First Amendment and Broadcast Journalism

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Broadcasting is such a volatile business and memories are so short that it is probable that few persons now remember a cause celebre of the 1950's.

It was an event in which broadcasting's relationship to the First Amendment received a solid buffeting, an event in which a major setback could have been suffered. No specific conclusions were reached as a result of the curious storm that raged for several weeks. No landmark precedents were established but in a sense it was a watershed in that it cleared the air and at least negatively established that broadcast journalism couldn't be throttled at the whim of an irritated government.

The event was a special "Face the Nation" program featuring Nikita Khruschev, the Prime Minister of the Soviet Union, as the guest.

The program was filmed in the Kremlin in Moscow. Ground rules agreed on with the Soviet leadership were relatively open. The format was essentially the same that the show still follows except for the fact that an interpreter intervened between guest and panel. The prime minister was vigorous, ebullient and responsive to questions and it was in this program that he uttered what has now become a famous phrase, "We will bury you".

The program was broadcast on a late Sunday afternoon of May, 1957, at a time when television as a force in news and public affairs coverage was still in its experimental infancy. There were no warnings at that time of an impending storm. The next morning the Khruschev interview was the headline story over the entire country: The New York Times, the New York Hearld-Tribune, and the Washington Post ran full text. It was clearly the most news-worthy effort performed to that date by television.
By Monday afternoon proof was at hand. It was unmistakably evident that the Secretary of State, John Foster Dulles, was outraged by the network effrontery in furnishing an outlet for a national appearance by the leader of the country's principal enemy. The President was said to be upset. Critics on the right who had not fully recovered from the McCarthy period started cannonading CBS by telegram, letter, telephone call and by messages to their congressmen.

CBS absorbed the early shock with confidence but then it began to waver. On the Tuesday morning after the Sunday of the program I was summoned to the twentieth floor CBS Board Room at 485 Madison Avenue immediately upon arrival at my office. The meeting which began almost at once carried on throughout that entire day and well into the next day. The participants included CBS News' Public Affairs Director, Irving Gitlin and Director of News, John Day. From the corporate executive staff there were Frank Stanton and Richard Salant who later succeeded me as President of the News Division. News Division personnel couldn't see anything arising out of the special Khruschev "Face The Nation" except clear advantages to CBS. Corporate management saw it differently. They anticipated a genuine threat to CBS' freedom to cover the news and, what is worse, that the interview might have given impetus or might in the future give impetus to the passage of restrictive legislation in the Congress. There, of course, always was that overriding fear that something might be done to the licenses of the five CBS owned television stations which constituted a principal source of net revenue to the corporation.

It took the arrival of outside public relations counsel to resolve the dilemma. He encouraged the adoption of an affirmative position rather than a negative one. He urged CBS to take the offensive; show pride in "Face The Nation" rather than embarrassment; brag to the country about having made a major contribution to better world understanding rather than apologize for giving the Russian leader an opportunity to speak directly to the American people.
Perhaps even more significantly the CBS response reflected in full page ads in the New York and Washington newspapers on the next morning became the springboard for a campaign on behalf of broadcasters' freedom of the press that was to last for several months. The campaign demanded First Amendment protection for broadcasting.

Whether anything specific was gained as a result of this campaign at least nothing was lost and broadcasters were set on a course that would lead to increasing claims to the First Amendment protection as complete as that claimed by the printed press.

Since that occasion the First Amendment has become a rallying point for defenses by broadcasters against all manner of criticism. First Amendment defenses have been triggered by causes ranging from the closing off of news sources, the issuing of subpoenas to reporters for appearances and subpoenas to editors for out-takes to more general matters with less obvious immediate results including various applications of the "Fairness Doctrine".

In fact, there is some reason to think that the "First Amendment" phrase may have been worked so hard that it has begun to lose meaning. Some broadcasters tend to use the words "First Amendment" much as the Israelites used trumpets at the Battle of Jericho. Recite the words "First Amendment" seven times and the barriers to full protection will collapse permitting broadcasters to walk unchallenged into the inner sanctum so long occupied exclusively by the printed press.

The matter is not nearly so uncomplicated. It is true that the Federal Communications Act of 1934 seems to promise a "hands-off" attitude on the part of government toward broadcast program content. Included in that Act is the paragraph which reads: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over radio communication or signals transmitted by any radio station and no
regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech”.

There is only one exception to this affirmation that broadcasters shall have the right of free speech and that is found in the Federal Criminal Code which specifies that fines up to $10,000 can be assessed for use of "obscene, indecent or profane language". The Criminal Code also forbids broadcast of information about "any lottery, gift enterprise or similar scheme". This would seem to give broadcasters reasonably clear sailing insofar as their news policies are concerned but the actual record of performance of government in its relationship with broadcasting suggests that other considerations frequently take precedence over this apparently clear and incontrovertible statement.

There are two facets of the Federal Communications Commission regulation of broadcasting which permit, at least by indirection, an abridgment of the freedoms which seem to be so clearly guaranteed. The first of these arises out of the licensing procedures; the second, from the "Fairness Clause" in Section 315, which did not become a part of the Communications Act until 1959.

The licensing procedure itself is sufficiently complicated that it is vulnerable to a variety of abuses. Since there is no way of designing a fool-proof scale on which to judge competing applications the Commissioners must rely on fallible and subjective human judgments.
The procedure becomes vastly more complicated when taken in context with the great variety of new elements added by the application and growth of the "Fairness Doctrine". The "Fairness Doctrine" itself added a sufficiently complex new element but when it was not only affirmed but somewhat convoluted by the Red Lion decision in 1969 the opportunity for utilization of the licensing procedure for the imposition of a philosophy became vastly strengthened.

It's a curious fact in the development of broadcasting in the United States that what passes for progress has frequently been made in a series of trade-offs. When broadcasters were given the right to editorialize in 1949 they were obligated to follow a "Fairness" rule. They were quite willing to live with "Fairness" as it applied to editorials but found that it tended to be inhibiting when applied to straight news broadcasts and documentaries which exhibited any genuine courage in attacking community problems.

In 1959 they succeeded in somewhat softening the "Equal Time" clause of Section 315. They were granted the right to cover candidate appearances in regularly scheduled news broadcast, news interviews and news documentaries without being forced to yield equal time. But there was a trade-off. For this privilege they gave up any claim they might have had to elimination or weakening of the "Fairness" clause. It was written into the law and was no longer a simple statement of FCC policy. It was the increasing complexity of interpretations, however, growing like barnacles on a ship's hull, that added new and complex dimensions.

The Bahnzaf cigaret case extended the application of the "Fairness Doctrine" to commercials. This move was reinforced by the Friends of the Earth case. In the midst of this gradual extension of the application of the "Fairness Doctrine" came the Red Lion decision handed down by the Supreme Court in 1969.
It's odd how an innocuous little sentence which simply specified that broadcasters have the obligation to "afford reasonable opportunities for the discussion of conflicting views on issues of public importance" could be stretched to the point where it could be applied to almost any part of the broadcast schedule. The Red Lion case really didn't add any new elements. It only shifted the focus. No longer could a broadcaster assume that following the good journalist's rule of objectivity would insure compliance. The Court shifted the emphasis from the rights of the media to the rights of the listener-viewer to hear and see a diversity of voices, attitudes and ideas. Thus was born the controversy over "public access", a controversy which has been raging since the Red Lion case and shows no promise of receding.

The problem with the application of the "Fairness Doctrine", of course, is that once you expand the list of criteria and apply a set of standards no matter how vague they may be it is necessary for human judgment to be applied to determine whether performance measures up to standards. The standards themselves must necessarily have been set as a matter of human judgment.

"Ascertainment" is a logical by-product of the strict application of the "Fairness Doctrine" as it relates to measurement of station performance. A station manager is under obligation to ascertain the needs, interests and desires of his community and to build a program schedule which caters to those needs, interests and desires. If his license comes under challenge he must prove that his "ascertainment" procedures were thorough and sound and that his program schedule recognizes all the factors discovered in his ascertainment exercise.

This all sounds very logical and quite innocuous. Obviously the trustee of a public award of a frequency to communicate should perform in the "public interest, convenience and necessity". But there are unfortunately no hard and fixed guidelines on
which to judge his performance; no scientific units of measurement that can be applied; no objective devices available for the judgment. It all must be completely subjective.

It is the subjective nature of this process that frightens broadcasters when a Vice President takes to the speaking platform in Des Moines, Iowa or the Director of the Office of Telecommunications Policy in Indianapolis, Indiana to lay down criticisms of "elitist gossip" and "ideological plugola". If his locally generated news programming or that obtained from the network is to be judged on the basis of political prejudice couched in scare words, he has a just reason to fear that his position is insecure.

If intemperate criticism comes from officials holding high office, the fears can be intensified. The gradual erosion of the defenses implied in the censorship phrase in the 1934 Act is small comfort. No wonder he worries whether his license may be at stake if he broadcasts any matter which might be regarded as critical of those in power.

The Chairman of the Federal Communications Commission, Dean Burch, conceded at a hearing of the Sub-Committee on Communications of the Senate Commerce Committee in February that there are dangerous elements in the "Fairness Doctrine". Senator Pastore asked him the question: "We're getting into the area of censorship here, aren't we?" Burch's answer: "I'm afraid that the 'Fairness Doctrine' by definition comes a little close to the area of censorship in the sense that we require certain things to be put on the air".
The trouble with fairness is that it has broad parameters and those parameters are broadening. If "Fairness" were simply construed as a requirement to maintain the news tradition for objectivity and balance, enforcement would be a relatively simple matter. Most broadcasters are dedicated to objectivity anyway and the extremists who have no interest in maintaining it could be quickly identified.

When fairness is projected into national political affairs or the elections, it becomes more complicated. A network has an almost impossible position in trying to keep some reasonable balance between the party in power and the out-party. The American system does not lend itself to the easy identification of the logical spokesman for the "loyal opposition". The "Equal Time" provision takes care of the appearances of candidates during election campaigns but "Fairness" is a much more subtle thing and subject to a vast range of interpretations.

CBS' ill-fated attempt to set up a mechanism for giving an opportunity to the "loyal opposition" to be heard in a program entitled "The Loyal Opposition" in the summer of 1970, illustrates the difficulty involved in trying to work out an institutionalized system for performing the role. CBS furnished the Democratic National Committee a half hour of time to respond to a number of Presidential speeches. Party Chairman Lawrence O'Brien, rather than answer precisely the points made by the President in his preceding half hour message, ranged broadly over a number of issues in which he flayed the Republican Party vigorously. The Republicans asked for time to answer. The Federal Communications Commission decided that they were, under the terms of the "Fairness Doctrine", entitled to such time. CBS did the only thing it could do. It put the program in mothballs and it hasn't been heard from since.
I walked headlong into a very carefully constructed trap eight days before the 1958 election. On a Sunday afternoon I received a call asking whether I might be interested in giving live coverage to a meeting of President Eisenhower's Cabinet which was scheduled to take place the next day. I replied in the affirmative, provided it would be a genuine Cabinet Meeting with all the members present. My theory was that the public had never seen the inside of the Cabinet Room, had never seen the Cabinet members assembled with the President and that they had no idea as to the procedures followed in regular Cabinet meetings. This seemed to be an eminently useful first in the television business and so I took the next step which was to call Jim Hagerty, President Eisenhower's press secretary at the White House, to discuss the offer more fully with him.

Hagerty told me that he could schedule the Cabinet Meeting at our convenience on the next day, a Monday. We decided on a one-hour period between 7:00 and 8:00 P. M. Affiliated stations were quickly informed of the decision, a mobile unit and crews were assigned to start setting up first thing next morning and the special events director in Washington was given the responsibility of handling all the logistical details.

Hagerty was as good as his word. Secretary of State Dulles failed to appear because he was on one of his many trips, but the other members of the Cabinet were all on the scene. The President called on them, one by one, to make reports. The cameras were placed in advantageous position to get both the members of the Cabinet delivering their reports and the reaction of the President. Public response to the program suggested the public was interested and grateful for the opportunity of seeing an American institution of which they had read many times in actual action.
It was equally obvious, however, that this Cabinet Meeting was staged. The purpose was not to conduct the normal business of the United States; it was not to discuss serious issues and arrive at honest conclusions. The purpose was to display the President and the Cabinet of the United States, Republicans all, to voters of both parties, just eight days before a national election. I had unwittingly given the Republican Party one hour of free time on the CBS radio and television networks in the guise of its being an event of public importance.

For this error CBS could surely have been charged with violation of the "Fairness Doctrine", unless it were to make amends by furnishing the Democratic Party with a similar hour at some reasonable time before the election. The Democrats complained about the so-called "Cabinet Meeting". They described it as a trick which it surely was, but they made the error of not demanding time to answer. The Democrats turned out to be the winners in the election and apparently no damage was done except to my own standards. Since those days "Fairness", however, has become a much more complicated commodity.

Mr. Bahnzaf was able to convince the Commission that since cigaret smoking is potentially injurious to the health it was a matter of public interest and concern. He further argued that the "Fairness Doctrine" demanded that messages calling attention to the possible damaging effects were urgently required. The Commission agreed and a new interpretation of "Fairness" had been written into the history of the Communications Act. Under this new interpretation it wasn't only news and public affairs programs that were subject to "Fairness" interpretations but also commercial advertising.
Many broadcasters had long followed a policy of refusing to sell time for the discussion of controversial issues, but sometimes the policy has been breached. CBS television for a number of years had permitted the Electric Light and Power companies to broadcast commercials in connection with the "You Are There" television program which were obviously designed to sell the virtues of private utility systems. Network and corporate officials eventually, however, discovered the error and insisted that the commercials sell products and not ideas. The advertising was duly changed to conform.

David Wolper, the Hollywood producer of documentaries and feature films, came into my office one day in 1958 with a one-hour documentary program relating to man's efforts to conquer space. The program was entitled "The Race for Space". I screened it with Wolper, found it thoroughly researched, skillfully produced and about as entertaining as a documentary program can be, but I turned it down. The basis for the turn-down was that the protagonist in the program which placed heavy emphasis on the efforts of the U. S. Army to develop a space program was General Medaris, the head of the Army space program. It so happened that at this point in history the Army, the Navy and the Air Force were engaged in a vigorous battle to see which of the three services would gain command of the country's entire space program. As it turned out none of the three did. The responsibility was ultimately given to the National Aeronautics and Space Administration. But carrying that program at that particular time with its strong Army bias and its glorification of General Medaris would certainly have been unfair to the other two services and, in a sense, to the Administration as well, since it was undoubtedly preparing even at that early stage to award the plum to NASA.
Our decision, which was later supported by both ABC and NBC, turned out to be an unalloyed boon for Mr. Wolper. He took his program to the Music Corporation of America, built an independent network for his program, engendered a barrage of favorable response and was off to a highly successful career in film production. CBS was undamaged. It retained its self-respect and pride and, as a matter of fact, produced what I think was a vastly better show in the "CBS Reports" series, but the "Fairness Doctrine" was beginning to close in. We were criticized in the most vigorous way for keeping the network to ourselves, for not permitting divergent voices to be heard, for not permitting the development of new talents, for closing off the channels of access for persons outside the narrowly limited sphere of broadcasting.

Public access has surely become the rallying ground for more criticism of the present structure of broadcasting than any single issue. In the 1940's it was the "Blue Book", an FCC Report recommending certain principles with respect to radio programming which was the center of controversy; in the 1950's among other things the Quiz Scandals commanded the major share of attention; in the 1960's it was Civil Rights and the coverage of dissident elements in our society. In the 1970's the dominant theme is "Public Access".

"Access" has become almost as overworked a word in the language as "relevant" was in the late '60's and "meaningful" before that. Not only is it overworked, it is so loosely used as to obscure its real meaning and its method of application to the broadcast scene.

What kind of access are we speaking of? Obviously we must include diverse opinions, ideas, attitudes. Obviously opportunity must be granted to a diversity of groups who now have little opportunity to be seen or heard or to have their opinions seen or heard on the established broadcast communications facilities.
But providing such "public access" invites consideration of a great number of knotty problems.

Should the broadcast facility become a speakers' corner where all dissident or dispossessed groups have the opportunity to ascend the soap box and speak to the fulfillment of their utmost desires?

Should the role of the "gate-keeper" be transformed so that the gate-keeper becomes more a traffic policeman regulating the flow of diverse persons, groups and ideas than the executive charged with responsibility for policy formulation? Which serves the public interest better? A system in which a management responsive to a diversity of public interest, needs and desires consciously establishes a policy and a mechanism to implement it, in which the ultimate responsibility for the selection of the diverse ideas, attitudes, and opinions rests with him, or one in which the initiatives lie with groups seeking to utilize his facility for "public access" purposes?

Should groups with adequate financial resources be permitted to purchase blocks of time to carry their points of view to the public? Or should broadcasters be permitted to impose "flat bans" against the sale of time for the discussion of controversial issues?

Should access be achieved on the basis of direct contact between individual and station management, or should it be indirect access achieved through participation in advisory councils?

Could access requirements be solved through more careful attention to a diversity of voices and views in regular news and documentary programs, or must they be achieved through new and special efforts?
Will attention to a diversity of voices lead to fragmentation or chaos, or to a sounder approach to national problems because more voices have been aired, more alternatives explored, more dissident voices brought into the formulation of policy?

Should more efforts to ease access to communications media be supported in the interest of catharsis, or because the nation will better be able to formulate sound policy by broadening the inputs?

Even more importantly, does the "right to speak" serve as a sufficient guarantee of First Amendment rights, or should there be some concomitant "right to be heard" in order to carry out fully the mandate of the Red Lion Case? Groups or individuals using "public access" are likely to be shocked by the paucity of viewers or listeners to their performances unless they are integrated into existing programming.

The cumulative effect of the decisions in the Bahnzof case, the Friends of the Earth case, and the Red Lion decision seem to have established, as a matter of public policy, the fact that there is an obligation on the part of broadcasters to furnish "public access". The Business Executives Move for Peace and Democratic National Committee case is still to be heard from but the decision will probably relate only to part of the problem, the question of "paid access" as opposed to "free access".

The matter of furnishing such access is not an uncomplicated one. Carried to its absolute ultimate we would simply be creating a new "Tower of Babel" in which the cacophony produced by a multitude of voices would leave nothing but chaos, confusion and frustration. At the same time a legitimate question can be asked as to whether freedom to use the air waves serves a more real purpose than simply giving the speaker an opportunity to blow off steam. If so, is it worthwhile devoting a
segment of an enormously valuable public franchise for the purpose? We run the real risk unless public access questions are settled judiciously and with restraint of creating so many opportunities, giving them to so many varied petitioners representing so many diverse sources that we will be guilty of an "idea and opinion overkill". As a matter of fact, there are those who think that we are already being subjected to an excessive volume of diversity.

Broadcast licensees are already committed to furnishing the type of diversity that is described in the Red Lion case and in the "Fairness Doctrine". The questions regarding how it should be done, however, are worthy of careful consideration.

It seems self-evident that a license holder should be more than a traffic policeman. He obviously must know his community. "Ascertainment", even though the word has the odor of government jargon about it, is a necessary requirement for understanding its problems and its people. The crucial question is whether the broadcast licensee can meet the requirements of "diversity" through his normal broadcast schedule. Or must he yield up some control to outside, non-professional, special pleaders.

This country has had reasonably good luck in the past by entrusting the control of its media to a corps of professionals. For the most part these professionals have acted with wisdom and sensitivity for the public welfare. A generalized "Fairness Doctrine" has furnished them a bench mark to guide their decision-making.

On the other hand, there are distinct dangers involved in too rigid an application of requirements for "public access" and for too broad an extension of the "Fairness Doctrine".
One danger arises out of the fact that the broadcasting station could become an oriental bazaar dedicated to the hawking of strange and exotic ideas, scheduled with no editorial judgment, no selectivity and no guaranteed relevance to current problems.

It is entirely likely that an uncontrolled or lightly controlled public access system could be monopolized by the more aggressive and articulate elements in society which are not necessarily the needy ones nor those which have the most to contribute. The microphones and cameras could go to those with the loudest voices, the most demanding attitudes and perhaps, in some cases, the most frightening threats.

Counter-advertising, a linear descendant of the "Fairness Doctrine" and the Red Lion case, sounds like a completely reasonable theory. If detergents foul up the sewer systems, why shouldn't ecology-minded groups have the opportunity to present messages countering advertising for the detergents? If gasolines pollute the air and contribute toward onsets of disease and eventual choking of cities, why shouldn't opponents have an opportunity to express a contrary point of view? If the construction of the Alaska pipeline will damage the ecological development of the territory through which it passes, shouldn't attention be called to this fact?

There are a number of distinct fallacies in this type of reasoning. In the first place, in the cases cited above, counter-advertising wasn't necessary to stimulate an intensive discussion of the issues. A national debate was generated without aid of counter-advertising. Perhaps more important, however, is the fact that while little affirmative can be accomplished (it should be noted that cigaret consumption is higher now than it was when radio and television stations carried cigaret commercials) serious damage can be done to the economy of the broadcasting business. There is no point in arguing here whether economic strength is desirable. The fact
is that our economy is governed by a profit motive. Until there is some better way found to operate our communications media it seems reasonable that we should do what we can to keep it economically viable. We can always switch to a public broadcasting system but the recent controversies over the Corporation for Public Broadcasting would seem to suggest that we haven't done too well yet in that area.

A greater concern stems from the fact that as we broaden the application of the Federal Communications Act of 1934 by rulings, policy statements, amendments, court decisions and interpretations we increase the number of entry points for government interference or intimidation and move farther away from the theoretical protections of the broadcaster we once thought were offered by the First Amendment. It is true that broadcasters have been far too timid in the past. They have been much too inclined to tremble in terror at governmental criticism. They have been much too quick to fly the white flag in fear of government penalties, but in their behalf it must be pointed out that there is a vast array of opportunities open to the government official for exacting punishment of one kind or another. Anticipation of punishment is frequently a sufficient threat to force a licensee to invest many hours of manpower and many thousands of dollars in building defenses. Encouragement of a competing application for his license, or hints of impending legislation serve as subtle constraints on his freedom to operate. Many of these fears are doubtlessly exaggerated, but a government license is a pretty thin line of defense if a government is determined to exact penalties or force compliance with a specific point of view, even if the First Amendment exists as a theoretical bulwark against government encroachment.

In short, there is nothing wrong with a "Fairness Doctrine" provided it's fairly imposed and provided it is not used as a vehicle for broadening government controls over all phases of broadcasting. The definitions which have so far been furnished by the courts should appear reasonable to an honest broadcaster.
There are three principal such interpretations: 1) A broadcaster must give adequate coverage to public issues. 2) Coverage must be fair in that it accurately reflects opposing views. 3) Coverage must be afforded at the broadcaster’s own expense, if sponsorship is unavailable. Any of these three interpretations could lead to excesses but if adopted as general statements of principle, no broadcaster should take exception.

A general requirement for operating in the "public interest, convenience and necessity" assumes that the broadcaster will give adequate coverage to public issues.

A positive "Fairness Doctrine", one that assumes that fairness is largely related to maintaining objectivity and balance, has previously ensured the broadcasting of a wide diversity of views, attitudes and opinions. And with the addition of some creativity and ingenuity on the part of management it could also succeed in presenting a diversity of faces.

The Cullman principle, the third of the interpretations listed above, is not unreasonable if it is employed only in significant cases. Where the controversy is of such demonstrated public concern that response is required as a matter of public policy, not of government whim, a non-paid response is probably in order.

Danger involving the "Fairness Doctrine" arises out of the bracketing of "fairness" with "public access" and the decision in the Red Lion case.

The newly refurbished "Fairness Doctrine" is thus more than a negative constraint disguised to maintain balance. It is becoming a positive force demanding that broadcasters take the initiative in seeking out voices, opinions and ideas which
do not otherwise make themselves heard. If this is accomplished by normal "ascertainment" procedures, the broadcaster can't really object. It is to his advantage to know his community well for business as well as program reasons.

The danger is that he can be penalized for having missed some obscure element, and that his responsibility to follow up "ascertainment" can be judged on a set of standards that are subjectively established.

Maintaining objectivity is not a wholly mechanical procedure. Human judgment is required to measure the degree of objectivity or conversely of imbalance. But the human factor plays a greatly enlarged role in assessing the sins of omission as opposed to the sins of commission.

An FCC Commissioner would require the vision of a clairvoyant and the wisdom of a Solomon to determine who deserves to be heard and whom to be overlooked. Additionally he must make his decision without benefit of living and working in the community where the case arises.

It is no wonder that the application of the First Amendment to broadcasting becomes baffling. The Amendment protects the right of free speech but the government functionary decides how the broadcaster exercises it and who else in the community may have access to his facilities to use the privilege.

The Federal Communications Act prevents the Commission from exercising any power of censorship but it can decide what is fair or unfair, and who has a right to use the facility to reply to management.
The Federal Communications Act specifies that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech", but it can revoke a license if the broadcaster doesn't furnish diverse members of his community with the right to respond to his "free speech". Can speech really be free if it may result in license revocation? Of what value is the constitutional assurance if a single individual or a group of commissioners or the whole apparatus of government is in a position to make a subjective decision as to what is fair and what is unfair?

It is the response to this question that caused broadcasters to react so vigorously to criticism from the Vice President, the Director of the Office of Telecommunications Policy and other Administration officials in the period since the Vice President's Des Moines speech of November, 1969.

The vulnerability of broadcasting is predicated on the fact that it is difficult to separate content from other aspects of regulation. A drift from an assigned frequency can be judged objectively by mathematical calculations. Performance of service to the community furnishes no such mathematical scale.

Critics insist that broadcasting must be treated differently from the printed press because it uses a valuable and scarce commodity, the limited radio frequencies. It is true that the spectrum available for broadcast use is too limited to permit any applicant who wishes one to obtain a license but this doesn't necessarily furnish decisive proof that broadcasting is a dangerous monopoly. There are approximately 1,700 daily newspapers in the United States but there are 8,253 broadcasting stations. Of this total 922 are television stations, the remainder radio. Of the television licensees 701 are commercial.
The City of New York has 3 mass circulation daily newspapers. There are six commercial VHF television stations and 1 non-commercial.

Chicago has more mass circulation dailies than any other city in the country -- four. But there are four commercial VHF television stations, three commercial UHF stations, one non-commercial VHF and one non-commercial UHF. In addition there are more than 60 radio stations in Chicago and Cook County.

The limited spectrum is a serious constraint against obtaining a license to broadcast but the investment costs required to go into newspaper publishing are equally onerous and serve as a very real obstacle if not quite so obvious a one as is faced by broadcasting.

The scarcity of new metropolitan dailies starting up in the last three decades is testimony to the fact that the day of the pamphleteer with the mimeograph is long since gone.

It is true that there are only three national networks but there are likewise only three national weekly news magazines, two national wire services and two principal news syndication services. Monopoly for the networks, yes, but not quite a virulent a one as critics argue. Not enough for the imposition of restrictions that would chip away at the underlying philosophy of the American tradition for free dissemination of news and information.

Admittedly, there is a vital need for channels for the expression of a greater variety of ideas and opinions. There is a danger that our communications media might become so tradition bound and inwardly oriented that they would not be responsive to new thought or novel suggestions. There is the possibility that broadcast frequencies would be used, if all constraints were removed, for the
maintenance of the status quo.

But we must weigh the advantages of free expression against the imposition of restrictions that would mandate a tightly controlled system of public access, a system which could conceivably require more restriction and more interpretation in a constantly growing process of accretion of complexity in order to be workable.

At a recent conference at Ditchley Park in Oxfordshire, England, devoted to a consideration of the relationship of broadcasting to media in eight countries with free election systems there was general agreement that broadcasters should abide by some general requirement for fairness. But there was likewise concern that fairness should not be so encrusted with detailed definitions, interpretations and requirements as to make it an objective in itself rather than a broad-gauge guide to service to the listener-viewer.

Not all our broadcast deficiencies can be cured by a hands-off policy nor can broadcasters rely wholly on the First Amendment to ward off criticism, but our broadcast policies would seem to be best served by giving the broadcaster a reasonable degree of editorial discretion under broad and general guidelines. Perhaps in the future public access on the widespread scale for which some broadcast critics now yearn can be accomplished through cable. A broad-band communications system with 20 or 40 or even 60 or 80 channels will, in all probability, furnish ample opportunity for all who wish to use it without conflicting with the interests of others. If we can wait until cable is ready to create an environment in which all voices can be heard and all ideas expressed without imposing restrictions which interfere with the basic rights of freedom of speech we can maintain reasonable respect for the First Amendment even though it is unlikely that broadcasters can or should ever insist on complete protection.
In the interim, the time seems appropriate for a thorough new look at the Federal Communications Act of 1934 and its instrument for the execution of government policy, the Federal Communications Commission. The Communications Act has been patched up, amended and expanded to cover new communications media and a myriad of new and unanticipated problems since its inception. Television was only a dream in 1934, radio in a primitive stage, and broad-band communications unheard of by lay persons. Communications satellites were something only for science fiction writers.

Perhaps of greater significance in considering the relationships of the First Amendment to Communications, radio news in 1934 was barely out of the pre-historic stage. Lowell Thomas, Boake Carter, and H. V. Kaltenburn were broadcasting news from network headquarters but the Associated Press was suing KSOO in Sioux Falls, South Dakota and KVOS in Bellingham, Washington for piracy of the news. A short-lived CBS News Service was organized in 1933 but was soon allowed to die quietly. Edward R. Murrow was in Europe hunting up speakers for CBS "Talks" programs. Associated Press and United Press service to radio stations came later as did the organization of network news departments.

In 1974, forty years will have passed since the Communications Act was passed and the FCC organized, forty years of the most rapid changes in world history. The Communications Act like the Constitution may have been written for the ages but it is more likely to have been designed to meet a specific set of needs which existed in 1934.
The future is not likely to furnish breathing spells when we can pause to have a look at the whole communications regulatory structure. We are going to have to do it on the fly. Therefore it would seem wholly in order to appoint a commission at an early date to examine the past 40 years of service, assess the future, and determine not where the Communications Act should be patched up but whether it should be retained, or a new structure established. Perhaps the impetus should be given by a disinterested citizen group funded by non-profit agencies rather than by an Administration or Congressional Agency.

At the same time some countervailing force should be established by citizen action, a force which can assess on an ongoing basis the relationships of government to media, serve as an unofficial watch dog over the relationship, carry out independent research, recommend courses of action to Congress and the White House, mobilize public opinion behind important changes which seem required, and support the concept of freedom of information.

Broadcast communications have become so essential to the functioning of late 20th Century society that they deserve the best efforts of the most thoughtful people to make it possible for them to operate most effectively in the public interest. Special attention should be found toward developing mechanisms to keep them as free of government constraint as they can possibly be consistent with the necessity of maintaining some type of licensing system.

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Sig Mickelson
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