suited specifically to foreign audiences in this Comment, means broadcasts in the native language of the country receiving the broadcast.
\textsuperscript{40} J. Redding, supra note 11, at 70-71.
\textsuperscript{43} Id.; Radio Act of 1927, supra note 41.
\textsuperscript{44} Radio Act of 1927, supra note 41, at § 6; Communications Act of 1934, supra note 42, at § 606 (1934).
\textsuperscript{45} Radio Act of 1927, supra note 41, at § 3.
\textsuperscript{46} Communications Act of 1934, supra note 42, at § 4.
Although the 1934 Act remains in effect, there have been significant revisions.

In 1939 the FCC issued its first set of revisions for the Communications Act of 1934.47 These revisions removed the experimental licensing criteria imposed upon private broadcasters in the 1912 Act and continued through the 1927 and 1934 Acts. This allowed international stations to broadcast commercially and attempt to make a profit.48 The 1939 revisions also created the present content standard for international broadcasters.49

The United States entered World War II in 194150 and once again the Government took control of all international radio operating facilities. Utilizing thirty-five to thirty-six transmitters,51 the stations were used to disseminate propaganda and war reports.52 The United States became a strong voice on the international airwaves.

When World War II ended, the Government had realized the importance of international radio communication. With the passage of the United States Information and Educational Exchange Act of 1948 (Smith-Mundt Act),53 Congress created VOA and thereby established a permanent government controlled broadcasting service.54

Private individuals were not prevalent in international broadcasting after World War II. In 1962 there were only three private international broadcasting stations.55 VOA continued to grow56 and used the majority of frequencies allocated to the United States57 by the International Telecommunications Union.58 The FCC, however, received applications from at least one licensee to expand its broadcasting service59 and from others who wished to be licensed.60 Because VOA was so large and made use of most of the frequencies allocated for U.S. stations, the FCC was worried about a shortage of frequencies and possible congestion if it approved the private applications it had received.61 Consequently, in 1963 the FCC froze all

48 Id.
49 Id.
51 K. Cox, FCC BROADCAST AGENDA No. 16379, 2 (Feb. 27, 1962) (Kenneth A. Cox was Chief of the Broadcast Bureau).
52 See generally C. Rolo, supra note 29.
53 Smith-Mundt Act, supra note 3.
54 Id. § 501.
55 K. Cox, supra note 51, at 3.
56 J. Redding, supra note 11, at 220-21.
57 Id. at 224-25.
58 The International Telecommunications Union is the governing body for international radio frequency spectrum management. F. Matos, SPECTRUM MANAGEMENT AND ENGINEERING 5 (1985).
59 K. Cox, supra note 51, at 1.
60 Id.
61 Id.
By 1973 the FCC revised its rules and lifted the freeze on licensing. The private broadcasters were allowed more broadcasting hours and began to compete with VOA for international audiences. The content standard, however, was still imposed on them.

II. History of International Content Standard

From its inception in 1939, the international content standard has never been fully interpreted by the FCC. The standard reads as follows: "A licensee of an international broadcast station shall render only an international broadcast service which will reflect the culture of this country and which will promote international goodwill, understanding, and cooperation." No license has ever been denied specifically because the standard was not met, nor has any commission or court decision ever explained the standard.

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62 "Freeze" on International Broadcasting, 25 Rad. Reg. (P & F) 1547 (Apr. 19, 1963) [hereinafter "Freeze" on International Broadcasting]. The reasons given for the freeze were: (1) decreasing sunspot activity; (2) an increase in frequency usage by both private international broadcast stations and by Voice of America facilities . . . ; (3) pending applications seeking authorizations for international broadcast stations . . . ; (4) an increase in the worldwide level of international broadcasting . . . ." J. Redding, supra note 11, at 250 (quoting "Freeze" on International Broadcasting, supra note 62).


64 See supra note 10 and accompanying text.


66 Prior to the enactment of the 1939 content standard, there was at least one denial of a private international broadcasting license that may have been based on content considerations. In April of 1939, one month before the content standard was enacted, the FCC denied a broadcast license to the Pillar of Fire organization. In re Pillar of Fire, 7 F.C.C. 265 (1939). Pillar of Fire was an organization "engaged in spreading and teaching the gospel . . . ." Id. at 266. They proposed a format of "one-third educational, one-third religious, and one-third entertainment." Id. at 268. The Commission denied the application for the following reasons:

[It is extremely doubtful that the proposed station will render satisfactory international broadcast service. Station operation will be . . . limited . . . to England . . . . The applicant has not formulated a definite program of research and experimentation which indicates reasonable promise of . . . contribution to the development of the international broadcast service . . . . The granting of this application and the operation of the station as herein proposed would result in objectionable interference to . . . . the operating hours of existing licensed international stations . . . . Due to the type of equipment applicant proposes to use, and to the frequencies selected, any division of station time on these frequencies will necessarily result in a definite curtailment of the international service now rendered . . . . The applicant has not established a need for the frequencies requested sufficient to warrant the granting of this application. The granting of this application will not serve public interest, convenience, and necessity.

Id. at 273. In light of the foregoing FCC explanation for denial of a license to Pillar of Fire and the state of world affairs in 1939, Redding questions whether the content of the proposed broadcasts could have been the reason for denial. J. Redding, supra note 11, at 254. According to Redding, the problems identified by the FCC were not insurmountable. Pillar of Fire simply did not plan to add to the "propaganda surge from America." Id. at 233-34.
Some understanding of the international content standard is gained from examining the political circumstances at the time the standard was enacted. In 1939 Germany was making very effective use of radio by broadcasting in the native languages of the countries receiving the broadcasts. The Germans provided, among other things, news and political discussions. As one author states: "The Nazi propaganda broadcasts . . . began to be frequently mentioned as requiring official United States response in a similar vein." Meanwhile, in the United States, private broadcasters were

See generally C. ROLO, supra note 29. Congressional comment indicated that:

The quantity and effectiveness of Germany's . . . service increased . . . during the 1930s, until . . . it was reported that:

Germany is now using 50-Kilowatt transmitters with highly directive antennas. Some 8 or 10 transmitters capable of being connected to any of 15 to 20 directive antennas are being used . . . . Sixteen frequencies have been put into use, and the German stations transmit to all parts of the world . . . . three to five frequencies are used simultaneously for the same program . . . being directed to the points where there will be the maximum number of listeners at a given time.

The programs are made up of music, entertainment, news, and political talks. When these programs are directed to the Western Hemisphere, English, Spanish, and Portuguese are used; for other parts of the world the languages are those of the audiences.

The legislative history of the Smith-Mundt Act also demonstrates congressional concern for countering Communist propaganda. For example:

In addition to feeding the minds of Europe, our expanded information and educational program would serve as the necessary corollary to the European recovery plan. If our aid is to be politically as well as economically effective, there must be general knowledge of our efforts. This has not been the case in the past. A remark by a provincial French newspaper editor was typical. "Everywhere," he declared, "you hear people saying that America has done nothing for France . . . . Everywhere you can hear anti-American talk and nobody denies the lies the Communists tell." Our Information Service must explain our true motives and refute the lies that the recovery plan is (1) a frantic effort to avert an inevitable American economic depression by foisting off our surpluses on Europe; (2) an unjustifiable attempt to give priority in relief to the German aggressors over their victims; (3) a plot to restore the military might of Germany as our instrument to dominate Europe; and (4) an instrument of imperialism designed to make of Europe a dependency of the United States . . . .

Our Information Service cannot effectively explain our point of view nor deny vociferous falsehoods in a whisper. We found it in fact to be only a whisper. Hundreds of millions are being expended by the Soviets; and the United Kingdom, although heavily in debt, supports a program employing some 8,700 persons as against our less than 1,400 and costing three times ours. Even little Holland is spending nearly a quarter of a million dollars this year, and spent half a million last year in the United States alone to defend and explain her policies. We are spending just over $30,000 in the Netherlands. It is the opinion of the committee that America is old enough and strong enough to warrant a change of voice—a voice that will rise confidently above the false call of communism.

S. REP. NO. 885, 80th Cong., 2d Sess. 5 (1948).

68 Senate Hearings on Construction and Operation of Radio, supra note 67.

69 Id.

70 J. Redding, supra note 11, at 148.
still relaying domestic programs. Although these broadcasters increased their international audience oriented programming, the United States continued to lag far behind Germany in effective use of international radio. The Roosevelt administration was dissatisfied with the U.S. response to Germany’s propaganda and sought to encourage private broadcasters to provide “an effective, militant, American voice on the high frequency bands.”

The administrative actions taken to encourage a more effective international radio voice from the United States are discussed by Jerry Redding in his dissertation on U.S. private international broadcasting. According to Redding, the administration first sought to have Congress approve a government controlled high frequency station. When these efforts failed, the administration supported an FCC revision of the rules governing international broadcasters. The FCC agreed to revise the rules to encourage a more effective U.S. voice on the international airwaves. Consequently, the FCC, with the assistance of the State Department, drafted the content standard.

The international content standard was highly criticized by the private broadcasters. Shortly after its issuance, editorial pages in major newspapers were filled with accusations of censorship. The reactions were so negative and widespread that the FCC suspended the content standard. It remained suspended throughout World

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71 Id. at 149-51. In 1937 the “private” broadcasters were General Electric and Westinghouse. The radio stations these companies operated relayed programs broadcast by the National Broadcasting Company (NBC) and Capital Broadcasting Company (CBS). In the fall of 1937 the stations relaying NBC programming were transmitting two hours and fifteen minutes of foreign language news daily in Spanish, Portuguese, German, French, and Italian. CBS broadcast relays were in English 98% of the time. Id. at 150-51.
72 Id. at 151-55.
73 Id. at 156.
74 Id. at 155-60.
75 Id.
76 Id.
77 Censorship Seen in International Ruling, 16 J. of Broadcasting 13 (June 1, 1939).
78 Newspapers See Censorship Danger in New International Ruling of FCC, 16 J. of Broadcasting 13 (June 1, 1939).
79 J. Redding, supra note 11, at 171. The FCC noted that:

[When the rule was first adopted in May 1939, as Section 42.05(a), it was subject to vigorous attack on “free speech” grounds. Editorials condemning it appeared in the New York Times, the New York Herald-Tribune, the St. Louis Post-Dispatch, the San Francisco Chronicle, and many other newspapers across the country. On petition of the American Civil Liberties Union (A.C.L.U.), a four-day hearing was held . . . during which representatives of the A.C.L.U., the NAB [National Association of Broadcasters], and most licensees of international broadcast stations then existing appeared to testify against the rule. Following the hearing, operation of the rule was suspended “temporarily” for a period of sixteen years. In 1955, the footnote suspending operation of the rule was deleted without discussion in the course of a general rule-making amending the international broadcast rules. Apparently, no case has since arisen under Section 73.788(a).]
War II and was not reinstated until 1954.80

In 1970, over fifteen years after the reinstatement of the content standard, the FCC noted some problem areas. George S. Smith, then Chief of the Broadcast Bureau at the FCC, stated:

[T]he Commission would have to take into account the elements of . . . our culture, . . . goodwill, understanding, and cooperation . . . [in] programming or proposed programming. The staff believes that these elements are of a vagueness that makes them difficult to apply. An examination of commission records has failed to show any discussion in the orders adopting the rules containing these standards that would aid in refining or sharpening them.81

In addition to the problem of vagueness, the FCC also indicated that it did not believe its proper role was to define the standard. Former Chief Smith questioned the FCC's judgment of international broadcasting by stating:

If the answer is that the test is whether the service will implement and promote U.S. foreign policy, one may ask whether the FCC knows this policy which, incidentally, is subject to change with changing situations. The FCC does not know exactly what the international policy needs are with regard to each country of the world or the world in general and our knowledge of the needs of each target area is minimal.82

The 1962 Chief of the Broadcast Bureau, Kenneth A. Cox, went even further, commenting that "[in] the area of . . . programming . . . the staff has been handicapped . . . by lack of a clear definition of the purposes and objectives of international broadcasting from the agency which has this function, i.e., the Department of State."83

Aside from the FCC's own problems with the standard, the United States Information Agency (USIA)84 was less than supportive of private international broadcasting in general.85 In a letter to Mr. Newton N. Minow, Chairman of the FCC in April of 1962, the USIA stated:

We must report that . . . we are having great difficulty in assigning . . . frequencies. In addition, there is the policy question of whether any given private international broadcaster is serving the national interest through his programming. The importance of this question is underscored by the fact that much of the world tends to assume that international broadcasts speak directly for the govern-

81 G. SMITH & W. WATKINS, supra note 9.
82 Id. at 20.
83 K. Cox, supra note 51, at 7.
84 The USIA was created in the early 1950s by the State Department. Its purpose is to control organization and funding of the VOA.
85 Contrary to this statement, the FCC files contain several letters from USIA proclaiming their support for private international broadcasting. The letters are prefaced with phrases such as "[w]hile the USIA encourages the development of private international broadcasting . . . " See generally FCC Files on International High Frequency Broadcasting From World War II Until 1963 (viewed with permission of Charlie Breig, supervisory engineer of high frequency broadcasting at the FCC).
Due partially to both the lack of availability of frequencies and the content of broadcasts, the FCC issued a freeze on licensing in April of 1963. While the freeze was in effect, the FCC suggested that the licensing of private international broadcasters might more appropriately be handled by the U.S. Department of State or by USIA, or abolished altogether. In the same memo, the FCC discussed reasons why neither of these alternatives were particularly appropriate.

In the case of a government agency, the FCC believed that giving the Department of State or USIA control over licensing of international broadcasters would be in violation of the spirit of the Smith-Mundt Act. This Act created VOA but specified that:

In authorizing international information activities under this Act, it is the sense of the Congress (1) that the Secretary shall reduce such Government information activities whenever corresponding private information dissemination is found to be adequate; (2) that nothing in this Act shall be construed to give the Department a monopoly in the production or sponsorship on the air of shortwave

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86 Letter from Edward R. Murrow, United States Information Agency to Mr. Newton M. Minow, Chairman of FCC (Apr. 2, 1962) (discussing problems with international broadcasting). The letter also stated that: "[W]e [USIA] must now indicate our extreme concern that due to the increased crowding of the frequency spectrum, any additional private international broadcasting could well work to this Agency's [USIA's] disadvantage." Id. At the same time, the U.S. Department of State also noted that "[i]n view of existing and potential limitations on the availability of frequencies for international broadcasting, the national interest requires that provision continue to be made to assure the Government adequate frequencies for an effective information program abroad." Letter from Edward A. Bolster, Director, Office of Transport and Communications, to Newton N. Minow, Chairman, FCC (Apr. 4, 1962) (discussing possible licensing of private international broadcast stations). The State Department went on to explain the breakdown of frequency hours used by private broadcasters and VOA. They expressed concern over any alteration in usage of the hours:

It is our understanding that a situation has already been reached in which the number of frequency-hours authorized to licensees of international broadcast stations for private operation has fully pre-empted the 25 percent maximum. Accordingly, it appears that the authorization of any additional frequencies to private international broadcast stations could only be by detraction from frequencies available to government international broadcasting stations.

The Department considers that this situation poses very serious questions in relation to its observation, cited above, on the necessity for continuing assurance to the Government of adequate frequencies for an [sic] effective information abroad. We therefore urge the Commission not to act affirmatively upon the application of International Communications, Inc. prior to the taking of the necessary policy decisions.

87 See K. Cox, supra note 51; supra note 62 and accompanying text.
88 G. Smith & W. Watkins, supra note 9, at 29-30.
89 Id.
90 Id.
broadcasting programs, or a monopoly in any other medium of information.\[^{91}\]

If the State Department or USIA were given licensing responsibility, control over private information dissemination could be total. The above language clearly indicates an attempt to avoid such control.

The alternative suggestion, abolishing international broadcasting altogether, is clearly in violation of the Smith-Mundt Act.\[^{92}\] Part two of the Act makes it explicit that the State Department\[^{93}\] should not achieve a monopoly over international broadcasting.\[^{94}\]

In spite of its concerns over the content standard, the FCC retained control of international broadcasting and kept the standard intact. When the freeze on licensing was lifted in 1973, the only applicants interested in shortwave broadcasting were religious organizations.\[^{95}\] The FCC believed this format raised no issues in regard to the content standard and granted their applications.\[^{96}\]

In 1979 an applicant proposed a format other than religious programming. Joseph Costello wanted to build WRNO to broadcast “rock ‘n roll” worldwide.\[^{97}\] Although the content standard was not specifically mentioned, the Commission questioned this type of broadcasting.\[^{98}\] The license was granted to Mr. Costello, but only

\[^{91}\] Smith-Mundt Act, supra note 3, at § 403. Despite this language in the Smith-Mundt Act, the Department of State informed the FCC that: 

["If it is shown that there is a need for the international broadcast proposed to be rendered, it is suggested that, before any license is issued, there should be agreement between your Commission and this Department with respect to the need for the proposed service. On the other hand, it is felt that such a statement should not actually appear in the rules of the Federal Communications Commission."]

\[^{92}\] G. Smith & W. Watkins, supra note 9, at 21.

\[^{93}\] Smith-Mundt Act, supra note 3, at § 4. VOA is basically the voice of the State Department and consequently the concern that that Department not control international broadcasting was really a concern that VOA not be the sole U.S. international communicator on the airwaves.

\[^{94}\] Id. § 501.

\[^{95}\] J. Redding, supra note 11, at 232-48.

\[^{96}\] See id. It is interesting to note that the FCC did question whether religious broadcasting complied with the content standard in 1970. They stated:

["The standard for assessing an “effective international service” is not clear. The Commission has little know-how in the special aims and techniques of a service aimed at proselytizing or informing, and customary techniques for measuring performance against listener needs are inappropriate to a medium where international policy ends are to be served; especially when those ends aren’t clearly known. If it is said that the measure of effectiveness is whether the programs broadcast to target areas reflect our culture, and promote international goodwill, understanding, and cooperation, how does one know whether the hoped for reflection and promotion occur? Sample Problem: does a Christian religious program falling on Moslem ears promote goodwill, understanding, and cooperation?"]

\[^{97}\] See Garay, supra note 8.

\[^{98}\] Id. at 649.
after several delays and a Commission hearing. This application represented the beginning of what may be widespread variation in international programming. Inevitably, the meaning of the content standard will be questioned.

From the foregoing, it is evident that the content standard was enacted to create a more effective U.S. political voice on the international airwaves. It has failed to serve that purpose. The FCC must now grapple with the meaning of the vague language and refrain from imposing it to the point of infringement on free speech. With diversity in international radio programming, however, there arises a greater probability of national security threats. As a practical matter, the FCC needs guidelines as to when program content may be considered a threat to national security and when protection of free speech dictates no interference with the broadcaster's programs.

III. Legal Issues in International Broadcasting

The first amendment guarantees that "[C]ongress shall make no law . . . abridging the freedom of speech . . . ." Although this language is broad, the first amendment has not been interpreted as absolute. As Justice Holmes noted, "the most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic." Broadcasting has traditionally been subjected to more restrictive first amendment interpretations than any other form of communication. The regulation of domestic broadcasting provides examples of the restrictions and is particularly comparable to international broadcasting.

A. Comparison to Domestic Broadcasting

One of the earliest and most explicit Supreme Court decisions on the first amendment rights of domestic broadcasters was Red Lion Broadcasting Co. v. Federal Communications Commission. The case involved a radio broadcast that constituted a "personal attack" on Fred J. Cook. Pursuant to the fairness doctrine, which requires

99 Id.
100 U.S. CONST. amend. I.
101 Schenck, 249 U.S. at 52.
102 Compare Red Lion Broadcasting v. Federal Communications Comm'n., 395 U.S. 367 (1969) (discussed infra note 103-16 and accompanying text) with Miami Herald Publishing Co., Inc. v. Tornillo, 418 U.S. 241 (1974) in which the Court held that a Florida statute granting individuals a "right of reply" to newspaper articles was an unconstitutional infringement on the freedom of the press. Id.
104 Id. at 372-74. At the time of the Red Lion controversy the FCC defined personal attacks in the following manner:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit
broadcasters to present public issues and to give fair coverage to each point of view, Mr. Cook demanded free air time to reply to the attack. The radio station refused to grant air time claiming that the fairness doctrine, and its specific application in the personal attack rule, was an unconstitutional abridgement of its freedom of speech. Red Lion Broadcasting Company’s contention was "that to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1969). Some attacks were excepted from paragraph (a). For instance, "attacks on foreign groups or foreign public figures" and personal attacks by "legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; ...." Id. Finally, perhaps the most significant exception to paragraph (a) was for "bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee)." Id.

The controversy in Red Lion arose when WGCB aired a 15 minute broadcast by Reverend Billy James Hargis as part of a Christian Crusade series. The Reverend discussed a book by Fred J. Cook. He stated:

Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McLinally, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies. Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency... now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right!'

Red Lion, 395 U.S. at 371-72 n.2.

105 The Supreme Court defined the fairness doctrine in the following manner: "The Federal Communications Commission has for many years imposed on radio... broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine...." Red Lion, 395 U.S. at 369. The obligations under the fairness doctrine must be met even if "done at the broadcaster's own expense...." Id. at 377 (citing Cullman Broadcasting Co., 25 Rad. Reg. (P & F) 895 (1968)). The Court also explained the different requirements the broadcaster must meet under a personal attack claim as opposed to a general claim under the fairness doctrine. They stated:

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases... and also the 1967 regulations... require that the individual attacked himself be offered an opportunity to respond.... These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side.

Id. at 378.

106 Id. at 386.
the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency."107 The Supreme Court disagreed and ruled that the fairness doctrine, with its particular requirements in cases of personal attack, was not a violation of the first amendment.108

The rationale of Red Lion was based on the theory that "'broadcast frequencies are limited and, therefore, . . . have been necessarily considered a public trust.'"109 The Court noted that licenses are issued only if the "'public convenience, interest, or necessity will be served thereby.'"110 Congressional interpretation of this language demonstrated that broadcasters are required "'to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.'"111 Hence, because "'[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,'"112 the public has a right to "'full and complete disclosure of conflicting views on news of interest to the people of the country.'"113 The Court concluded that the fairness doctrine, and the protections it afforded in personal

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107 Id. at 389.  
108 Id.  
109 Id. at 383 (quoting S. Rep. No. 562, 86th Cong., 1st Sess., 8-9 (1959)).  
110 Id. at 394 (quoting 47 U.S.C. § 307(a) (1964)).  
111 Id. at 380 (quoting Act of September 14, 1959, Pub. L. No. 86-274, 73 Stat. 557, § 1). The Court devoted a significant part of the Red Lion opinion to demonstrating the FCC's power, under congressional mandate, to implement restrictions such as the fairness doctrine. They stated: "'The authority of the FCC to promulgate . . . regulations derives from the mandate to the 'Commission from time to time, as public convenience, interest, or necessity requires' to promulgate 'such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary . . . .'" Id. at 379 (quoting 47 U.S.C. § 303 (1964)). The Court further noted that "'[t]his mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive . . . .'" Id. at 380 (quoting National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943)). Finally, the Court pointed to congressional support for FCC regulations: Congress, in 1959, announced that the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction . . . . Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations . . . ." Id. at 380-91.  
112 Id. at 390.  
113 Id. at 384 (quoting Amendment of Communications Act of 1934—Conference Report, 86th Cong., 1st Sess., 105 Cong. Rec. 17,830 (1959)).
attack situations, helped the broadcaster meet his or her obligations to the public.114

Based on the same rationale, the Court in *Red Lion* also noted that the equal time requirement of section 315 of the Communications Act of 1934 was a constitutionally permissible infringement on broadcasters.115 Section 315 states that "if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ."116 The fairness doctrine and the equal time provision demonstrate restrictions of first amendment freedoms that are unique to broadcasting. The restrictions are, however, of an affirmative nature. In other words, they are not used to prevent licensees from expressing their views; they are aimed only at assuring that the public receives an opportunity to hear opposing views. This is an important distinction because the Communications Act of 1934 specifically forbids the FCC to censor broadcasts. It states:

Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications.117

In spite of this provision, the Supreme Court has held that the FCC can prevent certain broadcasts in very limited situations.118 In *Federal Communications Commission v. Pacifica Foundation*119 the Court held that the prohibition against censorship did not prevent the Commission from sanctioning the use of obscene, indecent, or profane language in broadcasts.120 The case involved a monologue entitled "Filthy Words"121 which was broadcast by a radio station at about two o’clock in the afternoon. A father and his son heard the broadcast, found it offensive, and complained to the FCC. Although the FCC imposed no formal sanctions,122 it did issue a declaratory

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114 See generally id.
115 See generally *Red Lion*, 395 U.S. at 367.
117 *Id.* § 326.
119 *Id.*
120 *Id.* at 738.
121 *Id.* at 729. The Court described the broadcast as follows:

A satiric humorist named George Carlin recorded a 12-minute monologue entitled 'Filthy Words' before a live audience in a California theater. He began by referring to his thoughts about 'the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever.' He proceeded to list those words and repeat them over and over again in a variety of colloquialisms . . . . Pacifica Foundation, broadcast the 'Filthy Words' monologue.

*Id.* at 729-30. For a complete reproduction of the broadcast see *id.* at 751-55.
122 *Id.* at 730.
order granting the validity of the complaint and characterizing the language used in the broadcast as "patently offensive," "though not necessarily obscene . . . ." The FCC also noted that the order would become part of the station's file, thereby possibly affecting future license renewal of the station. When asked to clarify its declaratory ruling, the FCC stated it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." Furthermore, it reasoned that the "declaratory order was issued in a specific factual context." Therefore the implication was that the same words in other circumstances would not evoke the same FCC response.

The Court found "[t]he prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. . . . [H]owever, [it] has never been construed to deny the Commission the power to review the content of completed broadcasts." The Communications Act of 1934 was modeled after the Radio Act of 1927, and the Court noted that in 1927 the prohibition against censorship and the use of indecent language were included in the same section of the statute. Under the assumption that "Congress intended to give meaning to both provisions," the Court reasoned that the censorship language must be read as inapplicable to indecent language.

Pacific, the fairness doctrine, and the equal time provision are all qualifications of the right to free speech in the broadcasting context. If all are applied to international radio broadcasting, they have no more restrictive force than they do in domestic broadcasting. If the analysis stopped here, it would appear that international broadcasters could broadcast whatever they wished in the interest of pro-

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123 Id at 730-31. The Commission rested its declaratory ruling on its "power to regulate indecent broadcasting in . . . 18 U.S.C. § 1464 (1976 ed.), which forbids the use of 'any obscene, indecent, or profane language by means of radio communications' and 47 U.S.C. § 303(g) which requires the Commission to 'encourage the larger and more effective use of radio in the public interest.'" Id. at 731.
124 Id.
126 Id. at 893.
127 Pacifica, 438 U.S. at 735.
128 Radio Act of 1927, supra note 41, at § 29 provided:

Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

129 Pacifica, 438 U.S. at 738.
130 Id.
moting international goodwill, cooperation, and understanding, as long as all sides of an issue were presented and obscene, indecent, or profane language was avoided during times when children are likely to be exposed. The factor that distinguishes international broadcasting from domestic broadcasting is the concern for national security.

B. Limits Imposed for Protection of National Security

There are no cases that specifically deal with restrictions the FCC can place on private international broadcasts in the interest of national security. There are, however, a few "prior restraint" cases which deal with the power to prevent publication and dissemination of information that may be harmful to national security and/or foreign policy.132

Near v. Minnesota133 is one of the hallmark cases on the doctrine of prior restraint. There the Supreme Court held that prior restraint of a publication was "an infringement of the liberty of the press."134 Pursuant to a Minnesota statute prohibiting the publication of "malicious, scandalous and defamatory newspaper . . . articles,"135 the state of Minnesota sought a permanent injunction preventing the defendant, Near, from future publication of his newspaper.136 Near ad-

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131 A system of prior restraints is one in which any publication or broadcast would be subject to governmental approval before it could be disseminated to the public. L. Tribe, American Constitutional Law 724-28 (1978).

132 See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971). As an agency created by Congress, the FCC has only the powers delegated to it by that body. See supra note 111 and accompanying text. It is not clear whether the FCC could exercise the same restraints on free speech, in the interests of protecting national security, as the Department of State could. See, e.g., Haig v. Agee, 453 U.S. 280 (1981) (discussed infra notes 191-204 and accompanying text).

133 283 U.S. 697 (1931).

134 Id. at 729.

135 Id. at 702. The entire section of the act relied on by Minnesota read as follows:

Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away:

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

Id. at 702.

136 Id. at 705. Near had published information charging:

[In substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prose-
mitted publishing the articles in dispute, "but denied that they were malicious, scandalous or defamatory" and claimed his publication was protected under the due process clause of the fourteenth amendment.

Initially, the Court noted that liberty of the press and free speech were within the rights protected by the due process clause of the fourteenth amendment. These rights, however, are not absolute and therefore a state could put limitations on their exercise. Under the Minnesota statute, however, the state was attempting to completely suppress any further publication of the paper. In the Court's view this constituted the very "essence of censorship." If there was anything the constitutional protections of liberty of press and free speech were intended to prevent, it was, in the Court's view, the prior restraint of publications.

Finally, the Court in Near noted that prior restraints will not always be prohibited. They cited one exceptional case: "When a nation is at war many things that might be said in time of peace are

cutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

Id. at 704.
137 Id. at 705.
138 Id.
139 Id. at 707.
140 Id. at 708.
141 Id. at 713.
142 Id.
143 Id. The Court discussed the need for "immunity of the press from previous restraint in dealing with official misconduct" stating:

And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?

Id. at 718-20 (quoting 5 J. MADISON, REPORT ON THE VIRGINIA RESOLUTIONS 544 (1901)). Although domestic publishers and broadcasters are recognized as serving the important function of questioning governmental policy and keeping the U.S. public informed, international broadcasters may not be under the same duty. Private international broadcasting is restricted to programming intended for and directed to audiences outside the United States. 47 C.F.R. § 73.788(a) (1986). Therefore these broadcasters arguably have no duty to keep U.S. citizens informed and hence may not be afforded as much protection as domestic publishers and broadcasters.

144 Id. at 716.
such a hindrance to its effort that their utterance will not be endured as long as men fight and that no court could regard them as protected by any constitutional right.' "

Although the prohibition on prior restraint of publications was later upheld in *New York Times Co. v. United States* the members of the Court were unable to agree on the parameters of the prohibition. The Court issued a short per curiam opinion with six justices writing separate concurrences and three filing separate dissents.

*New York Times* involved an action brought by the Solicitor General on behalf of the United States to enjoin the New York Times and the Washington Post from publishing certain "classified material." The material in controversy was information about U.S. Government activities in Vietnam and became commonly referred to as the "Pentagon Papers." The Court noted that any "prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Therefore, the Government "'carries a heavy burden of showing justification for the imposition of such a restraint.' " The Court concluded that the Government had not met its burden and vacated the existing stay order. The individual opinions represented varying justifications for the per curiam opinion.

The most ringing endorsement for freedom of the press was Justice Black's concurrence. He began by quoting the Government's argument in support of an injunction: "'The authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the [c]onduct of foreign affairs and his authority as Commander-in-Chief.' " Justice Black, however, argued that to find "'inherent power' of the President to "halt publication of news... would wipe out the First Amendment." He noted that

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145 Id. (quoting *Schenck*, 249 U.S. at 47, 52).
146 403 U.S. 713.
147 Id.
148 Id. at 713.
149 403 U.S. 713.
150 Id. at 714.
151 Id. (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).
152 Id.
153 Id. at 718 (quoting *Brief for the United States* 13-14).
154 Id. at 719.
155 Id.
the press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. Ultimately, he concluded that "[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." Justice Douglas and Justice Marshall stressed the Government's lack of statutory authority for its argument. The Espionage Act provides that:

> Whoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The definition of "communicates" was held not to encompass publication. Therefore, the Espionage Act was inapplicable and the Government's claim rested on the inherent powers of the Executive. Justice Marshall stressed that Congress had denied the President the power he was currently seeking in two prior situations.

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156 Id. at 717.
157 Id. at 719. Justice Black also quoted a particularly eloquent passage written by former Chief Justice Hughes:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Id. at 719-20 (quoting Dejonge v. Oregon, 299 U.S. 353, 365 (1937)).
158 Id. at 720-24, 740-48.
161 Justice Douglas explained that there were eight sections in the Espionage Act and in three of those sections the word 'publish' was specifically mentioned. Id. at 721. Those three sections banned publications concerning the disposition of armed forces, photographs, and cryptography. Id. (quoting 18 U.S.C. §§ 794(b), 797, 798 (1970)). None of these sections were applicable to the materials in controversy. In Justice Douglas' opinion "Congress was capable of and did distinguish between publishing and communication."

Id.

Justice Marshall noted that the lower court had found that "communicates" did not mean publish, and that there was some support for that holding in the legislative history of the Espionage Act. Id. at 745. Aside from this point, Justice Marshall also indicated that even if the statute were applicable, it would possibly allow for criminal sanctions when the material was published, but not a permanent injunction from publication. Id.
162 Id. at 722.
163 Id. at 746.
During the debate over adoption of the Espionage Act, "Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy."\textsuperscript{164} In 1957, Congress also rejected a proposal by the U.S. Commission on Government Security to enact "legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified."\textsuperscript{165} Consequently, Marshall argued it was not the Court's place to create laws, "especially a law that Congress has refused to pass."\textsuperscript{166}

The Government's arguments received some support from Justices Brennan, Stewart, and White, although each still concurred in the per curiam opinion. While noting that the "successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy,"\textsuperscript{167} Justice Stewart concluded that the Executive had not met its burden of proof.\textsuperscript{168} Justice Brennan described the Government's burden as "proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea ...." The actual claim made by the Government was that publication "could," "might," or "may . . . prejudice the national interest in various ways."\textsuperscript{169} Justice White agreed that the "United States [had] not satisfied the very heavy burden . . . it must
meet to warrant an injunction against publication . . . ."171 Furthermore, he also pointed out "[i]f the U.S. were to have judgment under . . . [a mere grave and irreparable danger test] . . . in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press."172

Although Chief Justice Burger, Justice Harlan, and Justice Blackmun wrote separate dissents in New York Times, the thrust of their arguments were the same. Each focused on how quickly the issues involved were decided. The information in controversy was approximately 7,000 pages of material173 and was simply too much to try to comprehend in two days.174 Therefore, they suggested that the injunction against publication be continued while the case was remanded for a full hearing.175

In spite of the Court's clear prohibition on prior restraint of publications in Near and New York Times, at least one lower court has held a prior restraint to be proper in less than war time conditions.

In United States v. Progressive, Inc.176 the U.S. District Court for the Western District of Wisconsin held that a preliminary injunction against publication of "The H-Bomb Secret; How We Got It, Why We're Telling It" was proper.177 The issue before the court clearly involved the "clash between allegedly vital security interests of the United States and the competing constitutional doctrine against prior restraint in publication."178 The defendants argued that the article "merely contain[ed] data already in the public domain and readily available to any diligent seeker . . . . [O]ther nations already

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171 Id. at 731.
172 Id. at 732.
173 Id. at 750.
174 Justice Harlan detailed the sequence of events leading up to oral arguments in the case:

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a.m. The application of the United States for interim relief in the Post case was also filed here on June 24 at about 7:15 p.m. This Court's order setting a hearing before us on June 26 at 11 a.m., a course which I joined only to avoid the possibility of even more peremptory [sic] action by the Court, was issued less than 24 hours before. The record in the Post case was filed with the Clerk shortly before 1 p.m. on June 25; the record in the Times case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

Id. at 753.
175 Id. at 752, 758, 761-62.
176 467 F. Supp. 990 (W.D. Wis. 1979).
177 Id.
178 Id. at 991.
have the same information or the opportunity to obtain it." 179 The Government contended that "the danger [lay] in the exposition of certain concepts never heretofore disclosed in conjunction with one another." 180

The court noted the strong prohibition against prior restraint and the extremely narrow exception "involving national security" 181 as announced in Near. Although the court was convinced that the article was not a "do-it-yourself" guide for the hydrogen bomb, 182 it "could possibly provide sufficient information to allow a medium size nation to move faster in developing a hydrogen weapon." 183 Therefore, they concluded "that publication of the technical information on the hydrogen bomb contained in the article [was] analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint." 184

The Wisconsin court distinguished New York Times on three points: (1) the material in New York Times was historical information relating to events that occurred several years before the time of publication; (2) the government was unable to provide cogent reasons why publication should be prevented in New York Times, and simply argued that it might cause some embarrassment to the United States; and (3) New York Times did not involve the application of a specific statute. 185 In Progressive the court noted that the Atomic Energy Act of 1954 186 prohibited "anyone from communicating, transmitting or disclosing any restricted data to any person ‘with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation.’ " 187 According to the Act, "restricted data" included "all data concerning 1) design, manufacture, or utilization of atomic weapons; 2) the production of special nuclear material; or 3) the use of special nuclear material in the production of energy . . . ." 188 The court was "convinced that the terms used in the . . . [Act] . . . —‘communicates, transmits or disclosed’—include publishing . . . ." 189 Hence, they reasoned that the Act provided strong support for prior restraint of the H-bomb article. The Supreme Court never ruled on the prior restraint upheld in Progressive because the issues were rendered moot by the publication of

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179 Id. at 993.
180 Id.
181 Id. at 992.
182 Id. at 993.
183 Id.
184 Id. at 996.
185 Id. at 994.
188 Id. (quoting 42 U.S.C. § 2014 (1954)).
189 Id. (quoting 42 U.S.C. § 2274 (1954)).
similar information in another magazine. They did, however, have occasion to rule on the protection of free speech when national security is threatened and a federal statute is applicable.\[190\]

In *Haig v. Agee*\[191\] the Court held that the "President, acting through the Secretary of State, [had] authority to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States."\[192\]

Agee was a former employee of the Central Intelligence Agency (CIA) who declared his intent "to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating."\[193\] Pursuant to his intent, Agee publicly identified undercover CIA agents\[194\] and wrote two books identifying individuals as CIA personnel.\[195\] Secretary of State Haig revoked Agee's passport on the grounds "that your [Agee's] activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."\[196\] Agee objected to the revocation of his passport because the "regulation invoked by the Secretary [had] not been authorized by Congress and [was] impermissibly overbroad; . . . and the passport revocation violated his First Amendment right to criticize Government policies."\[197\]

The Supreme Court relied upon the Passport Act of 1926 (Pass-
port Act)\textsuperscript{198} which provides that:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.\textsuperscript{199}

Although the Court noted that the Passport Act did not specifically give the Secretary the power to revoke a passport, "'broad rule-making authority' " was granted.\textsuperscript{200} They noted that long standing presidential, secretarial, and administrative construction of the Passport Act, acquiesced in by Congress, indicated that the Secretary had the power to revoke a passport.\textsuperscript{201} Furthermore, although there had been few cases "involving substantial likelihood of serious damage to the national security or foreign policy of the United States as a result of a passport holder's activities abroad, . . . the Secretary has consistently exercised his power to withhold passports."\textsuperscript{202} Finally, in regard to Agee's first amendment claim, the Court noted the exception allowed in \textit{Near} and found that "the declared purpose of [Agee's disclosures was] obstructing intelligence operations and . . . recruiting of intelligence personnel."\textsuperscript{203} The Court inferred that this rose to the level of publicizing sailing dates and number and location of troops.\textsuperscript{204}

In light of the foregoing cases, one should consider whether a private international broadcaster may: (1) broadcast that he or she has received intelligence information confirming that the United States will pursue a covert operation to assassinate Muammar Kad-dafi within the next twenty-four hours; (2) further state that U.S. and British submarines are currently positioned off the coast of Libya as part of the initial steps of this plan; (3) at a time when Ronald Reagan and Mikhail Gorbachev are negotiating for a reduction in nuclear arms and have agreed to halt all nuclear testing during the negotiations, broadcast that the United States is still testing in spite of the agreement; (4) broadcast that information has become available that the United States kidnapped Adolf Hitler before the end of World War II, masterminded his apparent death in Germany while harboring him for fourteen years within the United States until he died of natural causes.

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\textsuperscript{199} 453 U.S. at 290 (quoting 22 U.S.C. § 211a (1976 & Supp. 1979)).
\textsuperscript{200} \textit{Id.} at 290-91 (quoting Zemel v. Rusk, 381 U.S. 1, 12 (1964)).
\textsuperscript{201} \textit{Id.} at 292-300.
\textsuperscript{202} \textit{Id.} at 302.
\textsuperscript{203} \textit{Id.} at 309.
\textsuperscript{204} \textit{Id.} at 308-09.
While these examples may seem mildly amusing, assuming each broadcaster's report was completely accurate and true, could the FCC prevent the broadcasts from airing or revoke the broadcaster's license if he or she did air the material? Two issues must be analyzed before this question can be answered: (1) Does the FCC have statutory power under the Communications Act to revoke an international radio broadcaster's license because it is aware that information similar to the examples above is about to be aired or has already been aired; (2) do any of the examples above rise to the level of publishing information that will inevitably, directly, and immediately cause imperiling of safety or amount to publishing number and location of troops?

Under the Communications Act of 1934, the FCC is granted broad powers over licensing of radio stations. In the realm of domestic broadcasting, the FCC has denied license renewal to broadcasters because it found the station was not operating in the public interest. In addition several applications have been subjected to hearings before the full Commission, in part, at least, because of programming deficiencies. Hence, although not often used, the FCC has an established pattern of regulating domestic programming by threatening nonrenewal. Under the Court's analysis in Agee this statutory pattern, coupled with no congressional indication of disapproval, is strong support for the FCC's power to deny license renewal based on content considerations.

In international broadcasting, the FCC has not established a similar pattern. The power to regulate international stations, however, stems from the same Communications Act of 1934. Arguably, the FCC can exercise the same threat of license nonrenewal if content specifications are not met. In international broadcasting it would merely be a matter of applying a different content standard: Does the broadcaster's programming reflect the culture of this country, and promote international goodwill, understanding, and cooperation?

Aside from the time of license renewal, the FCC does not have an established pattern, in either domestic or international broadcasting, of simply revoking a broadcaster's license because of information aired. Hence, it is not clear that the FCC could revoke an international broadcaster's license immediately upon his or her airing of information it found nonconforming to the content standard. Furthermore, the FCC has no established pattern of reviewing

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205 See supra note 111 and accompanying text.
208 See supra notes 200-03 and accompanying text.
broadcasts before they are aired and deciding whether they will be communicated to the public. In fact, the Supreme Court made it clear in *Pacifica* that the FCC could not "edit proposed broadcasts" or "excise material" from the format.\(^{209}\) Therefore, although the FCC can enforce the content standard against international broadcasters, it is not clear that the Commission can do so in any more effective manner than to threaten license nonrenewal.

In addition to the FCC's power, if information similar to the examples above was proposed for broadcasting, or actually aired by an international broadcaster, the Solicitor General might bring an action to enjoin the broadcast or impose criminal sanctions on the broadcaster. Pursuant to the Espionage Act, an international broadcaster could be subject to discipline for "willfully communicat[ing]...information relating to the national defense...[which he or she]...ha[d] reason to believe could be used to the injury of the United States or to the advantage of any foreign nation..."\(^{210}\) Although in *New York Times* "communicates" was held not to include publication, it may include broadcasting. Hence, in addition to the FCC's threat of license nonrenewal, the international broadcaster desiring to air information similar to the examples above may face prior restraint by the Government or immediate license revocation through criminal sanctions.

With some idea of who may regulate the international broadcasters at any given time, the issue becomes what information the FCC will consider nonconforming to the content standard and/or the Solicitor General consider an actionable threat to national security.

As in *Agee*, the first rule of statutory construction is to look to the purpose of the legislation. Reflection of U.S. culture and promotion of international goodwill, understanding, and cooperation originally meant pro-U.S. propaganda.\(^{211}\) There is little doubt that the drafters sought a strong political voice on the airwaves.\(^{212}\) Hence, the content standard, at minimum, allows for political discussions by international broadcasters. The standard, however, must be limited by the legal standards set out in *Near, New York Times*, and *Progressive*.

In the first example given above, the international broadcaster reveals a secret assassination plan. Basically he or she has put Kaddafi on alert and possibly made the U.S. objective more difficult to achieve. The entire U.S. offensive is placed at greater risk, simply because Kaddafi is expecting an attack. The location and number of troops, however, has not been broadcast. Clearly the broadcast will

\(^{209}\) *Pacifica*, 438 U.S. at 735.
\(^{211}\) See supra notes 67-77 and accompanying text.
\(^{212}\) *Id.*
have a direct effect on the otherwise covert operation. The FCC, however, will be forced to argue that the information does not meet the content standard and that the possibility of license renewal has been greatly diminished by the broadcast. The Solicitor General, on the other hand, may have a much more forceful argument that this information relates to national defense and could be used to injure the United States or assist a foreign nation. Therefore, pursuant to the Espionage Act and the case law on protection of national security, the Solicitor General stands a much greater chance of preventing the broadcast or criminally sanctioning the licensee than does the FCC pursuant to its content standard.

The second scenario takes the first example a step further. Now the broadcaster has indicated the location of troops and tied the British to the operation. As to location of troops, Near clearly prohibits the dissemination of that information. With regard to British involvement, the concern is a matter of international relations with a neighboring country that trusted the United States to maintain secrecy. This type of concern may not come within the Espionage Act because there is not a direct injury to the United States. The only harm is to relations with Great Britain. Concern for international relations sounds more like the language of the international content standard. Therefore, if the broadcaster eliminated the information concerning location of troops, the FCC may not be able to prevent the broadcast, but the Commission may have grounds for challenging license renewal.

The third example posits the situation where an international broadcaster reveals that the United States is not negotiating with the Soviet Union in good faith. Again, there is no immediate injury to the United States, only to our ability to negotiate. Arguably, the broadcaster has promoted international goodwill by informing the Soviet Union that it was not being treated fairly. The information is embarrassing to the United States, and the Solicitor General as well as the FCC would prefer that it not be broadcast. The authority for either entity to prevent the dissemination of this information, however, appears to be lacking.

Finally, the fourth scenario focuses on events occurring several years ago, but nonetheless presently damaging to U.S. relations with other countries, i.e. allies during World War II. As in New York Times, the information is not current and according to the Progressive court that older information might more appropriately be published. Once again, the broadcaster may promote international goodwill by informing the world of the deceptive practices of the United States.

213 See supra notes 144-45 and accompanying text.
214 See supra notes 185-89 and accompanying text. Publishing information, as in New York Times, may be more readily acceptable than broadcasting. See supra note 102.
Although, some countries may be so angered as to impose sanctions upon the United States, it is not likely that they would retaliate with direct physical force. Consequently, the Espionage Act may not prevent the broadcast and the international content standard may encourage it.

There are no clear cut answers to the FCC's power under the international content standard. It is apparent, however, that the FCC is limited in the manner in which it can require compliance with the language, not only because of the Communications Act of 1934, but also because the language is unclear. Ultimately, the Government has more control than the FCC over international broadcasters pursuant to the Espionage Act. In as much as international broadcasting by private individuals is growing and diversifying, the examples discussed in this Comment demonstrate the type of analysis each licensee must apply to politically sensitive broadcasts.

Laura J. Holland
**Appendix A**

### Some characteristics of radio-frequency spectrum

<table>
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<tr>
<th>Frequency Scale</th>
<th>10 kc.</th>
<th>30</th>
<th>100</th>
<th>300</th>
<th>1000</th>
<th>3000</th>
<th>10,000</th>
<th>30 mc.</th>
<th>100</th>
<th>300</th>
<th>1000</th>
<th>3000</th>
<th>10,000</th>
<th>30,000</th>
<th>100,000 mc.</th>
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<td>Wavelength Scale</td>
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<td>1000 m.</td>
<td>100 m.</td>
<td>10 m.</td>
<td>1 m.</td>
<td>10 cm.</td>
<td>1 cm.</td>
<td></td>
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<tr>
<td>Band Designation</td>
<td>VLF</td>
<td>LF</td>
<td>MF</td>
<td>HF</td>
<td>VHF</td>
<td>UHF</td>
<td>SHF</td>
<td>EHF</td>
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