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The Fairness Doctrine: How Fair?

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On June 22 the FCC announced the results of its reconsideration, begun two years ago, of the rules governing the use of television by the President and his opponents. The commission decided not to change a thing. The existing rules will therefore prevail for this election year and the foreseeable future, unless changed by Congress or the courts.

The rules fall under two headings: “equal time,” discussed in a previous article [The Nation, June 20], and the “fairness doctrine,” with which this article is concerned. The scope of the equal-time law is narrow. It covers only announced candidates for public office, and thus did not apply to President Nixon before January 7. Even in the period since then, Mr. Nixon’s various television speeches have not produced a right to equal time for his Democratic opposition, since in the FCC’s view the only candidates “opposed” to Nixon until the Republican convention are other aspirants for the Republican nomination. And even after the convention and through the November election, Nixon TV speeches may be held exempt from the equal-time law as “bona fide news events,” following precedents set by the FCC in 1956 and 1964 and left untouched by the June 22nd decision.

In all such cases where the equal-time law for one reason or another does not apply to a television appearance by the President, the fairness doctrine nonetheless does. Formulated by the FCC, ratified by Congress and upheld by the Supreme Court, this doctrine requires broadcasters to provide “reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance.” Unlike equal time, it is not limited to candidates for office and is subject to no exceptions for coverage of “bona fide news events” or any other program categories. Thus, as the FCC has said, “There is no question that the fairness doctrine is applicable to Presidential addresses on controversial issues of public importance.”

The catch is that “fairness” is much less precise than equal time in what it requires. When Mr. Nixon preempted fifteen to thirty minutes of prime time on all three networks to address the nation on the war in Vietnam (as he has done three times this year) or school bussing (as he has done once), the question is what kind of opportunity
the fairness doctrine requires for presentation of the opposing point of view. With one notable exception, the FCC has taken the position—which it has now reaffirmed—that the answer is committed to the almost unlimited discretion of the network or station:

In the case of Presidential addresses there is no requirement that they be met by countering addresses. Licenses are of course free to do so ... but they may also make the judgment to use a variety of formats—the presentation of representative partisan viewpoints on newscasts, on news interview programs, and the licensee’s own analysis, either after the speech or in subsequent newscasts and editorials.

Thus the opportunity provided the “other side” need not be in any way equal or comparable to that provided the President. When he states his case in an uninterrupted prime-time speech on all three networks simultaneously, it is enough that the opposing points of view be “covered” by each network through bits and pieces of programming in a patchwork of formats. These may be spread, furthermore, over an indefinite period of time.

When the FCC has examined the shreds of programming thus spun off by a Presidential speech, it has found them either roughly “balanced” in themselves or weighted in favor of the President’s point of view. Consequently, the FCC now refuses to examine the programming or to require the networks to produce it. The mechanics of the fairness doctrine are such that the complaining party has the burden of proving that the overall programming on the issue in question has not been balanced, but he or she is denied access to the scripts or tapes and even the program logs needed to make such a showing. “The complainant can usually obtain this information by communicating with the station.” the FCC tells the public in its “fairness doctrine primer.” The statement is false. Stations and networks customarily refuse to produce the information, and the FCC will not make them do so.

Thus it has long been evident that the fairness doctrine, as applied to Presidential addresses, does not in fact require broadcasters to provide a “balanced presentation of the opposing viewpoints,” as the FCC stated in its landmark 1949 report articulating the doctrine. Nor does it require “similar opportunities” for the presentation of the opposing views, as the FCC said in 1963. The gap between what the doctrine was supposed to mean and what it means in fact has widened progressively in recent years, as the television speech has amplified the power of the Presidency and as Mr. Nixon, in particular, has exploited it to an unprecedented degree. The resulting danger was noted last November in a decision of the federal Court of Appeals in Washington, written by Judge J. Kelly Wright:

The President’s extensive use of the media cannot, of course, be faulted, for there can be no doubt that in the distillation of an informed public opinion such appearances play a very basic role. But if the words and views of the President become a monolithic force, if they constitute not just the most powerful voice in the land but the only voice, then the delicate mechanism through which an enlightened public opinion is distilled, far from being strengthened, is thrown dangerously off balance. Public opinion becomes not informed, but instructed and dominated.

Complaints charging Mr. Nixon with “monolithic” use of the television speech have been voiced frequently during the past two years. The President himself has twice cited such charges as a reason for not “dominating television too much”—a reason he has invoked, however, only to justify his avoidance of the televised news conference. Meanwhile, the question of what the fairness doctrine requires in its application to Presidential speeches has been the subject of repeated litigation before the FCC and the Court of Appeals. The results to date have been neither conclusive nor consistent—the FCC’s recent reaffirmation of the status quo notwithstanding—and more cases are pending. The outcome will affect not only this year’s Presidential campaign but the power of the Presidency and the structure of the national political debate for a long time to come.

The battle began with the one case in which the FCC ruled that Nixon’s heavy use of TV speeches did require the networks to provide some sort of comparable opportunity for the opposing point of view. Between November 3, 1969 and June 3, 1970, Mr. Nixon went on prime-time television five times to deliver speeches expressing his views on the war in Indochina. On a complaint filed by an ad hoc group called the “Committee for the Fair Broadcasting of Controversial Issues,” the FCC ruled in August 1970 that these appearances required something more than the usual bits-and-pieces presentation of the opposition’s viewpoint. Examining the programming cited by the networks as having presented the other side of the war issue, the FCC found that it was “roughly balanced” in general and, in at least one case, “that the balance would slightly favor the Administration side of the issue, without consideration of the five Presidential addresses.” The FCC declared:

The critical consideration thus becomes: Are reasonable opportunities afforded when there has been an extensive but roughly balanced presentation on each side of five opportunities in prime time for the leading spokesman on one side to address the nation on this issue? We believe that in such circumstances there must also be a reasonable opportunity for the other side, geared specifically to the five addresses (i.e., the selection of some suitable spokesman or spokesmen by the networks to broadcast an address giving the contrasting viewpoint).

Finding that “all the networks have done something in the area of uninterrupted presentations in covering this issue,” but that none had done enough, the FCC required “that at the least, time be afforded for one more uninterrupted opportunity by an appropriate spokesman to discuss this issue...”

The FCC decision, joined in by Chairman Dean Burch and the other Republicans on the commission (while drawing dissents from two Democrats, Robert W. Bartley and H. Rex Lee), produced consternation at the White House. It also soon produced consternation on the part of Chairman Burch himself. This was seen in an extraordinary statement he issued a few days later, attacking specified newspapers and magazines—including some whose owners hold broadcast licenses from the FCC—for the way their coverage had “distorted the substance of the ruling.” His remarks were aimed in particular at headlines or stories that might have seemed unfavorable to President Nixon. The Christian Science Monitor, for example, was upbraided
for headlining its story, "Anti-Nixon Time Ordered." Without explaining what was inaccurate about the headline, Burch declared: "I would think that any fair observer would agree that nowhere in this decision is there any statement or implication that 'anti-Nixon' time has been ordered."

Burch's statement was prepared, according to both The New York Times and the Washington Star, with the aid—and probably at the instigation—of the White House staff. The Times report was revealing as to the stakes the White House sees riding on the fairness doctrine controversy: "White House officials, distressed at the suggestion in first reports that the F.C.C. decision would inhibit the President's use of television, worked over the weekend with Mr. Burch's personal staff in follow-up briefings with reporters. The White House expects that the President will still enjoy a favorable balance of TV time, these officials said. . . ." Burch's prior service as chairman of the Republican National Committee might otherwise be discounted as an indication of bias, but after this statement it is difficult to believe he will exclude partisan considerations, especially in an election year, from his handling of FCC matters affecting the political fortunes of President Nixon.

Besides Committee for Fair Broadcasting, the FCC in the past two years has decided three other major cases on the application of the fairness doctrine to Nixon TV speeches. None of them could call forth, from even the sloppiest or most biased headline writer, the term "anti-Nixon." In the first decision, also rendered in August 1970, the FCC snuffed out an important move by one network to provide some balance—some semblance of debate—in the discussion of national issues on prime-time television. CBS that summer, in a statement by its president Frank Stanton, had noted the "cumulative impact of broadcast appearances of representatives of the party in office" and "the disparity between Presidential appearances and the opportunities available to the principal opposition party," and had therefore offered twenty-five minutes of free, uninterrupted prime time to the Democratic National Committee for what the network called a "Loyal Opposition" broadcast. The resulting broadcast by committee chairman Larry O'Brien was aired July 7, and the Republican National Committee demanded of CBS equal time to reply. When CBS refused, the FCC ruled that the network was required to provide such time. While the five recent Nixon addresses had focused on the war, O'Brien had been "unresponsive" and discussed other issues as well, the FCC said. His speech was thus "party-oriented" rather than "issue-oriented," and it therefore required equal time for the opposing party, under a special subcategory of the fairness doctrine which in effect applies the equal-time rule to "political party" broadcasts.

The FCC's ruling killed off the "Loyal Opposition" broadcasts, which CBS had said it would run as a regular feature "several times each year." They would have been a far-reaching innovation in national politics. As Broadcasting magazine had said of the original CBS announcement: "For the first time, the right of the opposition party to express its views has in effect been institutionalized as an integral part of a broadcast schedule."

It took more than a year for the FCC's decision to be appealed. When the Court of Appeals decided the case, in November 1971, it reversed the FCC with one of the more ringing judicial denunciations of a federal administrative agency in recent memory. In an opinion by Judge Skelly Wright (part of which was quoted above), the court pointed out that while the FCC had limited its consideration of O'Brien's "responsiveness" to the five Nixon speeches on the war, it was "the indisputable fact that the President, personally and through his spokesman, had extensively expounded the Administration's views in numerous televised presentations which the commission arbitrarily ignored." Also, the FCC's ruling was embarrassingly at odds with a case it had decided in 1968 but had not mentioned this time. In that case, Wayne Hays, CBS had granted Republican Congressional leaders free time to respond to a State of the Union address by President Johnson. Democratic Congressional leaders had then demanded equal time to reply, and the FCC had upheld the network's refusal to provide it. The FCC's failure to deal with the Wayne Hays precedent was, the court said, "an inexcusable departure from the essential requirement of reasoned decision making." The need for FCC decisions to be "completely free from even the appearance of bias, prejudice and improper influence" is especially great "where, as here, the agency is functioning in the midst of a fierce political battle, where the stakes are high and the outcome can affect in a very real sense the political future of the nation." In a concurring opinion, Judge Edward Tamm concluded that "by giving one political party two bites of the proverbial apple for every one granted to the opposing political party, the commission has taken a role of political interference contrary to all of the teachings of administrative decision making."

But the FCC's decision had stood for fifteen months, and that was enough to bury the "Loyal Opposition" concept. By the time the decision was reversed, the Presidential campaign had begun, and CBS's taste for innovative programming adverse to the Administration's interests had been soured by the battle over The Selling of the Pentagon. In more recent disputes CBS, led by Stanton, has been in the forefront of the networks' fight against any suggestion that prime-time speeches by the President should give rise to a comparable opportunity for the other side.

The two more recent cases have involved attempts by the Democratic National Committee (DNC) to apply the Committee for Fair Broadcasting precedent to subsequent sequences of television appearances by Mr. Nixon. In the first case, the Democrats sought time to respond to three Nixon TV appearances in March and April of 1971: an interview with Barbara Walters on the Today show, the Conversation with the President conducted in clubby fashion by Howard K. Smith of ABC, and a speech on the war carried by all three networks. NBC and CBS denied time to respond to any of the programs; ABC provided an hour in which O'Brien and six Democratic Senators presented their views on the war. The FCC's response to the Democrats' complaint was, in the first place, to wait four months before deciding it. Only after the frustrated DNC had gone directly to the Court of Appeals did the commission, on August 20, 1971, issue its decision up-
holding the networks. The opinion found Committee for Fair Broadcasting inapplicable because of the "crucial distinction" that the Presidential broadcasts there had "dealt solely with the issue of the Vietnam war. That fact was essential to our determination that an appropriate response was required. That is not the case here."

The court's decision on appeal, issued February 2, must have caused rejoicing in the White House. In an opinion by Judge Tamm, joined by Judge George MacKinnon and a visiting district judge from Utah, the court not only upheld the FCC's ruling but went even further than the FCC in deferring to the judgment of the networks. "Should the licensee in good faith be satisfied that its broadcasting has created a reasonable balance and opportunity for opposing views to be heard on controversial issues, then there is no prima facie reason for Commission action," the court declared. (It is difficult to imagine a network or station telling the FCC it is not satisfied that its programming has been reasonably balanced.) The court further noted that the DNC, in any event, would not always be the most appropriate spokesman to reply to a Presidential address. Its principal reliance, however, was on an assumption the FCC had not made—that if each Presidential TV address required a comparable opportunity for reply, the result would be to discourage such addresses:

The President is obliged to keep the American people informed, and as this obligation exists for the good of the nation this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond in the opposition party. . . . We believe that adoption of this view would only serve to frustrate the ability of the President and the licensees to present authoritative Presidential reports to the public. . . .

The court did not explain how or why this would come about. There are two possibilities, neither of which seems likely. If the assumption is that the networks would refuse time to the President if they had to air a reply, there is no warrant for such a low opinion of the networks' public responsibility, much less of their receptivity to requests from the President. The Supreme Court in its Red Lion decision, upholding the fairness doctrine, made a contrary assumption; it expressed confidence that the doctrine would not have "the net effect of reducing rather than enhancing the volume and quality of coverage." Whatever may be the case in other situations, such confidence seems well grounded when the networks could reduce the volume and quality of coverage only by refusing the request of the President.

The second hypothesis—that the President would be unwilling to address the nation over television if his speech gave rise to a right of reply—seems equally unwarranted. It is unworthy of any President, and in any event it overlooks the value to any President of the opportunity television provides. As the court said, "authoritative Presidential reports to the public" are indeed desirable. But it is the theory of the fairness doctrine, and of the First Amendment, that the public is best informed not by unilateral reports from any source, no matter how "authoritative," but by the clash of opposing views from which the public can form its own judgment. Indeed, in the light of the Pentagon Papers, General Lavelle and so many other experiences of the past decade, the need for expression of an opposing point of view would seem to increase, not decrease, in proportion to the "authoritative" nature of the governmental source and the extent of public attention it commands.

Finally, the court declared: "The burden is, of course, to distinguish between the President qua President and the President in his political capacity. This burden must fall to the commission in ruling on requests such as that filed by DNC." Yet the FCC in its June 22nd ruling has squarely rejected this burden. "For obvious reasons . . . we strongly decline to make evaluations whether a report by an official is 'partisan' or 'political' and thus requires rebuttal by a spokesman for the other party, or the contending faction, or whatever. This would drag us into a wholly inadmissible quagmire."

The FCC is right. If it were possible, appropriate and necessary to distinguish between the official and the political roles of the President, the short-term Presidential appointees on the FCC would be less fit for the task than the lifetime judges on the Court of Appeals. The court's deference to the FCC on the issue thus seems peculiarly misplaced. But in any event the distinction, far from being crucial as the court thought, is irrelevant. Views on controversial issues expressed by the President "qua President" should be no more immune from expression of the other side than the "political" views of the President or the views of anyone else. Perhaps they should be less so. Even the FCC has recognized, at any rate, that speeches by the President on controversial issues are fully subject to the fairness doctrine, irrespective of the distinction put forward by the court.

The most recent case involved a series of TV appearances in which Mr. Nixon, evidently emboldened by the FCC's decision of August 20, 1971, steered daringly close to the facts of Committee for Fair Broadcasting, though still taking care not to duplicate them exactly. Both in
August 15 and October 7, 1971, Nixon made four broadcast speeches on his “new economic policy”; two were on TV and radio in prime time, one was on TV and radio in daytime, and one was on radio-only in daytime. Meanwhile, on three occasions from August to November, the President’s chief spokesman, Treasury Secretary Connally, held daytime press conferences that were also devoted to the economic program and were televised nationally by all three networks.

Upon the networks’ refusal to give the Democrats time to respond, the FCC had to find a rationale different from that of its August 20th decision, since these broadcasts, like those in Committee for Fair Broadcasting, had all dealt with a single issue. In a ruling adopted February 3—one day after, and no doubt encouraged by the Court of Appeals endorsement of the earlier ruling—the FCC was equal to the task. It rejected the DNC’s complaint on the basis that “[t]he facts of the present case are obviously different from those in Committee for Fair Broadcasting. Rather than five uninterrupted prime-time Presidential appearances on the issue, there were two, plus two such appearances outside of prime time.” The opinion went on to dismiss the Connally press conferences—even though “Secretary Connally opened the press conferences with his own statements in support of the Administration’s economic policy”—on the basis of the FCC’s journalistic judgment that Connally had been “subject in the three press conferences to the same kind of critical questioning that he would have faced on news interview programs.” Also, the press conference appearances “were neither uninterrupted nor in prime time.” In sum, “the facts of the present case do not correspond to the particular and unusual set of circumstances which caused us to rule as we did in Committee for Fair Broadcasting.”

In comparing the facts of the two cases the FCC was rather selective. It said nothing about the time spans involved: seven months for the five Nixon speeches in the earlier case, as against less than two months for the four Nixon speeches on the economy, or less than three and a half months for the four Nixon speeches plus the three Connally press conferences. Also, the FCC played it safe this time by refusing to examine the other programming the networks had presented on the issue. (It did request transcripts of the four “specials” the networks had run, but one proved to be heavily pro-Nixon and another irrelevant, so that line of inquiry was dropped.) The reality seems to be that as far as the FCC is concerned, Committee for Fair Broadcasting has gone the way of the Wayne Hays decision.

The Democrats have appealed from the FCC’s ruling on the economic broadcasts, and it will be interesting to see what the Court of Appeals does with the case. Much may depend on which judges are sitting that day. Also interesting is the fact that between January 25 and May 8 of this year Nixon has compiled another string of three prime-time speeches devoted exclusively to the war. He therefore can be expected to avoid making two more such addresses before the seven-month period expires on August 25, lest even the FCC find itself unable to distinguish the case from Committee for Fair Broadcasting.

But as long as Nixon avoids an exact duplication of Committee for Fair Broadcasting, he and his managers are home free under the presently prevailing decisions on the fairness doctrine. This means that at least through the Republican convention, and very possibly through the election (if Presidential speeches are held exempt from the equal-time law), Nixon can continue to pre-empt prime time to address the nation without concern that his Democratic opposition will have a comparable opportunity to respond.

The court’s decision in the case of the broadcasts on the economy probably will not come soon, but in any event it is unlikely to settle much. A reversal of the FCC on the facts of that case would not resolve the basic question of a right to respond to all Presidential broadcasts on controversial issues. Case-by-case determinations in this area can never be satisfactory, if only because of the excessive time it takes to get decisions from the FCC and the court. What is needed, for this year and the future, is a decision of the basic question.

The decision should be in favor of a right to respond. The spokesman for the opposing point of view would not necessarily be, as Judge Tamm assumed, a representative of the opposition political party. While the need for “Loyal Opposition” broadcasts has certainly not decreased since CBS abortively instituted the concept in 1970, the choice of the spokesman to respond to each Presidential address could be left to the network or station. Given the impact of a Presidential speech delivered in prime time over all three networks, it is hard to see how anything less than a similar format on each network can be a “reasonable” opportunity for presentation of the other side, or can be consistent with the fairness doctrine’s claimed objective of a “balanced presentation of the opposing viewpoints.” The FCC speaks often in these cases of “the robust, wide-open debate on public issues which we believe to be so important,” but seems to have a peculiar conception of what “debate” entails. At the least, a right of response to televised speeches by the President is needed during an election year.

The FCC in its June 22nd decision, however, has now rejected proposals to recognize a right of reply to Presidential broadcasts under the fairness doctrine. Among other arguments, the commission tries to duck the issue with a far-fetched claim that only Congress can adopt such a proposal. The Democrats can be expected to appeal, so that the Court of Appeals will finally have an opportunity to consider the basic question, though probably too late to affect this year’s campaign.

Meanwhile another attack on the FCC’s position has emerged. Sen. Harold Hughes and thirteen other members of Congress complained to the FCC on June 15 against the refusal of CBS and ABC to give or even sell them time to reply to Nixon’s position on the war and discuss Congressional alternatives. (NBC did offer to sell the group fifteen minutes of prime time on June 26 but they could not raise the money; meanwhile Frank Stanton of CBS, erstwhile originator of the “Loyal Opposition” concept, told Hughes not only that CBS had adequately aired the opposition to Nixon’s policy through the usual bits-and-pieces approach, but that in any event “the network does not sell time to individuals to present views on controversial issues.”) Hughes and his colleagues are arguing that Congress, as a coequal branch, has as much right as the Presi-
dent to communicate with the people by way of television, and at least the right to buy time to balance what is given to the President.

The Congressmen cannot expect any redress from the present FCC, but they may do better in court. What Chairman Burch and his Nixon majority perhaps ought to consider, as they single-mindedly hold the line against any right of TV access for the President's opponents, is that sooner or later the President to whom their decisions apply may be a Democrat.