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Murray J. Rossant's Letter to Roger J. Traynor With Enclosed Memorandum, "Organization of the National Media Council"

Murray J. Rossant

Benno Schmidt

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Mr. Roger J. Traynor  
Hastings College of the Law  
University of California  
198 McAllister Street  
San Francisco, California 94102

Dear Roger:

I am enclosing the latest handiwork of Bill Cary & Co. I think that the material is in much better shape, largely because of the revisions made at the San Francisco meeting of the working committee. With a little luck I believe that we will be able to finish the job at the upcoming meeting of the committee here in New York.

The enclosed material also includes a commentary on the changes. This was done mainly as a guide to those who were not at the meeting or who failed to read the original documentation.

As you know, we will be making public the Task Force report on November 30, the day before the meeting of the working committee. I think that it will arouse a considerable amount of interest so do not be surprised if the press starts getting in touch with you before you arrive here. We are simply stating that a committee is at work on implementing the Task Force report, and that you are involved with it as well as being the first chairman of the council.

A few points. Almost everyone we have discussed the title with prefers National News Council; it is so simple and accurate that it is a wonder we did not think of it before. But I am less certain about the rules of procedure for complaints brought by the press; almost everyone thinks that the committee on Freedom of the Press is the place to deal with them. And we still have to decide on a preamble that is both eloquent and elegant.
I look forward to seeing both Mrs. Traynor and you on December 1. You have a reservation at the Westbury for the evenings of December 1 and 2. We have asked for suite 1019 so, hopefully, that will be available for you. I also am trying to get Lord Devlin to come in for lunch on either that Friday or Saturday.

With every good wish for Thanksgiving,

Sincerely,

M. J. Rossant

Enclosures

/n
Memorandum

From: Benno Schmidt

To: William L. Cary

Subject: Organization of the National Media Council

I have reviewed the documents you have prepared for the Twentieth Century Fund concerning its proposal for a National Media Council, and I have a few comments which you and the Fund might want to consider prior to the San Francisco meeting. Since the General Rules of Procedure seem to me to raise the most difficult problems, I will take up those comments first.

1. General Rules of Procedure

A. In section 5, I think you should require complainants to specify any personal interest they have in Council action on the complaints they bring. The complaints brought to the Council will likely fall into two general categories: those from members of the public troubled by the media's handling of certain events, but without any personal interest in the matter, and secondly, complaints from individuals who believe they have been injured or mistreated by the media. It may be helpful to the Council in considering complaints of the second kind to have the complainant state what his personal interest is. I do not suggest that the Council limit its grievance procedures only to this second category.
of complainants who have something like "standing" in the jurisdictional sense, but I think the facts concerning "standing" should be before the Council when it considers the complaint. This could be accomplished by adding to section 5 the phrase: "and any individual interest of the complainant, or interest of any organization with which the complainant is affiliated, which is involved in the matter complained of."

B. Section 7 contains the problem that I think needs the most attention. As it now stands, section 7 says no complaint will be considered by the Council if "legal action based on the same subject matter is pending." As a practical matter, this provision is likely to prevent the Council from taking up most complaints against television and radio. Most of the broadcast journalism which has generated controversy in recent years has led to multiple complaints sent to the FCC. The FCC has taken the position that it should open a file on every allegation of news rigging, staging, or slanting, and that file becomes part of the licensee's record when his license is up for renewal. This administrative action would meet most definitions of "pending legal action on the same subject matter." I doubt that the Council wishes to exclude from its jurisdiction complaints about television and radio broadcasts which may have been raised
before the FCC by other complainants, and yet that is the force of the present section 7. Obviously, this problem cannot be ameliorated by simply requiring the complainant to waive legal and administrative remedies, since broadcasters presumably will not want to cooperate in any Council investigation which might produce difficulties with the FCC. I confess that I do not now have a recommendation as to how the Council ought to treat television complaints which may be considered concurrently by the FCC. Perhaps the problem could best be dealt with by stringent rules of confidentiality when the Council takes complaints against electronic media, or some agreement could be worked out with the FCC (though I doubt it). I am convinced, however, that this problem needs careful attention and that the present rule of procedure in section 7 is not workable.

C. The Rules of Procedure do not address the difficult problem of confidentiality. Actually, this is several different problems. First, how will the Council treat newsmen's claims that a report alleged to be without foundation was based on a confidential source? This is a subject on which newsmen, after the Caldwell decision, are rather anxious, and yet testing the reliability of confidential sources may go to the heart of the Council's ability to resolve many claims of press unfairness.
Memorandum to
William L. Cary

October 24, 1972

Second, will evidence brought before the Council by media to clear themselves of imputation of wrongdoing be protected? If the Council's decisions are to have public influence, they must demonstrate the factual basis for each step in their reasoning. Yet the media have firmly opposed governmental efforts to look into the research and editing behind controversial stories or broadcasts. Third, should investigations of electronic media be subject to special rules of confidentiality to protect broadcasters against potentially adversary FCC action? Fourth, what of the Council's deliberations? Few deliberative bodies work well if their internal discussions are exposed to public view. I would think the Council should deliberate in confidence and only the written reports (including dissents, if any) should be made public.

On each of these questions, I believe you need guidance from the Fund's committee before you are in a position to draft the specific standards of confidentiality as part of the Rules of Procedure.
2. **By-Laws**

   A. I would raise the question in section 1 whether the term of office of Council members should be longer than three years. Problems of succession may bedevil this self-perpetuating body if the Council gets into some controversial positions vis-à-vis either the media or government. I think the Fund should consider whether a four-year term of office with one-quarter of, say, a twelve-person Council up for succession each year would permit less of the Council's energies to be expended in perpetuating itself. Of course, there is something to be said for the three-year term and the early succession of one-third of the Council in terms of getting rid of non-productive members and providing for a greater infusion of new blood. Nevertheless, my guess is that the Council should devote less effort to succession than the three-year term, one-third annual renewal formula would require.

   B. There seems to be an ambiguity in section 3 concerning resignation by absence: your draft does not make clear whether a certain number of unexcused absences leads to mandatory resignation or, on the other hand, to an opportunity for the Council in its discretion to consider whether resignation is desirable. Since the Council can decide whether an absence is
to be treated as "unexcused," and only unexcused absences should be the basis for resignation, I believe resignation should be mandatory in the event of a certain number of unexcused absences. I am afraid the Council might get into a political hassle likely to involve personalities if the question of resignation by reason of consecutive unexcused absences is left to its discretion.

C. In section 4, there is an ambiguity about the meaning of "occupational category" in the second sentence. I gather you do not mean that if one of the "public members" needs to be replaced, his successor must be in the same occupational category (e.g., if a law professor resigns, replace with another law professor). Rather I assume you are referring to the two more general categories set out in section 1: public members and media members. That should be made clear.

D. In section 7, I wonder whether it is a good idea that only two members are empowered to call a meeting. I suspect occasions may arise when there is both political pressure on the Council and possible political self-interest among a couple of members. I would try to reduce the chances of a couple of Council members seeking to advance personal or idiosyncratic concerns by quick Council action and require that four or five members get together before being able to, in effect, override the Chairman's refusal to call a special meeting.
3. Certificate of Incorporation

A. Some trivial language suggestions in paragraph 3:
I would replace "and are" with a colon just to make the sentence read better. I would suggest cutting the phrase "press freedom" where it appears in paragraph 3 and throughout all the other documents as well, replacing that phrase with "freedom of the press" which is the familiar term of art. I would also cut "more" as it appears before "accurate" and replace "fairer" with "fair" before "presentation"; I think this phrasing will be less likely to trigger a hostile response from the media. Finally, in the seventh line of paragraph 3, I would replace "means" with "media."

B. I assume that the language of paragraph 7 presents no barrier to the receipt of salaries by officers of the Council, as I imagine that the Chairman at least may be compensated for substantial expenditures of time and energy. Also in paragraph 7, I trust the language toward the end is required by the tax laws. I think you want to be as permissive as the tax laws will allow with respect to such desirable activities as the Chairman testifying before congressional committees about proposed legislation concerning the press.
C. I note the suggestion of the Fund staff that reference should be made in the certificate of incorporation to the confidentiality of Council deliberations. I believe the certificate is not the proper place for reference to this problem precisely because it is both so important and also exceedingly complex. My recommendation would be to take up confidentiality problems in the General Rules of Procedure where they can be treated with the particularity required.

4. The Preamble

The preamble as it now stands strikes me as in need of further attention. Some stylist ought to try to beef up the rhetoric, and the lawyers ought to be careful about statements that the Council will be "disassociated [dissociated] from practitioners of journalism" (six members may be working journalists), and the Council "will provide an open forum . . ." (what is the extent of necessary confidentiality?). I don't mean to suggest that the preamble be converted into the Rules of Procedure, but it may be misleading as it now stands.

I fully agree that it should be a separate document.