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## Remarks of William O. Douglas\*

**T**HERE have been recurring examples of an effort to treat the news media—papers and magazines as well as radio and TV—as public utilities. The idea is to make them available to all so that every facet of current problems and events may be presented.

Radio and TV have been put into harness with some of those restraints. That is the teaching of *Red Lion*.<sup>1</sup>

The historic theory was that the airspace was federal property so to speak, and that the air waves being restricted had to be allocated and monitored in the public interest.<sup>2</sup> Thus there grew up a body of concepts administered by the FCC to keep TV and radio in harness.

TV and radio have become our most potent news media. An administration, taking over in Washington, D.C., wants the media on its side. It will seek to frighten them into subservience or to cajole them. Fright is more effective, for there is nothing more timorous and fearful than one billion dollars. Moreover, technology is changing the historic picture. Since TV has a relatively short area in which it can be re-

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\* Associate Justice, United States Supreme Court. Excerpted from a presentation on November 6, 1974, at Fairleigh Dickenson University, Teaneck, New Jersey, as part of the Leverton Lecture Series under the sponsorship of the Graduate Institute of International Studies, Fairleigh Dickenson University. The Hastings Law Journal holds no copyright on this material.

1. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). I did not participate in the *Red Lion* decision, but I have noted that I do not support it. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 154 (1973) (Douglas, J., concurring in the judgment). [Footnotes have been renumbered.]

2. The Senate Report accompanying the bill that was to become the Radio Act of 1927, 44 Stat. 1162, stated: "If the channels of radio transmission were unlimited in number the importance of the regulatory body would be greatly lessened, but these channels are limited and restricted in number and the decision as to who shall be permitted to use them and on what terms and for what periods of time, together with the other questions connected with the situation, requires the exercise of a high order of discretion and the most careful application of the principles of equitable treatment to all the classes and interests affected. For these and other reasons your committee decided that all power to regulate radio communication should be centered in one independent body, a radio commission granting it full and complete authority over the entire subject of radio." S. REP. NO. 772, 69th Cong., 1st Sess. 3 (1926).

ceived, the spectre of monopoly and its evils have loomed large. The era of satellites as broadcasting units has broken some of that monopoly. The slow spreading of cable TV is making it possible for distant TV towers to service even remote valleys or faraway cities.

These technological developments have broken some monopolistic practices and the future is bright with promise that first the entire continent and then the entire world can be brought into one's household. That means a promise of increasing variety of programs whether they embrace entertainment, debates on race, monetary policies, urban conditions, or straight-out political campaigning. In describing cable television, one author has written that:

Together . . . the elimination of channel scarcity and the sharp reduction of broadcasting cost, can break the hold on the nation's television fare now exercised by a small commercial oligarchy. Television can become far more flexible, far more democratic, far more diversified in content, and far more responsive to the full range of pressing needs in today's cities, neighborhoods, towns and communities.<sup>3</sup>

We as a people need to rethink the TV and radio problems in light of these new developments.<sup>4</sup> I emphasize the importance of the problem because in my view any intermeddling of government with any segment of the press is ominous. To make any organ of the press a public utility would put government in the driver's seat. The pattern of governmental intrusion could be varied. In the manner of some

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3. R. SMITH, *THE WIRED NATION* 8 (1972). Mr. Smith points out that "[i]n some areas local programming is already producing material of artistic merit that would otherwise never have found its way onto TV." *Id.* at 17. This local programming is made possible by cable television. Similarly, cable television has the potential for tremendous impact on the political process, where candidates have become highly dependent on TV exposure. *Id.* at 19. Indeed, the possibilities of cable television are enormous. See *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 73-76 (D.C. Cir. 1972) (Bazelon, J., dissenting).

4. "[I]f cable television develops to the extent predicted by its advocates, the nature of the medium will at some point become so different from traditional broadcast television that the fairness doctrine should not be constitutionally required in cable systems." Simmons, *The Fairness Doctrine and Cable TV*, 11 *HARV. J. LEGIS.* 629 (1974).

Indeed, there is evidence that even today the fairness doctrine's impact is declining. In a recent case the FCC determined that a television documentary entitled "Pensions: The Broken Promise" violated the fairness doctrine. The program discussed the many tragic cases of aging individuals who discovered late in life that they did not have the pension protection they had been led to expect. The program won many awards, but the Commission decided that the presentation had been unfair because insufficient emphasis had been placed on the positive aspects of the pension system. The Court of Appeals reversed the Commission's decision. While not rejecting the fairness doctrine, the court determined that on the facts the invocation of the fairness doctrine could not be justified. The court noted that "[t]he First Amendment is broadly staked on the

state legislation, see, *e.g.*, *Miami Herald v. Tornillo*,<sup>5</sup> views opposed to that of a newspaper could be required to be published. That is at one extreme. At another is the prior restraint laid on the press in the Pentagon Papers case, *New York Times v. United States*,<sup>6</sup> decided in June 1971. For two weeks an injunction obtained by the Government lay heavily on the press. The admonition of Hughes in *Near v. Minnesota*<sup>7</sup> was ignored:

While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.<sup>8</sup>

Prior restraint and the rule of fair comment are only forerunners of censorship. The private owners of the various parts of our mass media may be conservative, reactionary, or ignorant.<sup>9</sup> But their right to be independent promises independence for any opposed school of thought. So over the years we can expect a wide spectrum of ideas exploited by our mass media which would not happen if Big Brother in Washington, D.C., got his hands on the controls.

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view that our country and our people—rich in diversity of strains and viewpoint—is best served by widest latitude to the press, as broadening input and outlook, through a robust and uninhibited debate that is subject only to minimum controls necessary for the vitality of our democratic society.” *National Broadcasting Co. v. FCC*, No. 73-2256 (D.C. Cir., filed Sept. 27, 1974).

5. 94 S. Ct. 2831 (1974).

6. 403 U.S. 713 (1971).

7. 283 U.S. 697 (1931).

8. *Id.* at 719-20.

9. The press can be encouraged to be responsible in ways which do not involve serious inroads on its freedom. See, *e.g.*, TWENTIETH CENTURY FUND TASK FORCE REPORT, A FREE AND RESPONSIVE PRESS (1973); COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

