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THE FCC's ROLE IN TELEVISION PROGRAMMING REGULATION

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IT IS A PLEASURE to be here and to have an opportunity to participate in this consideration of what I, at least, believe to be a most important public question. I think the real issue is how well the system of privately owned but publicly regulated broadcasting which Congress has provided for — or at least permitted to develop — is working in these troubled times. Some people might say that this is not an important issue because television entertainment is trivial, its news inadequate, and its public affairs programming infrequent, shallow, and timid. I do not believe that is a fair appraisal of television today — but even if it were, the issue would still be vital because I think the unrealized potential of television is so great that we would have to address the question of improving its performance.

The basic drive of our system — except for its increasingly important, but still impecunious, educational segment — is profit. The underlying theory of the congressional approach is that the competition of the owners of broadcast stations will tend to produce a service that is in the public interest — and that any shortcomings will be corrected by government regulation. As I shall suggest later on, I think there are problems with both halves of this proposition and as a result, we are not getting the kind of television service the country needs and is entitled to receive.

With this brief setting of the stage, I would like to touch on a number of the items in the very thoughtful outline furnished us in advance of this meeting. The questions posed fall into two broad categories: (a) considerations of diversity and program balance, and (b) the presentation of controversial issues. The first deals with the entire range of television programming, the second with one small but very important part of the overall program service.

We were asked first to consider the matter of requiring program balance in terms of the constitutionality, the desirability, and the effectiveness of the FCC's activities in this area. I think this tends to assume that the FCC has, in fact, a policy requiring television stations to present balanced programming. I don't think this is true in any real sense. It is true that our forms still ask the applicant how much time he has devoted, or proposes to devote, to news and public affairs programming and to a catchall category including religious, instruc-

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tional, and agricultural programming. I suppose this implies an expectation that the Commission expects *some* programming in each of these categories — and, indeed, the more vocal and extreme defenders of complete freedom for broadcasters contend that the mere existence of the forms and their inclusion of such questions violate their rights of free speech. However, no one has ever been so foolhardy as to challenge our forms — and I do not think such a contention would get very far with the Courts, which are quite familiar with the general nature of the forms.

So there is some suggestion that a television station should carry something other than entertainment and sports — but no one can tell you how much of these balancing program types must be carried, simply because the FCC has no such requirements. While most stations do continue to propose at least vestigial programming in the three more serious categories which the Commission is alleged to favor, some radio stations, at least, have won renewal although they offered *no* news or *no* public affairs or *no* programming in the tripartite catchall category — and many more offer next to nothing. It is a little hard, it seems to me, to find a "requirement" of programming balance in all of this.

The nearest thing to minimum standards in use at the Commission is to be found in the processing guidelines which Commissioner Johnson and I proposed that the Commission adopt last May and which we use as a basis for our recurring dissents to the routine renewal of nearly all the stations in each bi-monthly group. Our position is that further study should be made of any station which proposes to devote less than 5% of its time to news, less than 1% to public affairs, and/or less than 5% to public affairs and "other" programming. We do not hold that such a proposal can not serve as the basis for a grant of renewal, but only that some special showing should be required to justify such minimal offerings.

But let us consider whether such a standard — inadequate though it may be — would be constitutional if adopted and applied by the Commission. It seems to me that it would meet any reasonable constitutional standard. In other words, I do not think that it would constitute either censorship over radio communications or interference with the right of free speech by radio;[1] nor would it, in my judg-

1. Both censorship and interference with the right of free speech are barred by § 326 of the Communications Act:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications . . . and no regulation . . . shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1964).

ment, abridge the broadcaster's freedom of speech guaranteed by the first amendment. In the first place, the guaranty of free speech is not absolute. One may not claim constitutional protection for obscenity, libel, or incitement to riot, whether he is speaking from a soap box in a park or over the facilities of a television station. Furthermore, there are additional rules which can be applied to one who has sought and obtained the privilege of using a scarce public frequency for his own profit or aggrandizement.

Thus denial of an application for a broadcast station does not violate the applicant's right of free speech, even though by government action he is totally barred from speaking by means of radio or television. In *National Broadcasting Co. v. United States,*[2] the Supreme Court said that

> The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, is valid under the Act, is not a denial of free speech.

It is equally clear that a successful applicant is not given a frequency solely for his own private purposes but is, rather, required, in return for the grant, to serve the public interest. To make sure that he does so, Congress created the FCC. The agency obviously cannot perform this function unless it has power to assess the licensee's performance and determine, on some rational basis, whether his program service has indeed been in the public interest. And in turn, the licensee has an obligation — while exercising his rights of speech — to meet that public interest standard. Suppose he decides that he wants to play rock and roll records, or run western movies, all the time. I think most people would regard this as grossly deficient in important respects, and I think the Commission can therefore deny renewal to such a proposal. The government has not barred its former licensee from playing the music of his choice in a discotheque or showing his movies in a theater. It is not suppressing his right to present such matter, or the right of interested members of the public to hear or see it. It is simply saying that, having seen what he has chosen to do with the public's frequency, it has decided that the public interest would be better served by licensing someone else. It could have done

2. 319 U.S. 190, 227 (1943).

that in the first instance without impairing free speech, and may do the same thing at the expiration of the license term. Certainly this does not subvert democracy or attack the kind of "speech" the founding fathers were seeking to protect.

This is not to say that the Commission could deny a renewal because it did not like the licensee's political views — the *NBC* case expressly bars this. Nor would this doctrine permit us to require the treatment of particular issues, the coverage of particular events, or the presentation of particular programs of any type. But if all we try to do is to require that 10% of the station's time be devoted to programming other than entertainment and sports — leaving it to the licensee to decide what programs in the remaining categories he will present — it seems to me we are promoting the public interest without impairing any significant right of the licensee.

If the Commission may constitutionally require its licensees to meet *some* programming standards, then we reach the question of whether an effort to obtain balance and diversity in programming is desirable. This is first posed in terms of whether regulation is necessary to insure service to minority interests, or whether the desired diversity will be provided in any event as a result of competition.

It is true that competition is effective in achieving certain ends. To the extent that we want television to present substantial quantities of mass appeal entertainment and sports, competition serves us very well. Most television advertisers are interested in reaching the largest possible audiences. They will therefore gravitate to the most popular programs, thus providing motivation for broadcasters to continue to present such programs — and indeed to copy them, thus proliferating this kind of material. This pleases the largest part of the audience, the advertiser, and the broadcaster — but it does not represent complete service of the public interest.

These same factors lead to the presentation of smaller, but still significant, amounts of news on the networks — and on the most successful local stations. But as we get more stations in a given community, we may find that the appetite for televised news is not great enough to support a substantial and competent news operation at everyone of them.

But when you consider public affairs, religious, instructional, and agricultural programming, I think it will be obvious that competition is not very effective to stimulate the presentation of such matter on a substantial and continuing basis. Some such programming is not appropriate for sponsorship, and much of the rest is not likely to attract advertiser support because it is either too controversial or ap-

peals to too small an audience. Thus ordinary economic incentives will not lead a broadcaster to present programs in these categories. I recognize that some broadcasters are shrewd enough — or public spirited enough — to conclude that the long range interests of the station will be served by a judicious quota of programming of this kind, and this may be some kind of sublimated "competition." But I think that a good percentage of the quite limited amount of such programming — which often serves minority interests — is broadcast largely because of the feeling that the FCC either does, or may in the future, give weight to such matter.

Of course, if we develop large numbers of stations in certain of the biggest markets or if CATV really achieves what its adherents claim for it, then it may be that specialized or homogeneously programmed stations or channels for minority groups will develop — just as specialized radio stations abound in metropolitan areas — as a result of competition. But if the objective is to maximize the chance that all viewers will get a balanced or diversified service from their favorite station or stations, then I think we will still have to look to regulation to achieve this goal.

The next question is whether we should really try to force diversity in television if it is available through other media such as newspapers, magazines, books, theaters, concert halls, and other sources of entertainment and information. It is no doubt true that almost any need or taste could be served through one or another of these channels, but for many people this availability is strictly theoretical. The Roper Polls show, each year, that more and more people look to radio and television as their principal source of news. In the face of such statistics, the availability of the *Christian Science Monitor* or *Harpers* or the latest book on Viet Nam is not very significant if we are trying to develop a broadly informed electorate. I do not claim we can expect radio and television to solve all our problems easily — or perhaps at all. But I am sure that we have some problems of such urgency that we are not likely to solve them at all if we do not marshal *all* our communications media in the most effective manner possible.

Questions are raised as to the adequacy or effectiveness of the FCC's regulatory policies — with initial emphasis on the 14 programming categories enumerated in our 1960 Program Policy Statement. These remain, as originally intended, a very good checklist for really responsible broadcasters. They include the program categories defined in our application forms — though perhaps in slightly modified form — and so get at least lip service from most stations. But there

are important elements included which, I think, receive too little attention today. Chief among these is the concept of "opportunity for local self-expression." This is one of the principal reasons for the licensing of some 7500 broadcast stations serving every community of any real size in the country. It is embodied in the public affairs category, but should be kept in mind because it is important to re-emphasize constantly that public affairs programming should serve this important end. I would also stress service to minority groups — a matter of heightened concern these days — which also falls generally, but not always, into the public affairs category. And certainly we need to pay more attention to service — good service — for children. So I think this catalogue of "major elements usually necessary to meet the public interest, needs and desires of the community," is as valid as ever. The trouble is that too many stations ignore some of these important matters, and the FCC has not devised effective means for correcting these deficiencies.

I do not think use of these categories results in an undesirable sameness among stations. Even assuming that they presented these elements in anything like similar proportions, there still is so much variety possible within each of these categories that the services of different stations are unlikely to be very similar. And where they are similar, this may be desirable — as when most television stations present news during the dinner hour because this is convenient for many people — or quite unrelated to any requirement of the FCC — when the three networks all load their Saturday morning schedules with cartoons featuring violence and horror on the claim that this is a service to children. When I was Chief of the Broadcast Bureau I used to say that I would defy anyone to detect, in the Commission's day-in and day-out actions, the uniform pattern that our critics said we were trying to enforce. I'm more certain than ever that the sameness in television comes from the efforts of the *timid* and *uninventive* to copy the successes of others rather than from any policies of the FCC, since such policies really don't exist.

As for the question whether the FCC should consider the quality of programming within a category, or seek to set minimum standards of quality, I think that is nearly impossible. Any such effort would probably reflect the subjective tastes and prejudices of the Commissioners of the day, and whatever the grounds for our selection, I'm sure that "expertise" in program judgments was not among them. There is, however, one related idea that I think has merit. Within the entertainment category I would like to create a sub-class of more serious entertainment fare. This would include more serious drama

and music than now appear with any frequency on television, as well as ballet, art, and other elements now hardly ever seen. While this programming would not attract the maximum audiences achieved by the ten most popular shows, it would appeal to 10 to 15 million homes which now do not receive a fair share of service from the medium. I think much of this would win support from advertisers interested in this audience, and any consequent reduction in income could be charged up as a fair remission of the substantial profits many television stations are realizing. And I believe that the Commission should establish requirements to insure that certain types of critically important programming are presented in prime time when the maximum audience is available. Otherwise religious, public affairs, and instructional programs are likely to be shunted off into nearly dead time, with great diminution in the effectiveness of television as a tool for helping to improve our society and the lives we lead in it.

The question of programming which is not obscene, indecent, or profane — but which offends a substantial percentage of the public — is a very difficult one. Under the spur of Senator Pastore and the Senate Commerce Committee, the Surgeon General and the broadcast industry have now embarked on a study of violence on television. Members of the Commission have long urged this on the industry, though we are reluctant, as the licensing authority, to undertake such studies ourselves. If the result is that no connection between televised violence and the mounting tide of violence in our society can be established, then we can relax about TV and look for other causes. But if it is demonstrated that a causal connection does exist, then I think the industry will have to take vigorous steps to eliminate the hazard — and if it does not, then I think the FCC would have to act, and that it could do so without constitutional difficulty.

Beyond that, I think the problem must be dealt with in terms of governmental exhortation, listener protests, and competing applications. I want television to be a mature medium which can deal with adult themes and take a realistic look at the world around us. But at the same time it is a medium which enters the homes of America with an ease and frequency that no other comparable medium can match. I think this requires care in scheduling and in treating certain matters. Essentially it is a question of taste, with respect to which governmental action would probably be ineffective — and undesirable.

The importance of diversity of ownership to diversification of programming and points of view is obvious. It has been receiving increased attention at the FCC, as is evidenced by our recently an-

nounced study of the ownership of broadcast stations by conglomerates[3] and the denial of renewal of license to WHDH-TV in Boston largely on grounds of concentration of media interests.[4] The former has aroused some support and interest in Congress, though not among broadcasters, while the Boston case has apparently upset many people in both groups.

I think it is necessary and proper for us to concern ourselves about conglomerate ownership of stations. I think it is undesirable to have such vitally important facilities become peripheral adjuncts to large and widely variegated business empires. This is likely to lead to watered-down responsibility for day-to-day operation of the stations. But even more importantly, I think there is a real danger that the broadcast facilities will tend to serve the economic interests of other members of the corporate family — promoting their projects, ignoring their antisocial conduct, flattering their friends and customers, dealing with each other to the disadvantage of their respective competitors — and only then serving the public interest. I think this is a risk the American public should not be required to run. But all of this is based on instinct and opinion. We need facts, which I hope can be developed in our study.

I cannot, of course, discuss the merits of the WHDH case, although I didn't participate in it because I was a party to the proceeding when I was Chief of the Broadcast Bureau. But I think it is fair to say that media diversity is becoming a more important consideration in all settings, but that it may not always be decisive.

In the area of the treatment of controversial issues, the FCC is on much firmer ground. In the first place, it usually acts with substantial unanimity in this field, in contrast to the sharp divisions in the overall program area. It has therefore had much more extensive and varied experience with Section 315 and the fairness doctrine than with general program issues, and feels a bit more certain of its legal position.

There can be no doubt that broadcasting — especially television — is playing an increasingly important role in our elections, though I am not sure it is making the kind of contribution it should. Since this is true, I believe that Section 315 is necessary — except for presidential elections — in order to insure that this most effective medium is fairly used in the public interest. Merely to consider the

3. In the Matter of Inquiry into the Ownership of Broadcast Stations by Persons or Entities with Other Business Interests, *Docket No. 18449,* FCC 69-117 (Feb. 7, 1969).

4. WHDH, Inc., 16 F.C.C.2d 1, 15 R.R.2d 411 (1969).

prospect of television stations' presenting the candidates of their choice to the exclusion of all others is, I think, enough to remind us that a statutory guaranty of fairness is basically desirable — though I agree that the present provision could be improved upon. I recognize, of course, that not all broadcasters would misuse their facilities if Section 315 were repealed — perhaps no significant percentage of them would do so. Indeed, everyone I've ever heard urge repeal of the section has hastened to assure all concerned that broadcasters would, indeed, continue to be fair. If that is what most of them are going to do in any event, I see nothing wrong with a legal provision to require the same thing of the minority who would not so conduct themselves. And in my experience even some very good broadcasters misconstrue the public interest in close political time cases.

I admit, of course, that Section 315 is a sort of "blunt instrument" and sometimes seems, to the casual observer at least, to produce arbitrary results. I think it produces seriously undesirable results at the presidential level, where the phenomenon of a multitude of fringe parties is most observable. That is why the FCC has favored exclusion of the presidential elections from Section 315. If that were done, I think the networks would probably make somewhat more free time available, and I am satisfied that they would treat the major candidates equally. But I am not sure that total elimination of the section would result in any significant increase in free time for other political candidates. Some three years ago we appeared before the Senate Subcommittee on Communications. Both Senators Pastore and Scott had just been through campaigns in which they had only a single opponent — so that no fringe party problem was involved. Yet they said emphatically that the stations in their states had *not* made any significant amount of time available. And I'm sure this is increasingly true as you consider less and less important offices. Indeed, I think the only local candidates who would get on, in many cases, would be the friends of the licensees — which is not progress, in my opinion.

I think it would not only be proper, but wise as well, to differentiate between the candidates of major and minor political parties. Chairman Hyde has suggested such a plan, and I support it. This would permit broadcasters to give increased attention to candidates of major parties without having to waste substantial time on candidates who are not really significant factors in the election. These people could, where appropriate, be given some time under the fairness doctrine — while the candidates of significant third parties would be provided time in some reasonable proportion to that given the major candidates. It seems to me that this is realistic and fair and would

promote the goal of informing the public about the candidates they are really interested in. It would recognize the status of the major parties without insulating them against the challenge of important new parties.

I do not contend that the unique impact of television on the electorate justifies regulation that would otherwise not be appropriate — though I think the Department of Justice is making some such argument in its brief in the *Red Lion*[5] and *RTNDA*[6] cases. But I am sure that the unique place television has come to occupy does make it very unlikely that Congress will repeal Section 315 or the fairness doctrine in the near future. In our recent appearances before both houses of the Congress the only sentiment I detected in this area was directed at the possibility of barring broadcast editorializing — at least with respect to political candidates. I think this is not likely to happen — and that such action would probably be unconstitutional.

Moving on to the area of fairness in the handling of controversial issues — the fairness doctrine — I think that the public is entitled to hear the various significant viewpoints on controversial issues of public importance over the stations licensed to use our publicly controlled radio frequencies. I therefore think that our fairness policies appropriately serve the end of making broadcasting a medium of free speech for a wide range of public leaders, rather than just for our licensees.

I do not think the fairness doctrine inhibits the broadcasting of controversial issues — although this is the claim loudly advanced by those who challenge it. I am still waiting to hear of a concrete case in which it has had this impact. In the first place, the doctrine holds that a broadcast station should devote a reasonable percentage of its time to public affairs, which can hardly be regarded as inhibitory. But it does not specify what issues are to be discussed, or who is to discuss them, or the format to be employed. It merely provides that *if* the licensee has presented one side of a particular issue, he should make reasonable opportunity available for significant opposing viewpoints. This does mean that he will have to devote more time to public affairs than if he had exposed his audience to only one side of the argument, but this could inhibit him — that is could prevent him from doing what he would otherwise have done — only if he cannot abide hearing both sides of important issues or is unwill-

5. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

6. Radio Television News Director Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), *rev'd*, 395 U.S. 367 (1969).

ing to make enough time available for the proper treatment of the public's important business. If it is claimed that the fairness doctrine is complicated and that he is afraid of becoming involved with the FCC in case a dispute arises, I can only say that we should seek a more competent and courageous licensee for his facility.

I think it is particularly unfortunate that the *RTNDA* case raised the issue of our personal attack rules in a vacuum, more or less. The *Red Lion* case, which involved the underlying policy which we have incorporated in these rules, presented an actual dispute between live contestants — to wit, Rev. Norris, who owns WGCB; Billy James Hargis, whose program the station carried; and Fred Cook, who was attacked in the broadcast. In addition, that appeal went before a Circuit Court which has had considerable experience with broadcast matters. We were affirmed there. But the *RTNDA* case simply attacked the rules themselves in the abstract — and went before what its counsel regarded as a more favorable court, though one which rarely hears broadcast cases. This has permitted the parties — particularly CBS — to parade before the court a long list of alleged personal attacks which, it was claimed, would not have been presented if it had been known that an obligation to permit reply would accrue. Many of these did not even involve personal attacks, as defined in the rules, but merely represented disagreement with, or criticism of, positions taken by the persons named. The parties also recited hypothetical cases in which they claimed the rules, if sustained, would induce them to withhold comment, thus inhibiting robust discussion of public issues. In my judgment these claims simply reflect upon the parties' qualifications as licensees. I do not see how NBC and CBS, if they had decided that the public interest would be served by presenting commentary in which personal attacks would be made, can then claim that the obligation to notify the persons attacked and offer time for response is so burdensome that they would abandon what they had found to be in the public interest. Indeed, I do not believe they would follow this course.

The Commission, which has had rather extensive experience with such matters, has never found these claims convincing. However, the Circuit Court of Appeals for the Seventh Circuit *was* persuaded. Although it purported to strike down only the personal attack rules, and said it did not reach the validity of the fairness doctrine itself. I do not think this is logically consistent. Indeed, if the reasoning of the Court is accepted by the Supreme Court, I think this will lead not only to invalidation of the fairness doctrine but Section 315 as well. If this happens, I think the public will have lost important safe-

guards with respect to the use of its broadcast frequencies. Decisions as to which candidates to present and as to how fully and fairly the public should be informed about controversial issues would be left entirely to the unchecked discretion of the broadcasters. While many of them would discharge their responsibilities well, our experience in administering Section 315 and the fairness doctrine has demonstrated that in many cases the public would not be well served and I think the democratic process would be impaired.

I do not contend that the FCC has or should have plenary powers in these areas or in the programming field generally. But I am convinced that, subject to review by the Courts and the Congress, it should have a significant role with respect to programming if the public is to be reasonably served.