

RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

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May 5, 1992

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The Honorable Albert Gore, Jr.
Chairman
Subcommittee on Science, Technology
and Space
Committee on Commerce, Science and
Transportation
U.S. Senate
427 Hart Senate Office Building
Washington, DC 20510

Re: Hearing on S. 2297, "Land Remote Sensing Policy Act of 1992"

Dear Mr. Chairman:

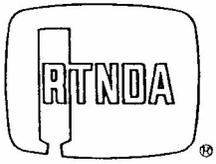
On behalf of the Radio-Television News Directors Association (RTNDA), I am pleased to submit the following statement for the record of the subcommittee's hearing on S. 2297, to revise the Land Remote-Sensing Commercialization Act of 1984.

The Radio-Television News Directors Association is the principal professional organization of journalists who gather and disseminate news and other information on radio and television in the United States.

For several years, RTNDA has sought to create a more favorable regulatory environment in order to encourage private companies to launch and commercially operate new remote-sensing satellites in space. RTNDA seeks greater availability of high resolution earth images for use by the news media to inform the American public, in keeping with the nation's open skies policy and free from unwarranted government interference.

To date the sole focus of S. 2297 has been the government's Landsat program as it has developed under the 1984 Act. That concern is addressed by changes through titles IV and V of S. 2297. RTNDA's area of special concern, as just indicated, is that part of the 1984 Act that pertains to the licensing of private remote-sensing systems, which provisions would be recodified by title III of S. 2297.

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The Subcommittee should not neglect the opportunity, through amendments to title III and related provisions of the bill, to correct conceptual mistakes and unconstitutional procedures in existing provisions of the 1984 Act as they apply to privately funded commercial systems, specifically 15 U.S.C. Sections 4241, 4242, 4243 and 4277.

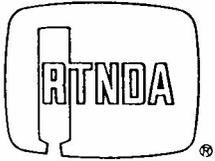
RTNDA seeks changes in federal law that will assure application of First and Fourth Amendment free-press and search-and-seizure protections for space-based newsgathering. The remote-sensing systems now in orbit are not fully suitable for news and information gathering. But future systems may be designed for more timely and higher resolution data acquisition. Changing current federal law will encourage private investment in a 'mediasat' or other privately funded company in the business of selling high-resolution imagery to news outlets around the world.

RTNDA has argued that the 1984 Act does not adequately accommodate constitutional requirements and that Commerce Department regulations do not implement the Act in a manner consistent with the Constitution. (See Petition for Rulemaking, filed by RTNDA et al. with the National Oceanic and Atmospheric Administration, April 1, 1988. This pleading has been provided to the Subcommittee staff.) In the Federal Register of January 18, 1989, NOAA rejected most of the proposals. NOAA said then that it would start further rulemaking to address some of the proposals, but it has not done so.

The need for Congressional action in this matter is due in part to the failure of NOAA to do what it could do to improve its own regulations; but, more fundamentally, the need for statutory reform stems largely from the failure of Congress in Subchapter IV of the Act (Title III of S. 2297) to establish a regulatory structure that clearly mandates the free-press, free-enterprise and open-skies policies of our governmental system.

The current provisions of the Act create a statutory scheme for licensing new commercial remote-sensing satellites to private entities that are willing to accept a status similar to government contractors while assuming the full financial risks of private entrepreneurs. This scheme is not consistent with other government policy, including Presidential directives, which encourage U.S. private industry to develop commercial, free-enterprise applications in space.

Therefore, with respect to both S. 2297 and H.R. 3614, we have proposed amendments designed to (1) create a less forbidding regulatory environment which would be more conducive to private investment for journalistic and other private, commercial imaging purposes, and (2) accommodate vital governmental interests in protecting national security and in meeting international obligations without infringing upon First Amendment and Fourth Amendment rights of private citizens, including journalists.



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Several of the amendments proposed by RTNDA were adopted by the House Committee on Science, Space and Technology in H.R. 3614, and we are working to gain floor amendments to that bill in order to fully achieve our goals, which are to

(1) incorporate a standard ("serious and imminent injury" to national security or international obligations) and a procedure (case-by-case court injunctive relief) consistent with traditional First Amendment law;

(2) provide procedures for licensing, suspending and terminating satellite operations in a manner that meets due process requirements, including agency hearings and written findings and conclusions by the agency, with normal judicial review thereof;

(3) eliminate the provisions for administrative searches and seizures;

(4) qualify the non-discriminatory access requirement to give media-operated satellite companies first use of data; and

(5) retain the current statutory provisions that give the departments of Defense and State advisory rather than determining roles on matters of national security and international obligation, respectively.

Attached are RTNDA's proposed amendments, referenced to existing provisions of Title 15 of the U.S. Code, Sections 4241-43 and 4277. In S. 2297, these provisions are to be substantially recodified through Sections 301-03 and 505.

In addition to all of the changes in these provisions proposed in RTNDA's attached amendments, RTNDA here objects to S. 2297's change from existing law in the first sentence of Section 505 of the bill. As explained in the attached, RTNDA has proposed that the second sentence of that section be changed to make it clear that the Secretary of Defense may recommend but may not make the final decision with respect to remote-sensing matters related to national security. The first sentence should, therefore, retain the Defense Secretary's role as one of consulting rather than taking action.

In the attachment, one rendition of the amendments is through amendatory language with section-by-section explanation. The other rendition is through a text of the entire sections with additional and stricken language indicated appropriately.



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These changes are necessary to make the statute properly sensitive to constitutional and commercial concerns of potential private-sector license applicants. Entrepreneurs, including media organizations, could not be expected to invest hundreds of millions of dollars in a business that is still subject to arbitrary and unconstitutional decision-making (including the possibility of outright extinguishment of their investments) under the broad and dangerous powers which the Act bestows upon government regulators.

RTNDA is grateful to the Chairman, members and staff of the Subcommittee for the consideration being given to this matter. We ask that you or your staff contact me or RTNDA General Counsel J. Laurent Scharff, a partner in the firm of Reed Smith Shaw & McClay in Washington, if you desire more information or discussion about RTNDA's concerns and proposals.

Sincerely,

A handwritten signature in black ink, appearing to read "DB", is written over a horizontal line that extends to the right.

David Bartlett

DB: kh

Attachment

Attachment to Letter of David Bartlett
To Hon. Albert Gore, Jr.
May 5, 1992

Re: S. 2297, "Land Remote Sensing Policy Act of 1992"

Proposed Amendments to Subchapter IV and Related Provisions of the
Land Remote-Sensing Commercialization Act of 1984, 15 U.S.C. 4241
et seq.

1. Section 4241 - Licensing private sector parties; authority of
Secretary; limitations

Amend subsection (b) by

(1) striking the first comma and inserting therein the
word "and";

(2) striking the next comma and inserting therein a
period; and

(3) striking the remainder of the subsection: "and any
applicable international obligations and national security
concerns of the United States."

Explanation

The language to be deleted is too broad an authorization
for denial of a license. National security and international
obligations are covered more carefully under other provisions of
the Act as qualified by these proposals.

2. Section 4242 - Licensing requirements for operation

Amend subsection (b) by

(1) deleting the phrase ",at a minimum," in the opening
clause;

(2) deleting in paragraph (1) the phrases "and promote" and "and implement" and the word "section"; and adding the phrase "the Secretary's valid orders pursuant to sections 4243 and" after the phrase "in accordance with";

(3) inserting before the semi-colon at the end of paragraph (2): ",but this paragraph shall not be construed to prohibit a licensee from publishing remote-sensing imagery before making the unenhanced data commercially available promptly thereafter on non-discriminatory terms";

(4) deleting the last phrase in paragraph (3): "satisfactory to the President;" and substituting therefor: "consistent with the provisions of this subchapter, upon the approval of the Secretary;"

(5) inserting after the first three words of paragraph (4) the phrase "at normal charges";

(6) deleting in paragraph (5) the phrase ",obtain advance approval of any intended deviation from such characteristics,"; and

(7) substituting a period for the semi-colon at the end of paragraph (6) and deleting paragraphs (7), (8) and (9) of the subsection.

Explanation

The "at a minimum" language can be construed as supporting too broad an authority in the Secretary to specify license requirements, while the absence of the language does not preclude other reasonable requirements.

Private licensees may be required to do what is truly necessary to protect national security and to observe international obligations, under orders of the Secretary and the courts, but they cannot constitutionally be required to "promote" national security and "implement" international obligations.

NOAA has adopted a rule permitting a licensee to make first use of data for dissemination of images to the public before promptly making the data available on a non-discriminatory basis; the statute should specifically authorize this practice, which would be important in the case of operation of a satellite by one or more news media entities.

The change in paragraph (3) of the subsection would recognize that termination of satellite operations, which could include transfer to another private entity, is a matter for decision through normal non-political, administrative channels, subject to administrative and constitutional due process protections, and is not a proper subject for Presidential fiat.

The government should have no greater right to non-discriminatory access than any other purchaser of remote-sensing data, and hence the clarification in paragraph (4) of the subsection that the Secretary may order the unenhanced data "at normal charges".

The ability of the government to recognize threats to national security and seek injunctive relief in the courts (under another proposed amendment here) depends on the government's ability to obtain "complete orbit and data collection characteristics of the system," as called for in the current law.

The government would not, however, have a need in that context, or the right under First Amendment law, to require news-collecting organizations to seek advance approval of orbits; hence, the later requirement in the current law is to be deleted.

Paragraphs (7), (8) and (9) of the subsection are antithetical to the concept of a private, free-enterprise information system protected by the First and Fourth Amendments. Other provisions of the Act, as modified by other proposals here, would assure adequate authority in the government to deal with serious threats to national security and international obligations.

3. Section 4243 - Administrative authority of the Secretary;
review of adverse action on license application;
judicial review of final actions

Amend the title of the subsection to add: "; injunctive relief"

Amend subsection (a) by

(1) adding at the end of the opening clause: ", insofar as consistent with applicable law,";

(2) deleting from paragraph (1) the phrase ",on an immediate basis,";

(3) deleting paragraph (2);

(4) deleting paragraph (6); and

(5) deleting the period and adding the following at the end of current paragraph (7): ", subject to limiting statutory, constitutional and other evidentiary privileges and rules;"

(6) adding a new paragraph (6) as follows: "(6) apply to a United States District Court for a temporary restraining order or injunction to prevent serious and imminent injury to a distinct and compelling national security interest of the United States, or to prevent a serious and imminent violation of a valid international treaty obligation of the United States."

Amend subsection (b) by

(1) deleting "(1), (a)(3), or (a)(6)," following the phrase "pursuant to subsection (a)";

(2) adding the phrase ", with written findings and conclusions," after the phrase "on the record";

(3) adding the word "for" after the phrase "after an opportunity".

Explanation

The changes in Section 4243 are proposed to eliminate the pervasive, invasive and unconstitutional supervision and control which the Secretary is empowered to exercise under the Act. Other existing law is to the contrary of this Act's grant of unqualified powers to the Secretary. See, e.g., the Privacy Protection Act of 1980, 42 U.S.C. 2000aa, which is a well-considered policy determination by the Congress to give news-gatherers additional protection from searches and seizures. Under the section as amended, the Secretary would be deprived of a power to take "immediate" action in terminating, suspending or further conditioning licenses, because a system of administrative appeal, with decisions based on hearing records and written findings and

conclusions, together with judicial review (as well as injunctive relief as proposed here), is preferable policy and is constitutionally required.

4. Section 4277 - Consultation

Amend subsection (a), the second sentence, to delete the word "determining" and substitute therefor the word "recommending".

Amend subsection (b), the second sentence, to delete the word "determining" and substitute therefor the word "recommending".

Explanation

The Secretary of Defense and the Secretary of State are understandably to be consulted on matters within their areas of special knowledge. Nevertheless, the Secretary of Commerce, as the person with responsibility for the licensing of private remote sensing systems, should have the ultimate authority for making a balanced decision about the need for specific national security and treaty-required conditions on licenses. The final and comprehensive decision by the Secretary of Commerce, based on reasons stated in writing, will be the decision reviewable by the courts.

Proposed

SUBCHAPTER IV - LICENSING OF PRIVATE
REMOTE-SENSING SPACE SYSTEMS

§ 4241. General authority

- (a) Licensing private sector parties; authority of Secretary; limitations

(1) In consultation with other appropriate Federal agencies, the Secretary is authorized to license private sector parties to operate private remote-sensing space systems for such period as the Secretary may specify and in accordance with the provisions of this subchapter.

(2) In the case of a private space system that is used for remote sensing and other purposes, the authority of the Secretary under this subchapter shall be limited only to the remote-sensing operations of such space system.

- (b) Grant of license; conditions

No license shall be granted by the Secretary unless the Secretary determines in writing that the applicant will comply with the requirements of this chapter~~[7]~~ and any regulations issued pursuant to this chapter.~~[7, and any applicable international obligations and national security concerns of the United States.]~~

- (c) Review of applications by Secretary

The Secretary shall review any application and make a determination thereon within one hundred and twenty days of the receipt of such application. If final action has not occurred within such time, the Secretary shall inform the applicant of any pending issues and of actions required to resolve them.

- (d) Denial of licenses; Secretary to refrain from denying to protect licensees from competition

The Secretary shall not deny such license in order to protect any existing licensee from competition.

§ 4242. Licensing requirements for operation

- (a) No person who is subject to the jurisdiction or control of the United States may, directly or through any subsidiary or affiliate, operate any private remote-sensing space system without a license pursuant to section 4241 of this title.

(b) Any license issued pursuant to this subchapter shall specify[~~, at a minimum,~~] that the licensee shall comply with all of the requirements of this chapter and shall --

(1) operate the system in such manner as to preserve [~~and promote~~] the national security of the United States and to observe [~~and implement~~] the international obligations of the United States in accordance with the Secretary's valid orders pursuant to sections 4243 and 4277 of this title;

(2) make unenhanced data available to all potential users on a nondiscriminatory basis, but this paragraph shall not be construed to prohibit a licensee from publishing remote-sensing imagery before making the unenhanced data commercially available promptly thereafter on nondiscriminatory terms;

(3) upon termination of operations under the license, make disposition of any satellites in space in a manner [~~satisfactory to the President~~] consistent with the provisions of this subchapter, upon the approval of the Secretary;

(4) promptly make available at normal charges all unenhanced data which the Secretary may request pursuant to section 4272 of this title;

(5) furnish the Secretary with complete orbit and data collection characteristics of the system[~~, obtain advance approval of any intended deviation from such characteristics,~~] and inform the Secretary immediately of any unintended deviation;

(6) notify the Secretary of any agreement the licensee intends to enter with a foreign nation, entity, or consortium involving foreign nations or entities.[~~]~~

[~~(7) permit the inspection by the Secretary of the licensee's equipment, facilities, and financial records;~~

[~~(8) surrender the license and terminate operations upon notification by the Secretary pursuant to section 4243(a)(1) of this title; and~~

[~~(9)(A) notify the Secretary of any "value added" activities (as defined by the Secretary by regulation) that will be conducted by the licensee or by a subsidiary or affiliate; and~~

[~~(B) if such activities are to be conducted, provide the Secretary with a plan for compliance with the provisions of this chapter concerning nondiscriminatory access.]~~

§ 4243 Administrative authority of the Secretary; review of adverse action on license application; judicial review of final actions; injunctive relief

(a) In order to carry out the responsibilities specified in this title, the Secretary may, insofar as consistent with applicable law, --

(1) grant, terminate, modify, condition, transfer, or suspend licenses under this subchapter, [~~and upon notification of the licensee may terminate licensed operations on an immediate basis,~~] if the Secretary determines that the licensee has substantially failed to comply with any provision of this chapter, with any regulation issued under this chapter, with any terms, conditions, or restrictions of such license, or with any international obligations or national security concerns of the United States;

~~[(2) inspect the equipment, facilities, or financial records of any licensee under this subchapter;]~~

~~[(3)]~~(2) provide penalties for noncompliance with the requirements of licenses or regulations issued under this subchapter, including civil penalties not to exceed \$10,000 (each day of operation in violation of such licenses or regulations constituting a separate violation);

~~[(4)]~~(3) compromise, modify, or remit any such civil penalty;

~~[(5)]~~(4) issue subpoenas for any materials, documents, or records, or for the attendance and testimony of witnesses for the purpose of conducting a hearing under this section;

~~[(6) seize any object, record, or report where there is probable cause to believe that such object, record, or report was used, is being used, or is likely to be used in violation of this chapter or the requirements of a license or regulation issued thereunder; and]~~

~~[(7)]~~(5) make investigations and inquiries and administer to or take from any person an oath, affirmation, or affidavit concerning any matter relating to the enforcement of this chapter, subject to limiting statutory, constitutional and other evidentiary privileges and rules; and

(6) apply to a United States District Court for a temporary restraining order or injunction to prevent serious and imminent injury to a distinct and compelling national security interest of the United States, or to prevent a

serious and imminent violation of a valid international treaty obligation of the United States.

(b) Any applicant or licensee who makes a timely request for review of an adverse action pursuant to subsection (a)[~~(1)~~, (a)(3), or (a)(6)], of this section shall be entitled to adjudication by the Secretary on the record, with written findings and conclusions, after an opportunity for an agency hearing with respect to such adverse action. Any final action by the Secretary under this subchapter shall be subject to judicial review under chapter 7 of Title 5.

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SUBCHAPTER VI -- GENERAL PROVISIONS

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§ 4277. Consultation

(a) Consultation with Secretary of Defense on national security matters

The Secretary shall consult with the Secretary of Defense on all matters under this chapter affecting national security. The Secretary of Defense shall be responsible for [~~determining~~] recommending those conditions, consistent with this chapter, necessary to meet national security concerns of the United States and for notifying the Secretary promptly of such conditions.

(b) Consultation with Secretary of State on international obligations

(1) The Secretary shall consult with the Secretary of State on all matters under this chapter affecting international obligations. The Secretary of State shall be responsible for [~~determining~~] recommending those conditions, consistent with this chapter, necessary to meet international obligations and policies of the United States and for notifying the Secretary promptly of such conditions.

(2) Appropriate Federal agencies are authorized and encouraged to provide remote-sensing data, technology, and training to developing nations as a component of programs of international aid.

(3) The Secretary of State shall promptly report to the Secretary any instances outside the United States of discriminatory distribution of data.

(c) Reimbursement of system operators for certain costs

If, as a result of technical modifications imposed on a system operator on the basis of national security concerns, the Secretary, in consultation with the Secretary of Defense or with other Federal agencies, determines that additional costs will be incurred by the system operator, or that past development costs (including the cost of capital) will not be recovered by the system operator, the Secretary may require the agency or agencies requesting such technical modifications to reimburse the system operator for such additional or development costs, but not for anticipated profits. Reimbursement may cover costs associated with required changes in system performance, but not costs ordinarily associated with doing business abroad.