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The FCC's Role in TV Programming Regulation

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FIRST OF ALL, I should like to say that my primary area of concern in television is news. The gathering of the news, the reporting of the news gathered, and the interpretation of that news.

My interest is also centered around the public service aspects of that medium as it applies to public affairs, and the discussion thereof. In the broadest terms, my particular area of concern is that segment of television that often is of such immediacy that it is necessary to make quick judgments as to what is to be aired and what is not to be aired.

I should also make it clear at the outset that I am not an attorney, so my remarks will be couched, not in the legal terminology of my distinguished colleagues but rather in the terms of a reporter and editor, a realm in which I find myself much more at home.

I should say that I speak with the voice of a veteran of the wars with Section 315, the fairness doctrine, and the personal attack rule. But what is being discussed here today goes far beyond 315 and fairness and personal attack. As I understand the subject, "The FCC's Role in Television Programming," we are discussing the Commission's role in all aspects of television.

I would not argue with those who have raised the questions about what television shows or does not show. In many instances when the questions have been asked, the answers that have been given have been a cause for concern by many broadcasters.

What is entertainment? What is news? What is information? Entertainment to some is an attack on government to others. What is news to some is a slanted and unfair description of events to others. What is information to some is propaganda to others. Even the best fiction is still a propaganda tool in the minds of some.

I think we can all agree on one thing however, and that is the impact that television has today. A current issue of *Newsweek,* for example, says that by the time the average American reaches 65 years of age, he will have spent nine of those years watching television.[1]

It is the responsibility of those in television to see that the medium is programmed in such a way that those nine years will have

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1. Bruno, *The FFC Creates Some Static,* NEWSWEEK, March 17, 1969, at 80–85.

been years well spent. How we go about determining that, or more specifically *who* determines that, is the area of disagreement. The basic question posed by current FCC program regulations, it seems to me, is not so much what is the proper role of the FCC, but rather what is to be the role of the broadcaster. Are broadcasters part of that fourth estate which, according to the Supreme Court, was "specifically selected"[2] by the Constitution to play an important role in the discussion of the public affairs?

I need not belabor this symposium with the historical antecedents of this view which prompted the first amendment. I would only remind you that the framers knew that the press could be — and at that time often was — highly partisan, *ad hominem* in its attacks and abusive of its power. James Madison defended a free press with descriptive language: "It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits."[3]

John Stuart Mill — that early champion of what one present-day law professor criticizes as the "romantic" view of free speech — thought (rather realistically, it seems to me) that

> [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith . . . that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.[4]

That language was quoted in the Supreme Court's opinion in the *New York Times* libel case.[5]

From this it is my understanding that newspapers and magazines cannot be legally subjected to government-enforced fairness requirements or any other kind of government view of their contents, except in those limited areas of expression not protected by the first amendment. In *Near v. Minnesota,* the Supreme Court said that if a publisher has a right without previous restraint to publish something, "his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection

2. Mills v. Alabama, 384 U.S. 214, 219 (1966).
3. *Report on the Virginia Resolutions,* IV MADISON'S WORKS 544, *as quoted in* Near v. Minnesota, 283 U.S. 697, 718 (1931).
4. J. MILL, ON LIBERTY 47 (Blackwell ed. 1947).
5. New York Times v. Sullivan, 376 U.S. 254, 272 n.13 (1964).

is made."[6] In the *Associated Press* antitrust case, the Court stated: "The decree does not compel AP or any of its members to permit publication of anything which their 'reason' tells them should not be published."[7]

Either the FCC has not carefully read certain Supreme Court decisions concerning the press, or the FCC does not consider broadcasters as members of the press. The only other alternative is that the FCC believes that by the simple expedient of congressional amendment of the Communications Act, the FCC could regulate the contents of printed publications as it regulated that of broadcast stations. Perhaps by the time this paper appears in print the Supreme Court will have indicated in the pending *RTNDA*[8] and *Red Lion* cases[9] which if any of these alternatives is correct or justified.

For years the FCC placed its emphasis on the arguments that broadcasting frequencies are scarce, that broadcasters are licensed, that the airwaves belong to the public, and that, therefore, broadcasting is "different" from the print media and, accordingly, program content can be regulated. These traditional arguments were rejected by the Seventh Circuit's opinion in the *RTNDA* case.

The Court of Appeals found that broadcasting stations are less scarce than daily newspapers, that the licensing power must be restricted to its legitimate purpose, that the radio spectrum cannot literally belong to anyone and that its use cannot justify intellectual content regulation any more than the use of a special mailing privilege justifies regulation of newspaper content.

In recent years the Commission has been attempting to shore-up an independent argument for its fairness requirements — that these requirements expand rather than abridge freedom of speech, since, it is claimed, many individuals and views are thereby heard that would not otherwise be heard. It is apparent that, if valid, this hypothesis would be equally valid for newspapers and magazines, many of which are recognized as partisan, "slanted," and vigorous in attacking their opponents without offering or permitting them space for reply. It is almost anticlimactic to state that the Commission has never gathered empirical evidence to support its hypothesis about the encouragement of free speech. On the other hand, the Seventh Circuit held that the FCC "personal attack" and political editorial rules create

6. 283 U.S. 697, 720 (1931).
7. Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945).
8. Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), *rev'd*, 395 U.S. 367 (1969).
9. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

a "substantial likelihood" that free expression by broadcasters will be inhibited.

The Commission's inquiry into the fairness of network coverage of last summer's Democratic Convention in Chicago is the very kind of accounting to government most likely to inhibit broadcasters. Acting upon unsworn and generally impressionistic written complaints from the public, and undoubtedly responsive to a furor in Congress, the Commission (political appointees, we must remember) entered upon an investigation of speech at the heart of that most sensitive of first amendment areas — the political process. It is small consolation that in its recent letter to the three networks, the Commissioners stated that they found no violation of the fairness doctrine. The important fact is that they believed themselves qualified and empowered to make such a determination. In so doing, the Commission recognized that its fairness requirements are "exceptions" to a "general rule" that its members "do not sit to review the broadcaster's news judgment . . . ."[10]

Adding contradiction upon contradiction, the Commission demanded more information from the networks, this time concerning certain allegations of news event "staging," even though, only a few paragraphs earlier in its letter, the Commission had proclaimed that it was not concerned with the "truth" of the news reporting.[11] If it occurred, said the Commission, such staging would be a "fraud" on the public.[12] So now, attorneys tell me, the Commission must not only determine whether news coverage is "fair"; not only whether it is the "truth"; but also (if it is to be considered a fraud on the public) whether it actually misled the public, which would require a determination that the staged event was a material element in the story and was not an accurate portrayal of a real event.

The impression that the Commission really does interest itself in the "truth" of controversial presentations on the air is buttressed by the Commission's statement in its letter that it will look into charges of "deliberately slanted" or distorted news.[13] Certainly this is a giant step beyond the fairness doctrine, which does not purport to outlaw editorial-type expressions by broadcasters.

In the United States, we have heretofore relied upon publicity to expose the shams and distortions in what people write, speak, and photograph of public events. Indeed, the varied reactions of politicians,

10. Letter to American Broadcasting Co., Columbia Broadcasting System, Inc., National Broadcasting Co., FCC 69-192, Feb. 28, 1969.
11. *Id.* at 7.
12. *Id.* at 9.
13. *Id.* at 8.

journalists, and the public generally to the Chicago convention television coverage gained widespread publicity in all news media, including television, and gave proof of the self-critical and self-corrective process of our free society.

Broadcast journalists see FCC regulation in this area as a challenge to their status as members of the press. The press has a special role to play, and what the press says, or does not say, must be beyond the reach of government administrators.

Madison said that the first amendment "instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, meant a positive denial to Congress of any power whatever on the subject."[14] That certainly includes the present misguided efforts by the FCC — and by Congress through Section 315 of the Communications Act — to enhance free speech by government decree. Broadcasters are not common carriers who exist to serve up the news and opinion of all who wish to be known and heard. By definition, the press exercises an editorial function, and it is the tradition of a free and independent press which best assures robust debate on public issues.

Broadcasters are no less a part of the press because they disseminate information and views by use of microphones, cameras, and radio frequencies rather than by type, newsprint, and the printing press. The Supreme Court said that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[15] Even if the broadcasting medium be likened to public streets and parks, the use of which the government may regulate for parades and speeches, the choice of users cannot be regulated on the basis of the content of the communications to be aired. The user need present no message not of his own choosing. It is the *government,* in regulating the people's use of the *medium* (not the *communicator,* in his *message* on the medium), which must not censor. Marshall McLuhan notwithstanding, the medium is not the message.

It is true that not everyone can be a broadcast licensee, but it is equally true that not everyone can be a newspaper owner. Even aside from the investment of money needed to start either a newspaper or a broadcast station, the presence of one or more established newspapers in a community can just as effectively foreclose competition in the form of a new newspaper as the presence of broadcast licensees

14. 4 ELLIOTT'S DEBATES 571 (1836).

15. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

can effectively foreclose new broadcast competition in a community. In many cities in the United States, there are broadcast frequencies available and unassigned but not attractive enough economically to spur applications for their use. Still, the number of stations in all the broadcast services is increasing, while the number of newspapers is decreasing. CATV and other developments in technology promise not only to expand the availablities for picture and sound presentations but also to bring newspaper and other printed word reproductions into the realm of FCC regulation. Lastly, broadcasters have proved themselves to be engaged in the work of journalism by their accomplishments and dedication of resources in their field. More people depend primarily upon broadcasters for news than upon print.[16] The fact that most broadcasters are also providing commercial entertainment programming is no more relevant than the fact that newspapers — even leading ones like *The Washington Post* — carry pages of comic strips, society chatter, sports and advertisements. A convincing case could be made, I believe, that most major-market television stations are more aggressive and informative in their news and public affairs functions than their local newspaper counterparts. Where do you draw the line on this, anyway? The Supreme Court has recognized, as the FCC apparently has not, that "[t]he line between the informing and the entertaining is too elusive . . . [because] [w]hat is one man's amusement, teaches another's doctrine."[17]

Simply put, the press cannot be regulated in the manner in which the FCC is presently regulating broadcasters, and broadcasters are part of the press. If the first amendment does not fully protect broadcasters from program content regulation by the government, freedom of the press, as we have known it in this country, will become irrelevant as the news communicating function shifts further to electronic forms regulated by government.

16. Roper Research Associates, *Emerging Profiles of Television and Other Mass Media: Public Attitudes 1959-1967* (Television Information Office, 1967).

17. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952); Winters v. New York, 333 U.S. 507, 510 (1948).