> sweepers, 3 light cruisers, 17 destroyers. Ships in Dock were: 4 light cruisers, 2 destroyers. Heavy cruisers and carriers have all left. (2) It appears that no air reconnaissance is being conducted by the fleet arm.[311]

In the early morning of December 7, the War Department in Washington intercepted and decoded a message from Tokyo to the Japanese Embassy. Secretary of War George Marshall composed a message to be transmitted immediately to Honolulu:

> Japanese are presenting at one p.m. Eastern Standard Time today what amounts to an ultimatum also they are under orders to destroy their code machine immediately Stop. Just what significance the hour set may have we do not know but be on alert accordingly Stop.[312]

Early morning interference prevented the War Department's 10-kilowatt transmitter from establishing a circuit to Honolulu. So Marshall sent the message by Western Union to San Francisco, where it was relayed by RCA over its 40-kilowatt transmitter to Hawaii. The message had taken fifty-two minutes to transmit from Washington to Honolulu and arrived at 7:33 A.M., when the first Japanese bombers were 37 miles away.[313] RCA's operator put the message in an envelope, scheduled for hand delivery, marked "Commanding General." Within minutes, the attack began. Three hours after the last Japanese bomber had left Hawaii, the decoded message was finally presented to General Walter Short, who threw it in the waste basket.[314]

After World War I, the Navy had created RCA to

311. *Id.* at 13.
312. *Id.* at 60.
313. *Id.* at 61.
314. *Id.* at 64–65.

protect against the foreign influence in wireless that the admirals feared would tip the balance of naval power against the U.S. By midday on December 7, 1941, the Imperial Japanese Navy had crippled America's Pacific fleet, relying on intelligence routinely sent by RCA Radiogram from Japan's spy in Honolulu. The War Department's own network for radio communications had failed to protect the Navy at the critical moment, and the U.S. government was reduced to sending the Secretary of War's warning by Radiogram. Foreign ownership of wireless had played no role in the gravest breach of national security in American history.

CONCLUSION

From 1934 to 1995, national security has been the only enunciated rational that can be found in the legislative history for the foreign ownership restrictions in the Communications Act. The actual experience with the restrictions, however, raises substantial doubt that they have ever been an efficacious means of achieving the security objectives for which they were conceived. Moreover, it is far from clear that the U.S. government had in 1934, or has today, the ability to control the natural implications of telecommunications and information technologies—technologies of which early radio was merely a crude forerunner. Today, in an era of satellite networks and Internet cyberspace, the technologies of communications have surpassed the government's ability to control them. More and more, when we take regulatory aim at these technologies, we find ourself shooting at bogeymen that are only abstractly understood and described by such terms as the "ether," the "spectrum," and the "net."

In trying to regulate technologies that exist in such netherworlds, we endeavor to play a game that changes with the regulator's every move. In the case of radio, the need to take licenses away from foreigners during World War I arose from the fact that an extraordinary confluence of world conflict and technological advances in naval warfare had made wireless unusually powerful in shifting the balance in the European war. The proximate cause of the security problem, however, was not that aliens were licensed to use radio. A number of other decisions by President Wilson and his administration had a far more immediate effect on the national security.

If the aliens operating the Sayville station had violated President Wilson's neutrality order, they should have been swiftly prosecuted for their offenses and prevented from repeating them. In fact, they were not arrested until 1917. Further, section 2 of the Radio Act of 1912 authorized Wilson not only to shut down any radio station "in time of war," but also to do so "in time of . . . public peril or disaster."[315] If aliens on Long Island were indeed transmitting information about ship movements to U-boats, then Wilson himself could have prevented at least some of the destruction of life and property in 1915 and 1916 by invoking his existing statutory power nearly two years sooner than he did, rather than permitting the German-controlled Sayville station to operate under Navy censorship.

By 1917, Wilson's embarrassment with the Zimmermann Telegram demonstrated that wireline communications could jeopardize U.S. national security just as much as wireless communications. Increasingly, the military potential of telecommunications depended upon the sophistication of its encryption techniques. Yet, the Communications Act of 1934 did not begin to restrict a foreigner's ability to send encoded messages over the radio frequencies licensed to an American common carrier. The threat to national security had shifted from the identity of the electronic messenger to the imperviousness of the messages he carried for others.

In the years after the surprise attack on Port Arthur in 1904, the U.S. Navy recognized the military significance of

315. 37 Stat. 302, § 2 (1912).

wireless. But the ultimate irony awaited those in the Navy who believed that the foreign ownership restrictions enacted in 1927 and 1934 made their battleships more secure against enemy powers. In December 1941, Japan's fleet steamed undetected toward Hawaii under a radio blackout with orders to replay Port Arthur, this time with a new technology as devastating as the U-boats of 1914—bombers and torpedo-carrying fighters launched from aircraft carriers. On the eve of the attack, the Japanese consulate in Honolulu burned its code books and transmitted its last communiqué to Tokyo, not by way of some clandestine wireless station, but by an encoded RCA Radiogram. Meanwhile, the newly amended foreign ownership restrictions stood vigilant against a risk that technology had rendered obsolete.

3

3

The Statute

THE FCC HAS CONSISTENTLY misread the most important foreign ownership provision in the Communications Act. To understand how this misinterpretation could arise, we now examine the language and scope of section 310(b). We also examine that section's relationship to other provisions in the Communications Act and other statutes that concern foreign direct investment in U.S. telecommunications.

STATUTORY TEXT

Section 310(b) of the Communications Act restricts foreign ownership or management of four kinds of FCC radio licensees: "No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representatives thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a federal government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license."[1]

1. 47 U.S.C. § 310(b). Although broadcast and common carrier licenses are familiar, the two aeronautical licenses mentioned in section 310(b) are relatively unfamiliar. "Aeronautical en route stations provide air-ground communications for the operational control (flight management) of aircraft by their owners or operators. Communications relate to the safe and efficient operation of aircraft . . . . En route stations are the means by which companies satisfy Federal Aviation Administration requirements to maintain reliable communications between each aircraft and its dispatch office, in the case of large airlines, or maintain flight following systems, in the case of small airlines and commercial aircraft operators. Aeronautical fixed stations provide point to point communications pertaining to safety, regularity and economy of flight." Market Entry and Regulation of Foreign-affiliated Entities, Notice of Proposed Rulemaking, IB Dkt. No. 95-22, 10 F.C.C. Rcd. 5256, 5296 ¶ 97 & n.82 (1995) [hereinafter *Market Entry and Regulation*].

It might appear that the restrictions on alien ownership or management are increasingly permissive the more removed the alien ownership or management is from the actual licensed facility. Alien individuals and alien corporations are flatly prohibited from directly holding licenses. Domestic corporate licensees are limited to 20 percent alien capital stock ownership and are prohibited from having any alien officers or directors. A parent corporation or holding company for domestic corporate licensees may have up to 25 percent alien capital stock ownership and 25 percent alien membership on its board of directors, although it still may not have any alien officers.[2] But this analysis ignores the fact that sections 310(b)(3) and 310(b)(4) regulate not only ownership, but also *control*.

The alien interests are additive and cumulative with respect to the FCC licensee. Each statutory limit in section 310(b) "refers to total, as opposed to individual, alien ownership interests in any one facility."[3] Thus, even if a foreign buyer of an American communications business were not violating the statutory restrictions in and of itself, it might do so in combination with the ownership interests of other foreign investors in the American firm.

This aspect of section 310(b) could conceivably create a race among alien buyers when a licensee wholly owned by Americans citizens is offered for sale. Particularly if the licensee is or will be a publicly traded corporation, a foreign bidder has an incentive to acquire as quickly as possible the "maximum" equity holding in the licensee (a slippery notion, as we shall see presently) that it ultimately might desire (for

2. "Section 310(b)(4) does not proscribe aliens becoming directors as long as at least 75% of the directors in a company that controls the licensee are United States citizens." McCaw Cellular Communications Inc., 4 F.C.C. Rcd. 3784, 3788 ¶ 30 (1989).

3. Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Report and Order, Dkt. No. 20521 *et al.*, 97 F.C.C.2d 997, 1009 ¶ 22 (1984) [hereinafter *Attribution of Ownership Interests*].

example, a full 20 percent holding directly in the licensee rather than, say, 15 percent); otherwise, subsequent equity acquisitions by a different alien buyer could foreclose the first alien from increasing his stake in the licensee. On the other hand, if the first alien bidder acquires the maximum equity holding under section 310(b), and if that statutory maximum is subsequently violated by an acquisition by a different alien, it seems reasonable to expect that the FCC would follow a last-in, first-out approach to mandatory divestiture.

SUBSEQUENT AMENDMENTS

Since 1934, Congress has made several changes in section 310(b). Some of these amendments weaken the intellectual case for retaining the remainder of section 310(b).

The first amendment, enacted in 1958, permits the FCC to license a radio station on an aircraft to an alien or the representative of a alien, provided that person holds a U.S. pilot certificate or a foreign aircraft pilot certificate that is valid in the U.S. on the basis of reciprocal agreements.[4] A 1974 amendment exempts safety, special, and experimental radio services from section 310(b),[5] so that "persons who use radio services as an incident to their business" would not be forced to go without radio communications if they lacked "the resources and skills necessary to establish subsidiary corporations" with which to comply with the foreign ownership restrictions.[6]

Several other amendments concern amateur radio. A 1964 amendment authorizes the FCC to permit an alien licensed by his government as a amateur radio operator to operate the station licensed by his government in the U.S., provided that a bilateral agreement exists between the U.S. and the alien's

4. Pub. L. No. 85-817, 72 Stat. 981 (1958).
5. Pub. L. No. 93-505, 88 Stat. 1576 (1974).
6. H.R. REP. NO. 1423, 93d Cong., 2d Sess. 2 (1974).

government giving similar rights to U.S. amateur radio operators, and provided further that the FCC notifies appropriate government agencies of any applications for authorizations, and that such agencies furnish to the FCC information bearing on the request's compatibility with U.S. national security.[7] A 1971 amendment permits the FCC to issue a license for amateur radio service to an alien who has been admitted to the U.S. for permanent residence, subject to similar requirements concerning notice and compatibility with national security.[8] The 1974 amendments also enacted the provision now designated as section 310(c), which authorizes the FCC "to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, . . . provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators."[9] Originally, this provision allowed only for bilateral reciprocity. But a 1990 amendment extends this right of aliens on a multilateral basis.[10]

The extensive liberalization of the foreign ownership restrictions for amateur radio licensees seriously undermines the credibility of one of the two traditional rationales for section 310(b)—namely, the putative need to prevent wireless communications with the enemy by subversive elements within the U.S. If it is possible to scrutinize the national security implications of licensing individual aliens, then surely it is possible to scrutinize the national security implications of licensing an alien corporation to hold more then 25 percent of a radio common carrier or broadcaster. On the other hand, if

7. Pub. L. No. 88-313, 78 Stat. 202, § 2 (1964).

8. Pub. L. No. 92-81, 85 Stat. 302, § 2 (1971).

9. Pub. L. No. 93-505, 88 Stat. 1576, § 2 (1974) (codified at 47 U.S.C. § 310(c)).

10. Act of Sept. 28, 1990, Pub. L. No. 101-396, 104 Stat. 850.

the national security scrutiny given alien individuals applying for amateur licenses is merely perfunctory, then the credibility of the national security rationale diminishes. Admittedly, the power and propagation characteristics of radio signals transmitted by an alien amateur radio operator in 1995 may be inferior to those of a television station or a provider of cellular telephony service. The fact remains nonetheless that the amateur radio stations so licensed would still have the capability to communicate with persons outside U.S. territory, and indeed those foreign licensees may have a considerably greater ability to do so today than did the German nationals who used state of the art technology in 1915 to communicate with the German fleet from their station on Long Island. It is remarkable that the national security rationale for section 310(b) continues to be cited when Congress in effect compromised, if not repudiated, that objective when it amended the Communications Act in 1971 and 1974 to permit the FCC to license foreign amateur radio operators.

Wireline Telephony

Various licenses and services are exempt from section 310(b). Aliens may hold licenses not enumerated in section 310(b). Section 310(b), in other words, is an exhaustive list and does not preclude a foreign bidder from being the transferee of other, unenumerated FCC licenses held by an American entity.

Most significantly, the foreign ownership restrictions do not extend to communications by wire. If a telephone company held no radio licenses, section 310(b) would not limit the extent to which a foreigner could invest in the company. (As discussed below, to commence common carrier service, the foreigner would still need to receive FCC authorization under section 214 of the Communications Act.[11])

11. 47 U.S.C. § 214.

As a practical matter, however, wireline telephone companies almost always employ some radio links that implicate section 310(b). Such was the case in 1992 in the acquisition of Telefónica Larga Distancia de Puerto Rico (TLD), the U.S. domestic and international long-distance carrier, by Telefónica de España.[12] As chapter 6, will explain in greater detail, Telefónica de España acquired more than 25 percent of the stock in TLD, but it did so by segregating TLD's wireline and radio common carrier activities and purchasing different percentages of each. We will examine in chapter 4 the generic business strategies that will enable a foreign investor to maximize his investment in an American telecommunications firm while complying with section 310(b).

CABLE TELEVISION

One presumably unintended consequence of the 1974 amendments to section 310(b) was to permit aliens to hold licenses for microwave radio stations in the cable television relay service. Although cable system operators were not directly covered by section 310, most became indirectly subject to the ownership restrictions by virtue of their use of microwave relay stations.

1976 Proposed Rulemaking

In 1976, the FCC considered and ultimately rejected a proposed rule that would have restricted foreign investment in the cable television industry.[13] This experience with cable television relay

12. Telefónica Larga Distancia de Puerto Rico, 8 F.C.C. Rcd. 106 (1992).

13. Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, Report and Order, Dkt. No. 20621, 59 F.C.C.2d 723 (1976) [hereinafter *Cable Television Citizenship Requirements*]. *See also* DANIEL L. BRENNER, MONROE E.

services two decades ago is instructive because many of the same arguments raised then are heard today in the debate over whether and how to liberalize section 310(b).

In its Report and Order, the FCC gave several reasons for its determination that ownership restrictions were not warranted at that time. First, the agency observed that foreign investment in cable was quite limited.[14] Next, it distinguished cable operators from broadcasters on the ground that, although cable operators could produce original programming, such operators lacked the "totality" of program content control typical of broadcasting in 1976.[15] Two decades later, of course, such a distinction is utterly nonexistent: The largest cable television systems operators, TCI and Time Warner, are in 1995 far more vertically integrated into program production and distribution than is the typical television broadcast licensee subject to section 310(b).[16]

The FCC further reasoned in 1976 that "[a]lien ownership restrictions do not apply to communicators generally, to newspapers, wire news services, non-license radio and television networks, film and television producers, cable system networks and channel lessees, and it is not clear that they should apply to a system operator solely because of his potential ability to influence, through his program origination efforts, the ideas and attitudes of cable subscribers."[17] The agency also deemed foreign ownership to present little threat to national security because "[t]housands of different systems are operated across the United States, most diverse in their operators and each individually responsible to the communities that have

PRICE & MICHAEL I. MEYERSON, CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY § 4.04[3] (Clark Boardman Callaghan rev. ed. 1995).

14. *Cable Television Citizenship Requirements*, 59 F.C.C.2d at 726 ¶ 9.

15. *Id.* at 727 ¶ 9.

16. *See* David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 FED. COMM. L.J. 511 (1995).

17. *Cable Television Citizenship Requirements*, 59 F.C.C.2d at 727 ¶ 9.

selected and franchised their operations."[18] "It is these local jurisdictions," the FCC reasoned, "that are initially in the best position to determine whether or not an individual operator's nationality will prevent him from satisfying his 'public interest' obligations."[19]

The FCC did not base its decision solely on the conclusion that no *harm* would arise from not extending section 310(b) to cable television. It also recognized explicitly the *benefit* of foreign investment in developing new telecommunications technologies:

> The Commission further believes that citizenship prohibitions may in some measure deter the development of cable television in the United States. Although it is hoped that the industry will continue to find sources of domestic capital to fund its growth, it remains at this time relatively undeveloped and in need of new sources of capital and technology to continue its development. Foreign interests, if permitted, could contribute to this development. *The Commission, we believe, ought not deny these resources to cable without overriding reasons of national importance. In the absence of a demonstrable harm and where benefits may result, the Commission is inclined to allow free market forces to determine the direction of capital flow within the industry.* The proposed restrictions have been termed, in the comments, a "cure for which there is no disease." The slight evidence accumulated regarding cable systems owned by aliens seems to bear this out,

18. *Id.*
19. *Id.*

for now.[20]

As we shall see in chapter 7, the FCC's own reasoning in 1976 for not extending foreign ownership restrictions to cable provides the most succinct and compelling argument two decades later for liberalizing foreign direct investment in telecommunications generally rather than using section 310(b) as tool of U.S. trade policy.

Out of an abundance of caution, the FCC in its 1976 cable decision cautioned that it would continue to monitor the extent of foreign investment in the cable television industry and that changed circumstances could justify ownership restrictions in the future.[21] The agency declined to address public comments arguing that it had no jurisdiction to adopt foreign ownership restrictions for cable television operators.[22] The FCC suggested without elaboration that its general statutory responsibilities for radio authorizations and regulation of cable television provided that authority.[23]

1980 Petition for Rulemaking

In 1980, as a result of increasing Canadian investment in the U.S. cable television industry, the FCC again considered the question of foreign ownership.[24] An Illinois cable system proposed that the FCC promulgate a rule that would have provided that "no cable television system . . . shall carry the signal of any television broadcast station or any programming

20. *Id.* at 727 ¶ 10 (emphasis added).
21. *Id.* at 727 ¶ 11.
22. *Id.* at 728 ¶ 12.
23. *Id.* at 728 n.10.
24. Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, Memorandum Opinion and Order, 77 F.C.C.2d 73 (1980) [hereinafter *Foreign Ownership of CATV Systems*].

delivered by a radio facility licensed by the Commission if it is owned, operated or leased, by" a person subject to section 310(b).[25] The rule, of course, would have had the effect of severely restricting alien ownership of U.S. cable systems.

The cable system's rationale for such regulation was a candid blend of protectionism for American firms and greater content control for regulators. As summarized by the FCC, the U.S. cable industry's reasons for seeking regulation were

> that the amount of foreign ownership has greatly increased since the Commission last considered this issue [in 1976], that it would be "unfortunate" if U.S. cable operators are unable to operate in a considerable number of major markets because alien interests who did not invest in cable systems earlier are now able to call on foreign sources of funds to acquire many of the most desirable franchises in this country, and that cable systems now have a considerable amount of discretion in the programming carried so that the considerations here are very like those applicable to broadcasting where alien interests are severely limited and alien control totally banned.[26]

Another company endorsing the proposed rule argued that "foreign capital is not needed to support domestic cable development,"[27] and the National Cable Television Association explicitly advocated that the FCC adopt a principal of reciprocity:

> When one foreign government pursues a policy

25. *Id.* at 74 ¶ 2.
26. *Id.* at 75 ¶ 5.
27. *Id.* at 75 ¶ 6.

> of discrimination and restriction regarding U.S. commercial interests, the agencies and establishments of the United States are empowered to impose reciprocal limitations. Such limitations are not aimed at punishing foreign nationals or restricting foreign commerce. They are intended to expand international commerce by inducing the elimination of barriers to it.[28]

The parties opposed to these proposed restrictions, which largely consisted of U.S. cable systems with Canadian investors, argued that "the amount of foreign ownership that now exists or is likely to exist in the future is insignificant and that the amount of power that cable system operators have to control the content of programming which is provided to their subscribers is minimal."[29] They noted that the Canadian owners at issue were "from a country with close and friendly ties to the United States."[30] They further argued that these companies would benefit American consumers by increasing competition in the U.S.[31] And they argued (probably incorrectly as a matter of constitutional law, as we shall see presently) that municipalities were competent to address the question of foreign ownership in their franchising process.[32]

The Canadian investors attacked the principal of reciprocity on three grounds. First, they argued that "national policy favors the free flow of investment between countries" and that "the FCC is not an appropriate body to either alter that policy or to consider matters relating to international trade and

28. *Id.* at 76 ¶ 6.
29. *Id.* at 77 ¶ 8.
30. *Id.*
31. *Id.*
32. *Id.*

international relations."[33] Second, and less persuasively, they argued that Canada's restrictions on cable television ownership could not be compared to those being proposed for the U.S. because foreign companies dominated the industry in Canada.[34] Third, the FCC would exceed its powers by concerning itself with questions of foreign commerce rather than the question of whether the cable television service provided in the U.S. served the public interest.[35]

The FCC rejected the petition and reaffirmed its 1976 position that section 310 should not be read "as reflecting a general policy against foreign investment in communications enterprises in the United States."[36] The agency began its discussion by firmly rejecting the idea that it should act on the principle of reciprocity to encourage foreign governments, particularly Canada, to open their markets to investment by U.S. companies:

> The Commission's responsibilities relate to "interstate and foreign communications" (47 U.S.C. 1), that is to telecommunications within the United States and between the United States and foreign countries. This does not imply, however, any responsibility for investment policy with respect to communications systems in foreign countries. *We do not believe a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part.* Nor are we, in any case, in a position to know if such a policy on our part would in fact have the result intended or if, to the contrary, it would lead to increasing trade

33. *Id.* at 77 ¶ 9.
34. *Id.*
35. *Id.*
36. *Id.* at 81 ¶ 20.

> barriers in other areas.[37]

In any event, the agency concluded, without specific direction from Congress, it "is obviously a matter that does not come within the sphere of the ordinary concerns of this Commission."[38] The regulation of foreign direct investment "is a matter which we believe is appropriately considered by other branches of the government."[39]

The FCC further found that, although there clearly had been changes since the FCC considered the issue in 1976, "[t]hese changes do not persuade us . . . that additional restrictions are needed"[40] in light of the fact that the increase in the total number of foreign-owned cable systems was relatively insignificant. Moreover, the agency noted, a restrictive ownership rule would likely harm consumers:

> At this time it is difficult for us to perceive how the television viewing public would benefit in any way from the regulation requested. Rather it would appear that such a restriction would merely promote the self interests of the domestic cable television industry at the expense of additional competitive alternatives for the public in the franchising process.[41]

The FCC emphasized that "the primary responsibility for selecting cable television system operators is not the Commission's."[42] Rather, the agency explained, no foreign-owned cable system may operate in any community without a

37. *Id.* at 79 ¶ 13 (emphasis added).
38. *Id.*
39. *Id.*
40. *Id.* at 80 ¶ 18.
41. *Id.*
42. *Id.* at 80 ¶ 19.

franchise granted by state or local government.[43] The FCC saw no reason why the question of whether a foreign company should be offered a franchise could not be decided by state and local governments on a case-by-case basis. While noting that cable operators in 1980 did exercise more editorial control over programming than in 1976, the FCC rejected as "highly speculative" the assertion that local controls could not avert threats to domestic interests.[44]

The FCC also reaffirmed its 1976 conclusion that section 310 did not require the agency to adopt a rule restricting alien ownership of cable systems, for cable television was neither broadcasting nor a common carrier radio service.[45] Nonetheless, the FCC, again with belt and suspenders fastened, reiterated its 1976 promise to keep monitoring the situation and, if circumstances took a turn for the worse, to restrict alien ownership of cable systems in the future.[46]

Implications of the 1984 and 1992 Cable Legislation

At the time of its 1980 ruling, the FCC was perceived to enjoy extraordinarily broad jurisdiction over cable.[47] Both the reality and perception have since changed. The Cable Communications Policy Act of 1984[48] divided authority over cable television between the FCC and state and local authorities.[49] The statute specifies: "Any Federal agency, State or franchising authority may not impose requirements regarding the provision or content

43. *Id.*
44. *Id.* at 81 ¶ 19.
45. *Id.*
46. *Id.* at 81 ¶ 21 & n.9.
47. BRENNER, PRICE & MEYERSON, *supra* note 11, §§ 2.03, 2.04.
48. Pub. L. No. 98-549, 98 Stat. 2779.
49. 47 U.S.C. § 521(3).

of cable services, except as expressly provided."[50] Thus, powers that Congress did not expressly grant should be considered denied. The 1984 act authorizes the FCC to enact rules restricting ownership of cable systems by "persons who own other media of mass communications which serve the same community."[51] But the statute does not restrict foreign ownership of cable systems or authorize the FCC to promulgate rules that would do so.

In 1992, Congress rewrote the law regulating cable television;[52] yet, as one of the leading sponsors of that legislation noted, failed to override the FCC's decision not to subject cable to section 310(b).[53] Representative Markey, then powerful chairman of the Telecommunications Subcommittee of the House Energy and Commerce Committee, strongly urged that Congress make restrictions on foreign ownership of cable systems a part of the 1992 Cable Act.[54] The amendment would have restricted foreign ownership of cable, direct broadcast satellite (DBS), "wireless cable," and other video distribution services.[55] The bill would have amended section 310(b) by

50. *Id.* § 544(f).

51. 47 U.S.C. § 533(c).

52. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

53. Edward J. Markey, *Telecommunications and Financial Services Trade Hangs on NAFTA Thread*, 1 SAN DIEGO JUSTICE J. 281, 283 (1993).

54. "I rise in strong opposition to the amendment . . . to H.R. 4850 by . . . [Mr. Lent]. [T]he Lent substitute leaves cable systems vulnerable to takeover by foreign entities. It preserves a giant loophole in our existing telecommunications law that permits foreign ownership of cable television systems, direct broadcast satellite systems, and other new video distribution technologies while prohibiting foreign ownership of telephone and broadcasting companies. There is surely no reason for us to invite a breakdown of nearly 60 years of sound and consistent telecommunications policy, or to permit foreign ownership or domination of the next generation of telecommunications technologies." 138 CONG. REC. H6558 (daily ed. July 23, 1992) (statement of Rep. Markey).

55. The bill's preamble contained the following findings:

adding at the end of it the following new paragraphs:

> (2)(A) No cable system (as such term is defined in section 602) in the United States shall be owned or otherwise controlled by any alien, representative, or corporation described in subparagraph (A), (B), (C), or (D) of paragraph (1) of this subsection.
>
> (B) Subparagraph (A) of this paragraph shall not be applied—
>
> (i) to require any such alien, representative, or corporation to sell or dispose of any ownership interest held or contracted for

(a) Findings. — The Congress finds that —

(1) restrictions on alien or foreign ownership of broadcasting and common carriers first were enacted by Congress in the Radio Act of 1912;

(2) cable television service currently is available to more than 90 percent of American households, more than 62 percent of American households subscribe to such services, and the majority of viewers rely on cable as the conduit through which they receive terrestrial broadcast signals;

(3) many Americans receive a significant portion of their daily news, information, and entertainment programming from cable television systems, and such systems should not be controlled by foreign entities; and

(4) the policy justifications underlying restrictions on alien ownership of broadcast or common carrier licenses have equal application to alien ownership of cable television systems, direct broadcast satellite systems, and multipoint distribution services.

H.R. 4850, 102d Cong., 2d Sess. (1992).

on or before June 1, 1990, or acquired in accordance with clause (ii); or

(ii) to prohibit any such alien, representative, or corporation that owns, has contracted on or before June 1, 1990, to acquire ownership, or otherwise controls, any cable system from acquiring ownership or control of additional cable systems if the total number of households passed by all the cable systems that such alien, representative, or corporation would, as a result of such acquisition, own or control does not exceed 2,000,000.

(3)(A) For purposes of paragraph (1) of this subsection, a license or authorization for any of the following services shall be deemed to be a broadcast station license:

(i) cable auxiliary relay services;

(ii) multipoint distribution services;

(iii) direct broadcast satellite services; and

(iv) other services the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(B) Subparagraph (A) of this paragraph shall not be applied to any cable operator to the extent that such operator is eligible for the exemptions contained in subparagraph (B) of paragraph (2).[56]

The Bush administration strongly opposed Representative Markey's bill on the grounds that it would invite retaliation by other nations, violate existing trade agreements, and endanger negotiations to open foreign markets to U.S. telecommunications firms.[57] The proposed measure was adopted by the House, but the Senate rejected it; in the face of President Bush's veto threat, the section was not adopted in conference.[57]

Representative Markey's unsuccessful attempts to extend section 310(b) to cable television and new wireless broadband services makes clear that the FCC today has no authority to promulgate rules restricting the ownership of cable systems by foreigners. The Communications Act, as amended by the 1992 cable legislation, also does not expressly empower local governments to consider foreign ownership as a factor in franchise proceedings.[58] In the absence of having received an explicit grant from Congress, municipalities should be deemed to have been denied such power.

Although many aspects of the franchise process are committed to the discretion of the municipality, the Communications Act limits the franchise authority's power to consider program content in franchise proceedings. The franchise authority may not include requirements for video programming or information services, although it may enforce

56. *Id.*

57. "Such a restriction invites retaliation by other countries and violates existing international obligations. It could stifle the growing investment of U.S. firms in foreign cable systems. It also threatens negotiations to: (1) eliminate the use of trade restrictions by other countries, and (2) open foreign government procurement to U.S. telecommunications products and services, an area in which the U.S. is in an increasingly strong position." 138 CONG. REC. H6487 (daily ed. July 23, 1992) (Statement of Administration Policy, Executive Office of the President, Office of Management and Budget).

57. *See* 138 CONG REC. H8335 (daily ed. Sept. 14, 1992).

58. 47 U.S.C. § 544(f).

requirements for broad categories of video programming.[59] And, in renewal proceedings, the franchise authority may consider only the "mix, quality or level of cable services."[60] It would arguably constitute censorship in violation of these provisions (as well as the First Amendment) for a franchise authority to refuse to franchise a cable system because it was foreign-owned—that is, because of the speaker's identity. Concerns over national security or the transmission of propaganda would not provide a municipality a credible basis for refusing to franchise a foreign-owned cable system, as Congress rather than the states or their subdivisions has responsibility under the Constitution for addressing such concerns.[61] The same would be true if a local government refused a franchise to a foreign-owned cable system because of concerns with trade policy, as such action would intrude on the plenary powers of Congress to regulate foreign commerce.[62] Moreover, if challenged on equal protection grounds, any discriminatory classification of aliens in the franchising of cable systems by local governments would be reviewed under strict scrutiny—and consequently would be highly susceptible to being struck down as unconstitutional.[63]

59. *Id.* § 544(b).

60. *Id.* § 546(c)(1).

61. *See, e.g.*, Perpich *v.* Dep't of Defense, 496 U.S. 334 (1990) (construing Congress' command over National Guard).

62. "It is an essential attribute of [the power of Congress to regulate foreign commerce] that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action . . . . The principle of duality in our system of government does not touch the authority of Congress in the regulation of foreign commerce." Board of Trustees of the Univ. of Ill. *v.* United States, 289 U.S. 48, 56 (1933).

63. State statutes that classify individuals on the basis of alienage are generally reviewed under the Equal Protection Clause of the Fourteenth Amendment using strict scrutiny. Graham *v.* Richardson, 403 U.S. 365 (1971). Such statutes are upheld only if they are necessary to achieve a compelling state interest. *Id.* at 371–72. *See also* Sugarman *v.* Dougall, 413 U.S. 634, 642 (1973); *In re* Griffiths, 413 U.S. 717 (1973); Examining Bd. of Engineers *v.*