

CTW

ERVIN TESTIMONY, HEARINGS

FEB. 1, 1972

He joined the White House staff in January 1969. As Special Assistant to the President, his responsibilities included the space program, atomic energy, maritime affairs, communications, liaison with regulatory agencies, and several specific economic and organizational matters.

I want to welcome you to the subcommittee and express our deep appreciation for your willingness to come and give us the benefit of your observations on what I consider one of the most important aspects of our national life.

**STATEMENT OF CLAY T. WHITEHEAD, DIRECTOR OF THE OFFICE OF TELECOMMUNICATIONS POLICY; ACCOMPANIED BY ANTONIN SCALIA, GENERAL COUNSEL**

Mr. WHITEHEAD. Thank you very much, Mr. Chairman. I am very pleased to be here with you today and to have this opportunity to discuss with the subcommittee some of the aspects of the first amendment which I consider to be an important concern of my office to protect.

I would like first of all to introduce to the subcommittee Mr. Antonin Scalia, sitting at my right, general counsel of the Office of Telecommunications Policy.

Senator ERVIN. We are delighted to have him with us also.

Mr. WHITEHEAD. I wish to address my remarks today specifically to the first amendment implications of the two most significant innovations in our mass communications system during the past decade.

The first of these is cable television. Coaxial cable and related technologies enable large numbers of electronic signals—television signals included—to be carried directly into the home by wire rather than being broadcast over the air. There is no particular limitation on the number of signals which can be provided; systems now being constructed typically have the capacity to carry about 20 television channels, and can be readily expanded to 40.

The original use for this technology was "CATV," or community antenna television. As its name implies, that involved no more than the use of cable to carry broadcast signals picked up by a high master antenna into homes in areas where reception was difficult. In recent years, however, use of the technology has progressed far beyond that. Many cable systems now use microwave relay systems to import television signals from far distant cities. Some originate programming of their own, and make unused channels available to private individuals, organizations, schools, and municipal agencies. Looking into the future, cable technology has the potential to bring into the home communications services other than television—for example, accounting and library services, remote medical diagnoses, access to computers, and perhaps even instantaneous facsimile reproduction of news and other printed material. But I wish to focus today upon the immediate consequences of cable, and in particular its impact upon mass communications.

I do not have to belabor the point that the provision of 20 to 40 television channels where once there were only four or five will drastically alter the character of the medium. It converts a medium



of scarcity into a medium of abundance. As this subcommittee is aware from earlier testimony, one of the most severe problems which must be faced by broadcasters today is the allocation of limited broadcasting time—allocation among various types of programming, and allocation among many groups and individuals who demand time for their point of view. Cable, if it becomes widespread, may well change that by making the capacity of television, like that of the print media, indefinitely expandable, subject only to the economics of supply and demand.

Of course the new medium also brings its own problems, several of which are immediately related to first amendment concerns. Economic realities make it very unlikely that any particular community will have more than a single cable system. Unless some structural safeguard or regulatory prohibition is established, we could find a single individual or corporation sitting astride the major means of mass communication in many areas.

The second aspect of this new technology which bears on the first amendment is, to my mind, the more profound and fundamental, because it forces us to question not only where we are going in the future, but also where we have been in the past. That aspect consists of this: The basic premises which we have traditionally used to reconcile broadcasting regulation with the first amendment do not apply to cable.

In earlier sessions of these hearings, this subcommittee has heard three principal justifications for Government intrusion into the programming of broadcast communications: The first is the fact of Government licensing, justified by the need to prevent interference between broadcast signals. But with cable, there is nothing broadcast over the air, no possibility of interference, and hence no unavoidable need for Federal licensing. The second is "the public's ownership of the airwaves" which the broadcaster uses. But cable does not use the airwaves. The third is the physical limitation upon the number of channels which can be broadcast in any given area—meaning that there is oligopoly control over the electronic mass media, in effect conferred by Federal license. But the number of feasible cable channels far exceeds the anticipated demand for use, and there are various ways of dispersing any monopoly control over what is programmed on cable channels short of controlling content.

In other words, cable television is now confronting our society with the embarrassing question: Are the reasons we have given in the past 40-odd years for denying to the broadcast media the same first amendment freedom enjoyed by the print media really reasons—or only rationalizations? Why is it that we now require (as we in effect do) that each radio and television station must present certain types of programming—news, religion, minority interest, agriculture, public affairs? Why is it that our courts repeatedly intervene to decide, or require the FCC to decide, what issues are controversial, how many sides of those controversies exist, and what "balance" should be required in their presentation? Is it really because the detailed governmental imposition of such requirements is made unavoidable by oligopoly control of media content or by the need to decide who is a responsible licensee? Or is it rather that we have, as a



society, made the determination that such requirements are good and therefore should be imposed by the Government whenever it has a pretext to do so? And if it is the latter, is this remotely in accord with the principle of the first amendment, which (within the limitation of laws against obscenity, libel, deception, and criminal incitement) forbids the Government from determining what it is "good" and "not good" to say?

This stark question is inescapably posed by cable technology. The manner in which we choose to regulate cable systems and the content of cable programming will place us squarely on one side or the other of this issue. Perhaps the First Amendment was ill conceived. Or perhaps it was designed for a simpler society in which the power of mass media was not as immense as it is today. Or perhaps the First Amendment remains sound and means the same thing now as it did then. The answer to how we as a nation feel on these points will be framed as we establish the structure within which cable television will grow.

Because the President realizes that such fundamental issues are involved, he has determined that the desirable regulatory structure for the new technology deserves the closest and most conscientious consideration of the public and the executive and legislative branches of Government. For this reason, he established last June a Cabinet-level committee to examine the entire question and to develop various options for his consideration. Not surprisingly in view of the magnitude and importance of the subject, the work of the committee is not yet completed. I assure you, however, that the first amendment concerns such as those I have been discussing are prominent in our deliberations in the committee—as I hope they will be prominent in yours when the Congress ultimately considers this issue.

I now wish to turn to what I consider the second major innovation in our mass communications system during the past decade—the establishment of a corporation for public broadcasting, supported by Federal funds. The ideals sought by this enterprise are best expressed in an excerpt from the report of the Carnegie Commission on educational television:

If we were to sum up our proposal with all the brevity at our command, we would say that what we recommend is freedom. We seek freedom from the constraints, however necessary in their context, of commercial television. We seek for educational television freedom from the pressures of inadequate funds. We seek for the artist, the technician, the journalist, the scholar, and the public servant freedom to create, freedom to innovate, freedom to be heard in this most far-reaching medium. We seek for the citizen freedom to view, to see programs that the present system, by its incompleteness, denies him.

In addition to this promise, public television also holds some dangers, as was well recognized when it was established. I think most Americans would agree that it would be dangerous for the government itself to get into the business of running a broadcasting network. One might almost say that the free-speech clause of the first amendment has an implicit nonestablishment provision similar to the express nonestablishment restriction in the free-exercise-of-religion clause. Just as free exercise of religion is rendered more difficult when there is a state church, so also the full fruits of free speech

cannot be harvested when the government establishes its own mass communications network. Obvious considerations such as these caused Federal support of public broadcasting to be fashioned in such a way as to insulate the system as far as possible from government interference.

The concern went, however, even further than this. Not only was there an intent to prevent the establishment of a Federal broadcasting system, but there was also a desire to avoid the creation of a large, centralized broadcasting system financed by Federal funds—that is, the Federal establishment of a particular network. The Public Broadcasting Act of 1967, like the Carnegie Commission Report which gave it birth, envisioned a system founded upon the bedrock of localism, the purpose of the national organization being to serve the needs of the individual local units. Thus it was that the national instrumentality created by the act—the Corporation for Public Broadcasting—was specifically excluded from producing any programs or owning any interconnection (or network) facilities.

Noncommercial radio has been with us for over 50 years and non-commercial television for 20. They have made an important contribution to the broader use of communications technology for the benefit of all. The new Corporation for Public Broadcasting has, for the most part, made a good start in expanding the quantity and quality of programming available to local noncommercial broadcasting stations. There remain important questions about the most desirable allocation of the corporation's funds among educational, instructional, artistic, entertainment, and public affairs programming. But most importantly, from the first amendment standpoint, there remains a question as to how successful the corporation has been in avoiding the pitfalls of centralization and thereby of government establishment. Now that we have a few years' experience under this new system, we see a strong tendency—understandable but nonetheless regrettable—towards a centralization of practical power and authority over all the programming developed and distributed with Federal funds. Although the Corporation for Public Broadcasting owns no interconnection facilities, which the act forbids, it funds entirely another organization which does so. Although it produces no programs itself, which the act forbids, the vast majority of the funds it receives are disbursed in grants to a relatively few production centers for such programs as the corporation itself deems desirable—which are then distributed over the corporation's wholly funded network. We have in fact witnessed the development of precisely that which the Congress sought to avoid—a fourth network so-called, patterned after the BBC.

There is, moreover, an increasing tendency on the part of the corporation to concentrate on precisely those areas of programming in which the objection to establishment is strongest, and in which the danger of provoking control through the political process is most clear. No citizen who feels strongly about one or another side of a matter of current public controversy enjoys watching the other side presented; but he enjoys it a good deal less when it is presented at his expense. His outrage—quite properly—is expressed to, and then through, his elected representatives who have voted his money for



that purpose. And the result is an unfortunate, but nonetheless inevitable, politicization and distortion of an enterprise which should be above faction and controversy.

Many argue that centralization is necessary to achieve efficiency, but I think it is demonstrable that it does not make for efficiency in the attainment of the objectives for which public broadcasting was established. For those objectives are variety and diversity—almost inherently antithetical to unified control. To choose for public broadcasting the goal of becoming the fourth network is to choose for it the means which have brought success to the first three—notably, showmanship and appeal to mass tastes. This is decidedly not to say that there should be no nationally produced programming for public television. Some types of programming not offered on commercial television require special talent, unique facilities, or extensive funds that can only be provided at the national level; it is indeed the proper role of the corporation to coordinate and help fund such programming. But both for reasons of efficiency and for the policy reasons I have discussed above, the focus of the system must remain upon the local stations, and its object must be to meet their needs and desires.

The First Amendment is not an isolated phenomenon within our social framework, but rather one facet of a more general concern which runs throughout. For want of a more descriptive term we might describe it as an openness to diversity. Another manifestation of the same fundamental principle within the Constitution itself is the very structure of the Nation which it established—not a monolithic whole, but a federation of separate States, each with the ability to adopt divergent laws governing the vast majority of its citizens' daily activities. This same ideal of variety and diversity has been apparent in some of the most enduring legislation enacted under the Federal Constitution. Among the most notable was the Communications Act of 1934. Unlike the centralized broadcasting systems of other nations, such as France and England, the heart of the American system was to be the local station, serving the needs and interests of its local community—and managed, not according to the uniform dictates of a central bureaucracy, but according to the diverse judgments of separate individuals and companies.

In 1967, when Congress enacted the Public Broadcasting Act, it did not abandon the ideal and discard the noble experiment of a broadcasting system based upon the local stations and oriented towards diversity. That would indeed have been a contradictory course, for the whole purpose of public broadcasting was to increase, rather than diminish, variety. It is the hope and objective of this administration to recall us to the original purposes of the act. I think it no exaggeration to say that in doing so we are following the spirit of the Constitution itself.

Mr. Chairman, that concludes my prepared statement. Thank you very much.

Senator ERVIN. I want to commend you on your statement, which raises some of the most serious problems I think we have in understanding the first amendment. You have effectively pointed out that the justifications which we have employed for regulating the broad-



casting medium is founded upon factors which do not apply in the case of cable television. I sometimes think we have only touched the outer fringes of what will be possible through cable television. I happen to live in the foothills of the Blue Ridge Mountains and owing to the configuration of the mountains or some other natural conditions that I don't fully understand, I was unable to get some very close TV stations. But by means of cable television, my capacity to hear and see has been vastly expanded. I get many stations that I couldn't get at all in time past. Certainly since cable television does not use the airwaves and since limited frequencies is not a problem for the cable television, I think you make an excitingly fine case for the propositions that whatever justifications there may be for regulations of the broadcasting media, which uses the airwaves, does not apply to cable television.

I think we all recognize that the main purpose of the First Amendment was to afford rights which would make Americans politically and intellectually and spiritually free. We can't escape the fact that the Federal Government regulation of the broadcasting media which uses the airwaves results in two things which are somewhat dangerous to liberty. One is that it keeps the broadcasting media at all times under a Damocletian sword, and the other is that it tends to make the government succumb to the temptations to try to brainwash the American people.

The first amendment was designed to allow people to present both sides of a question. I have one illustration drawn from my own experience representing my State of North Carolina which, as you know, manufactures a great deal of tobacco. First we have a political doctor over in HEW who wants to dictate what the Americans should smoke, and I suspect, eat, drink, and wear, though he hasn't gotten to the last three things, and for some reason the FCC has succumbed to his blandishments. They now have a regulation which says in effect that while people can broadcast derogatory statements about tobacco, people who think that tobacco is pretty good can't say anything in favor of it over the air.

Nevertheless, the policy of the FCC is that it has the complete possession of all the truth on this subject and those who disagree with them have none.

I think if the Federal Government adopts such a policy that generally it destroys freedom of the mind. I think the First Amendment was written to implement the concept expressed by Thomas Jefferson when he said, "I have sworn upon the altar of God eternal hostility to all forms of tyranny over the minds of man."

So I certainly agree with you that we need reconsideration of some of these things and we don't want government domination.

Also I share your views about the centralization and control of the public broadcasting system. I am a sort of a lone voice crying in the very confused governmental wilderness at the present time. I don't believe in centralization of power. I am a disciple of Woodrow Wilson who said that liberty has never come from government. Liberty has always come from the subjects of it. The history of liberty is the history of the limitation of government not the increase of it. When we resist, therefore, the concentration of power we resist the

processes of  
the destruction

I think ma  
stroyed by

The public  
public broad  
ton, WETA.  
sents. And  
clean swor  
appropriat  
ment, "I d  
death your  
ment, peop  
public exte

I think it

It has a  
way to ma  
against G

I will ce  
these sub  
some of t  
which ar  
your exp  
about it.

Senate  
statement  
am espec  
your of  
shall ask

Before I  
that you  
is at the  
structur  
could be  
major ma  
modern  
see any  
ration  
have t  
or tele  
of a re  
years  
and

Mr. T  
for  
are  
the  
kind  
to  
I

Pr



processes of death because concentration of power always precedes the destruction of human liberties.

I think many of the liberties of American people have been destroyed by centralization of power.

The public broadcasting presents a real problem. We have some public broadcasting stations, I think we have one here in Washington, WETA, which does a marvelous job with the programs it presents. And, of course, public broadcasting also sits under a Damoclean sword if it is going to be dependent upon Federal appropriations. While many of us profess, as did Voltaire, the sentiment, "I don't agree with a thing you say but I will defend to the death your right to say it," as you pointed out so well in your statement, people don't want views that they don't like disseminated at public expense.

I think it is essential that we keep public broadcasting.

It has a real function to perform and we have got to find some way to make it secure in its financing and also to make it secure against Government control of the contents of what it broadcasts.

I will certainly await with interest your report of your study of these subjects because I think you have put your finger squarely on some of the most serious problems that we have in this field, and which are so closely intertwined with the First Amendment. I like your expression that the First Amendment, whatever you may say about it, it is designed to secure diversity of opinion.

Senator HRUSKA. Thank you, Mr. Whitehead, for your very fine statement. You put many questions very clearly, quite pertinently. I am especially interested in the impact of some of the activities of your office in the light of the First Amendment. In a little while I shall ask you some specific questions on that subject.

Before I do, however, I would like to ask you about this statement that you made during the course of your testimony this morning. It is at the bottom of page 2 of the statement. You say, "Unless some structural safeguard or regulatory prohibition is established, we could find a single individual or corporation sitting astride the major means of man's communication in many areas." Considering modern technology as having broadened the range of CATV, do you see any comparability or do you see any similarity between a corporation that would gather—all the programs that are available and have them for sale, or for distribution to local broadcasting systems or telecasting systems? Do you see any similarity between that kind of a mechanism and the structure that has been created through the years by the Associated Press and by the United Press International and other press services?

Mr. WHITEHEAD. I think there is certainly the potential, Senator, for that kind of similarity to arise. Local cable television systems are going to have to obtain their programming from certain sources, their news from certain sources, and I think it is likely that some kind of centralized nationwide organization could spring up similar to what has happened with the Associated Press. This is a distant possibility.

Senator HRUSKA. Well, now, there was a time when the Associated Press and United Press International fell into the displeasure of



those in Government who under our laws didn't like monopoly and the things that go with monopoly. That has been pretty well resolved now, hasn't it?

Mr. WHITEHEAD. I think it has been in that case. I think there will have to be similar kinds of things considered with respect to cable television to avoid just the problem that I think you are referring to.

Senator HRUSKA. So that if there is a gathering, whether it is by one corporation or by two or by three, perhaps they will not be able to say we will give these programs only to certain stations and we will not give them to others. Perhaps they have gone into the public domain to the extent that AP and UPI have gone and they are not able to discriminate, are they, under the present system?

Mr. WHITEHEAD. That is certainly one very effective way of going about it and it avoids the dangers of direct regulation that we would be very sensitive to in that kind of area.

This is what I was referring to when I said certain kind of structural changes should be made or should be adopted. It is to avoid the very detailed regulatory programs and still avoid the dangers that are implicit in the monopoly kind of situations to which you refer.

Senator HRUSKA. In the quotation that you included from the report of Carnegie Commission on Educational Television, they say, "We seek for educational television freedom from the pressures of inadequate funds."

By what means can that be achieved? After all, we have two sources of funds, I presume. One is from private sources, an organization or a corporate entity of some kind that provides the services that television for education would like to have. There is another source and that is from the public funds over which under our Constitution, thank goodness, the committees and Members of the Congress and the two Houses of the Congress have control.

How can we achieve a freedom from pressures of inadequate funds?

Do you know?

Mr. WHITEHEAD. I am afraid I don't know the full answer to that, Senator. The ideal, of course, would be unlimited funds with no restrictions. That is simply incompatible with the traditions of our society. People either have to use their own money or they have to convince other people to give them the money.

Public television today is obtaining funds through donations from corporations, from the listener and the viewer, and from foundations. They are also beginning to receive funds from the Federal Government. However, I think all of those people have a responsibility to ask what that money is being used for. There has to be an answerability, nevertheless. The answerability in the form of private donations is quite simple. If you do not like what you are listening to, you don't contribute any money.

In the case of Federal funds, however, there is a much more ticklish problem which I am referring to. I think we would all have to agree there simply cannot be unlimited funds, that we should provide adequate funds, that Federal Government should be a supple-

mentary source but not the principal source of those funds, and that the Congress does have a responsibility to ask in broad form how those funds are being used and whether those uses serve the purposes the public would like to see served.

In short, I think their desire for unlimited funds has to be just a desire and goal rather than something that can be actually attained.

Senator HRUSKA. Well, of course, your reference to the ideal situation being one where there would be unlimited funds provided, that wouldn't fit very well, would it? First of all, there isn't that much money. Secondly, in this country we don't like discrimination. The 14th amendment says everybody should be treated equally and a free press and even an educational television system is but one of our national goals. There have many other national goals, and if we are going to treat everybody equally and give them all unlimited funds, the dollars wouldn't be worth very much, would they?

Mr. WHITEHEAD. We have to make the judgment.

Senator HRUSKA. You say the Government would want to know what the funds it provides are being spent for.

Sometimes there are prohibitions and restrictions put upon the expenditure of those funds and you say one of those prohibitions specifically excludes the Corporation for Public Broadcasting from producing any programs or owning any interconnection or network facilities.

How meaningful is that prohibition, Mr. Whitehead?

Mr. WHITEHEAD. I think it is somewhat less meaningful than originally intended. Through the device of wholly funding these activities, the corporation has discovered, not suprisingly, that it has rather great control over what programs are produced and which ones are distributed over the public broadcasting network.

I don't mean to imply that they use that control, for improper purposes, but I simply do refer to the point that one organization is in effect exercising the power that I believe the Congress did not want it to have, and this raises a problem with respect to how we proceed in providing Federal guidance and funding.

Senator HRUSKA. Do you feel that a system of grants and, of course, the use of the programs from organizations that receive those grants, constitutes an evasion or violation of the statutory prohibition excluding the corporation from producing any programs or owning any interconnection with network facilities?

Mr. WHITEHEAD. No, sir. I don't consider it a violation nor would I consider it a purposeful evasion. I do think, though, that it reflects a rather different spirit than what I understand was intended by the 1967 act.

Senator HRUSKA. Well, what are your views on creating and implementing a national public TV news show anchored by former NBA newscaster Sander Vanocur for the robust salary of \$85,000, presumably per year? I noted this item in the *Newsweek* of February 7th. What are your ideas on that in the light of the prohibition to which you alluded in your statement?

Mr. WHITEHEAD. Senator, I would prefer not to comment on any particular individual or employee or even any particular show that is put on by public broadcasting.



Senator HRUSKA. Well, then, for the purposes of my question, I eliminate the name of Sander Vanocur.

Mr. WHITEHEAD. Thank you, sir.

I think that that type of thing is illustrative of the general problem which I was referring to, to wit when public funds are being used, there has to be some concern about the uses to which the funds are being put. As to the level of salaries, for instance, I think the public generally feels that public services has its own rewards and the use of public funds for paying very large salaries is not compatible with that general feeling.

It raises other problems. Public television has traditionally made use of talents of artists, writers, directors, actors, and so forth, who could command rather great salaries in the commercial sector but who donate or make available their time at a very low level to participate in the very worthwhile activities of educational and public broadcasting. Obtaining large salaries through public funds is going to inevitably discourage that kind of thing and in the process it is going to change the spirit of public television.

Furthermore, I think that to the extent public television wants to be involved in the discussion of controversial political affairs, which is inevitably going to be provided, they simply have to take into account the fact that this is going to make public television itself controversial. They have to weigh the benefits of that and the costs of that.

Along with that is the question of whether Federal funds should be used for this kind of purpose and that raises simply the broad question of principle that I raised in my statement.

So I think there are a number of problems.

Senator HRUSKA. This is a direct attempt. When a grant is made to another entity at least it is not that direct, but when a man is hired as a newscaster, without references to personality, without reference to salaries, when there is created a national public TV news show, wouldn't that seem to be specifically within the prohibitions that say the corporation is excluded from producing any programs?

I don't know much about your telecommunications industry but to a layman it seems where there is a prohibition from producing any programs and then there is, according to this news article, the creation of a national public TV news show, I think they are talking about the same thing, don't you?

Mr. WHITEHEAD. Sir, as I said, it is certainly not a violation of the act. It obviously is counter to the spirit of the act.

Senator HRUSKA. It is obviously what?

Mr. WHITEHEAD. Counter to the spirit of the act. Technically they are not producing that program. They have given a grant to another entity that is producing the show.

Senator HRUSKA. Well, it wouldn't be my purpose to go into that further because I understand that other committees of this Congress are inquiring into the matter. Perhaps they have a more specific oversight of the activities of the corporation. And I will entrust that part of the subject to their tender mercies. I think they will give it a good working over. They should.

Now, directing some questions to your statement proper, recently the Federal Trade Commission recommended that the Federal Com-

munications Commission require "counter-advertising" under the Fairness Doctrine. Do you think there are any First Amendment problems with this proposal?

Mr. WHITEHEAD. Yes, sir. I think there are. There are two important First Amendment considerations. One is the growing tendency to discriminate against the broadcasting media simply because of the fact of a Federal license. That raises broad First Amendment problems.

Perhaps more directly there is the question of who is going to oversee this process? How are we going to decide who gets to counter what and whether the person who is doing the counter-advertising is in fact not being deceptive?

Now, product advertising is not considered, I believe, to come under the free speech provisions of the First Amendment. It is not considered to be protected speech.

On the other hand, counter-advertising presumably would be. So there do arise very sensitive First Amendment problems of who is going to oversee the process, who gets to say what about advertising, who gets to do the counter-advertising? It merely moves the FTC's problem back one step and tries to pass over to the FCC what should really be the responsibility of the Federal Trade Commission.

We find this a very disturbing proposal and disagree with it.

Senator HRUSKA. In the example given by Senator Ervin about the evils of tobacco being considered in a sacrosanct position, no controversy about it at all. It was the FCC who said that, wasn't it?

Mr. WHITEHEAD. That is correct.

Senator HRUSKA. So they have moved in and have answered the question you raised when you ask who will take charge of monitoring this. They have stepped into that void, haven't they?

Mr. WHITEHEAD. They have.

Senator HRUSKA. Do you think that is where it should reside?

Mr. WHITEHEAD. We think the decisions on advertising practices should properly reside with the Federal Trade Commission. If you want to regulate advertising, you should do it through your control of advertising, not through the device of Federal licensing and regulation.

Senator HRUSKA. Where it is a hybrid creature, and the advertising may be a viewpoint and the answer to it an opinion, then we get half and half, don't we?

Mr. WHITEHEAD. That is right.

Senator HRUSKA. And we don't know whether we should be in one area or the other.

Mr. WHITEHEAD. That is right.

Senator HRUSKA. Now, on the subject of CATV, I understand that your office had negotiated with interested parties and received various viewpoints on it, and recently a compromise was achieved which would retard CATV growth subsequently and especially in the top 50 markets. How does this square with what seems to be the bright future that is seen for the technology developed by CATV?

Mr. WHITEHEAD. Well, the bright future of any new technology or any new industry always presents a bit of a chicken and egg problem. How do you get the thing geared up to be big enough so that



the advantages can in fact come about. The way that the Federal Communications Commission wanted to adopt, is to give cable television some favored treatment on its ability to import distant signals.

Now, as soon as they do that, there are profound copyright questions that arise and the Federal Communications Commission approach is to authorize those distant signals to be imported and to allow special copyright provisions—a compulsory license as it is called.

The compromise that was later reached among the parties, the copyright owners, the cable television people, and the broadcasters, placed some restrictions on the terms and conditions under which this special treatment would be afforded in the top 50 markets. So that viewed in its proper perspective, it is not retarding of cable television in the top 50 markets but simply not giving it such favored treatment in the top 50 markets. The reason for that, in the economics of television production, is that the top 50 markets are essential to the continued profitability of the program production organizations. They have to be assured of making an appropriate profit in those markets if they are going to be able to produce programming at all. The agreement was intended to provide much more freedom and much more latitude for cable television in the markets below the top 50 and to keep the necessary copyright exclusivity provisions in the top 50 markets to assure the program suppliers' economic base would not seriously be damaged.

Senator HRUSKA. Of course, when there has been a negotiation with reference to an interpretation of the copyright laws we get into the field of legislation, the statutes, and then normally when there is a difference of opinion upon that, we refer it to the courts. We go into the courtroom and ask the judge, what do you think this really means? So I presume that this arrangement and compromise which was worked out would be subject to court interpretation?

It would also be subject would it not, to express legislation on the subject where a law enacted by Congress would say this is what shall be. Do I state the case fairly?

Mr. WHITEHEAD. Absolutely.

Senator HRUSKA. Now, your office has a responsibility to develop policy for direct to home broadcast satellites. Are there any First Amendment implications of this for the U.S. broadcasters and if so, what are they?

Mr. WHITEHEAD. Yes, there are First Amendment implications. On the one hand, we would generally view the expansion of any new outlet of communication as an expansion or opportunity to extend the workings of the First Amendment. However, in this case there is the possibility, because of the economic realities, that direct broadcasting from satellite to home would result in the establishment of a new centralized national television system. It would involve programming to the entire Nation and the economics of this would drive out local broadcasting.

Now, this would work counter to the principle of the First Amendment where we want as many local and diverse voices as possible. You have those two competing kinds of First Amendment considerations that need to be weighed.



There is also the international problem which we have to keep in mind. Use of the radio spectrum in space is inherently an international of activity and the United States I am afraid is in the minority around the world in believing the world should be an open society—open to the freedom of information across national boundaries.

There is some movement abroad in international communications circles to try to limit or to forbid the use of satellites for this kind of purpose. We are very diligent in trying to avoid that taking place.

Fortunately this is a problem that is not going to be with us in the immediate future because the technology and the economics of the technology are such that it simply is too expensive for practical use in the foreseeable future.

Senator HRUSKA. Well, it is gratifying that the substances of your answer indicates that future decisions or considerations will be given within the framework of the first amendment. That is encouraging.

What is the administrative financing plan for the CPR? Is personal financing the goal as far as you know? What policy or what thought has your office on that subject?

Mr. WHITEHEAD. We along with most people feel very strongly that long-range financing is essential to setting up the kind of corporation, and kind of public broadcasting system that we want and need in this country. Unfortunately in setting up that kind of long range financing we have to resolve some of these very vexing questions that I discussed in my statement. We have concluded that it is simply not an appropriate time to try to push through a long range financing plan in this session of Congress. We have therefore submitted a one-year extension of the authority for funding of the Corporation for Public Broadcasting at an increased level of funds, up to \$45 million from the previous year of \$35 million to assure the corporation can continue to grow and continue the healthy development of public broadcasting.

In our bill, which I believe will be introduced today, we have provided that a certain amount of the funds, namely, \$15 million, would go directly to the local stations as a matter of right.

Senator HRUSKA. Mr. Chairman, I have a series of additional questions that are along this line. I don't want to burden the record at this point nor to encroach on the time of other witnesses and staff and the Chairman. May I ask unanimous consent that these questions be propounded to Mr. Whitehead for his answers and insertion into the record?

Senator ERVIN. That will be fine. So ordered.

They will be directed to Mr. Whitehead and he can answer them in writing.

Mr. WHITEHEAD. I will be pleased to do so.

Senator HRUSKA. I would prefer to do it that way and, if there is no objection, I would appreciate it.

(The material referred to follows:)

#### SENATOR HRUSKA'S QUESTIONS FOR MR. WHITEHEAD

1. The Corporation for Public Broadcasting seems to put a lot of emphasis on British Broadcasting Corporation entertainment shows, cultural uplift and public affairs discussions and documentaries. What does this have to do with



educational TV? Do you think the Corporation for Public Broadcasting is simply programing for an economic or cultural elite? Is it responsive to the needs of "middle Americans" of all races?

2. What do you consider to be the influence of foundations, such as the Ford Foundation, on public broadcasting programs, operations and policy making? Do you see any "free press" dangers in this? Should foundations be precluded from these activities?

3. How much money has the Ford Foundation directed to public broadcasting activities?

4. How could the Congress best keep tabs on the Corporation for Public Broadcasting's use of federal funds, just to see that there's fiscal responsibility and with no intent to exert improper influence?

5. You mentioned today that the Cabinet Committee on cable TV is studying this or the other fundamental issue and will soon make recommendations. What's holding the report up?

6. Do you know what the cable TV Cabinet Committee is considering to assure that cable development will enhance the opportunities for free expression which you described for us today?

7. What is the Office of Telecommunications Policy's role in advising the Federal Communications Commission on the First Amendment implications of its proposed rules regarding cable program content, access channels and the like?

RESPONSES OF CLAY T. WHITEHEAD TO QUESTIONS RAISED BY SENATOR ROMAN L. HRUSKA REGARDING FIRST AMENDMENT IMPLICATIONS OF PUBLIC BROADCASTING AND CABLE TELEVISION

*Question No. 1.*—The goals to be achieved for public broadcasting were initially derived from early educational radio and television services which developed in response to the educational needs of local communities and the instructional programs of state and local educational entities. The Carnegie Commission on Educational Television built on these educational broadcasting goals and created the concept of public broadcasting, which was intended to include more than classroom instructional services and other strictly educational broadcast services for use outside of the classroom. The intent was to have the Corporation fund programing in a wide variety of fields, including drama, culture, and art. The Congress followed this intent in the Public Broadcasting Act of 1967, although there was some uneasiness expressed about the Corporation's funding of entertainment programing.

In its programing operations, CPB has provided entertainment, "cultural uplift," public affairs and other types of programing. These do tend to appeal to a cultural and economic elite. I think, however, that there is no doubt that the more emphasis CPB gives to instructional services, adult education broadcasts, and programing for the learning needs of children, the more CPB is appealing to a broader, more diverse audience. Both types of programing are desirable; it is a question of emphasis. We believe that CPB should work more closely with the local educational stations to see where the balance should be struck between both types of program services to achieve the greatest benefit to the public.

*Questions Nos. 2 and 3.*—Foundations, in general, and the Ford Foundation, in particular, have contributed much of the financial support for the development of public broadcasting. No single private or public entity has contributed as much as the Ford Foundation—nearly \$200,000,000 in all. Obviously, when any entity—including the Government—spends large sums of money upon an enterprise it looks to see that the enterprise is developing along the lines that it desires. There is nothing wrong about this; indeed, it would be irresponsible for any private or public donor to dispense money willy-nilly, without regard to success in achieving the desired goals.

On the other hand, it is certainly legitimate to question whether it is appropriate for a social institution as important as public broadcasting to be substantially directed along the lines desired by any single entity that is not accountable to the public. The Ford Foundation, for example, is well known to be particularly interested in public affairs programing. Naturally, this interest underlies the Foundation's funding decisions and affects the balance among various types of programs that are made available to the public.



The inappropriateness of dominant influence by a single private source—however benevolent that source may be—is one of the reasons the Administration believes that public financing for public broadcasting should be established on a sound, fiscally responsible and stable basis.

*Question No. 4.*—In 1967, when the Congress enacted the Public Broadcasting Act, a question was raised as to how the Congress could maintain responsibility for CPB's use of Federal funds. The matter was resolved by including a provision in the Act allowing for an audit of CPB by the General Accounting Office. To my knowledge, Congress has not used that provision.

*Question No. 5.*—The President's Cabinet committee on broadband cable television was formed in June 1971, and has spent a considerable amount of time analyzing the fundamental and difficult policy matters which it must resolve in order to make its recommendations to the President. There has been steady progress in the committee's work, and there is nothing "holding up" its recommendations except the complexity of the task.

*Question No. 6.*—The Cabinet committee has considered a number of different approaches for cable development which will enhance opportunities for free expression. While it would be inappropriate for me to discuss the details of the committee's current deliberations, I can highlight some of the First Amendment objectives that public policy should set for cable television. One of the most important objectives is to facilitate access to cable channels for both program production and program reception. Another objective is to guard against the dangers posed by the fact that, in most instances, provision of cable transmission services will be a natural monopoly. Furthermore, as cable develops over-the-air broadcasting must be allowed to continue to provide essential public services that will contribute to the total diversity of programming and program sources.

There are various ways to achieve these First Amendment objectives for broadband cable development. There could be broadcast-type regulation for cable, with use of the Fairness Doctrine, paid access requirements, program "anti-siphoning" rules, etc. A strict common carrier approach could also be chosen, which would require complete separation of program supply and distribution functions. Another approach may be to require vertical disintegration of the program production and program distribution functions, in order to avoid excessive concentration of control over the access to cable channels. Other approaches and variations on the above are also possible.

Whatever the approach ultimately chosen, the Cabinet committee will be guided by the fundamental goal of fostering the opportunities for free expression which broadband cable promises for the future.

*Question No. 7.*—OTP has not advised the Federal Communications Commission on the First Amendment implications of the FCC's new rules regarding access channels, cable program content, and other cable services not related to the retransmission of television broadcast signals. The Administration's views on these aspects of cable television will be based on the Cabinet committee report. As I noted earlier, free speech considerations are prominent in the committee's deliberations.

While we take no position at this time regarding those aspects of the FCC's proposed rules not related to retransmission of broadcast signals, we nevertheless support prompt implementation of the entire package, with broad industry support. We think this is essential to enable the development of this promising new technology to proceed.

The framework and national policy for cable regulation is a matter of crucial importance to our society, and it requires the most careful congressional consideration as a matter of mass media structure. The FCC rules will serve to permit cable growth while that deliberation is proceeding and yet not foreclose the opportunity for congressional review and readjustment of the long-run policy. Indeed we would not urge final implementation of the FCC's new cable rules if we thought that this would have the effect of foreclosing any practical evaluation of a broad, long-range policy for broadband cable technology. We believe, however, that implementation of the rules will not have this effect, and that the FCC rules could serve as a transitional approach to the ultimate public policy treatment of cable technology.

Senator ERVIN. Mr. Whitehead, I will have to admit you have confused me a little by making the distinction between freedom of



speech generally and freedom of advertising. I think you and I would both agree that the First Amendment gives every American the right to make a political speech in which he says my religious views are good for my country. Don't we?

Mr. WHITEHEAD. Yes, sir.

Senator ERVIN. What provision of the Constitution says to an manufacturer, you are to be forbidden by a Federal agency to say that the goods you produce are good for the country?

Mr. WHITEHEAD. I don't think there is any problem with that, sir, and my general counsel, has just flagged the same problem for me. Not being a lawyer I am a little bit at a loss in grasping all the technicalities.

Senator ERVIN. I will have to confess I can't see a valid distinction between a man saying, my political views are good for the country, and a man saying my product is good for the country.

Mr. WHITEHEAD. I certainly have no problem with that in principle.

Senator ERVIN. You don't have a problem with it?

Mr. WHITEHEAD. No, sir.

Senator ERVIN. Nevertheless, you say the Federal Government can determine the truth of the latter but not of the former?

Mr. WHITEHEAD. No, sir, that is not what I am saying. I think the advertiser certainly has the right to say to the public what he wants to say. I just was under the impression that there were certain restrictions that were placed on that right and I may have been wrong.

Senator ERVIN. Well, the FCC has required certain people producing certain gasolines who advertise that their gasoline is good for the motor, to present as a part of their advertisement information indicating that their gasolines pollute the atmosphere.

Now, I don't know what your views are on that but my view is that action is polluting—that is, FCC requirements of that kind are polluting freedom. In my opinion, polluting freedom is worse than polluting the atmosphere, if we have to make a choice between those two very disagreeable things. If you allow the FCC, or any other governmental agency, to say this product is good and that product is bad, and an advertiser cannot speak up for the goodness of his own product in public broadcasts, I think you are very close to getting to the point of allowing the government to say to the American people, it would be good for you to read this book but it would be very bad for you to read that book because that book might give you some thoughts that the government thinks are improper.

Mr. WHITEHEAD. Yes, sir; I agree completely with you in spirit.

Senator ERVIN. Thank you.

Mr. WHITEHEAD. And that was my reason for being so upset and opposing the FTC's proposal which I think carried this use of government regulation and licensing in broadcasting far beyond what was ever intended and far beyond what was sound.

Senator ERVIN. The trouble with governmental power is that those who have it have an insatiable appetite for more power and they abuse power. I think there is less danger in having people abuse freedom of speech than there is in having despotic governmental power because one perceives freedom even though the freedom is exercised and abused, and the other stifles freedom.

Thank you very much.  
Do you have any questions?

Mr. BASKIR. I would like to followup on some of those points which Senator Hruska and the chairman mentioned. In a speech in October, you had some very very critical things to say about Fairness Doctrine and other legal mechanisms to open up accesses to broadcasters; stronger, I might add, than any of the other witnesses we have heard. You said it was of government control, that the courts, and I guess the FCC, are making broadcasters government agents that to take away the licensee's First Amendment rights and giving the public an abridgable right of access, in essential is, I guess, the First Amendment then becomes what the FCC and the courts say it is.

You also had three proposals which were designed to change the situation. One was with respect to access. If I recall, you wanted to have a statutory right of access, with whoever paying for the time accommodated on a first come first served basis. I think when you made that speech and made those proposals, they were your personal views. I would like to ask you first, are they still your personal views and only your personal views, or do they represent something more from the administration?

Mr. WHITEHEAD. Those are reflective of the broad concern of those in the administration and elsewhere that there are fundamental problems involved in the direction we are taking to regulate broadcasting. Those specific proposals you refer to were my personal proposals and remain my personal proposals. They were put forward because we felt very strongly that this was needed to stimulate public discussion of these very broad questions of how we are regulating broadcasting. Public discussions I think, had become rather bogged down and we felt a concrete proposal, presenting a rather different alternative, would be useful in stimulating public discussion. We thought they were responsible proposals and we continue to think so. However, we are not yet prepared to take action on them because I don't think we have had sufficient public discussion to justify pushing those specific proposals forward and trying to get them adopted at this time.

But we do think that these proposals and like proposals should receive very serious public consideration.

Mr. BASKIR. On the right of access, your proposed statutory right of access in place of the Fairness Doctrine and various other things, as I recall, was based upon requiring the broadcasters to sell time to whoever asked for it and had the money to pay for it.

Now, the Federal Trade Commission has proposed to the FCC a similar proposal but they added another item, that some of this time should be offered free of charge. I wonder what your views are on that?

Mr. WHITEHEAD. The problem of requiring a broadcaster to provide time free of charge is that the only place that can be done is the government. Therefore you get right back into the problem of government power over the content of speech that I was referring to earlier and the chairman alluded to.

This is just a very serious and very sensitive problem. The spirit of the proposal that you are talking about was to limit the Fairness



Doctrine in its application to program time and not to use the Fairness Doctrine as a way of obtaining the right of access for an individual to have time to express his point of view. The Fairness Doctrine is intended to assure various points of view are expressed. It was never intended to be a mechanism whereby a person could claim the right of access to a television screen. The proposal I made was an attempt to illustrate that and provide a different access mechanism that would avoid the Federal Government getting involved in the very detailed determination of who gets that right of access. The proposal would also avoid undermining the economic structure of broadcasting by requiring all sorts of free time to counterbalance people who have paid for time or simply claimed right of access.

Mr. BASKIR. How would you handle the problem, which I gather the Trade Commission's proposal is aimed at, of getting points of view across from people who do not have enough money to buy time? There are very important points of view, I expect which cannot command funds in the public marketplace because—

Mr. WHITEHEAD. Well, first of all—

Mr. BASKIR. They are not attractive from the commercial points of view, so the people who hold them can't find the money to buy the time.

Mr. WHITEHEAD. I think most points of view if they are sufficiently important do attract funds. But recognizing that that may not always be the case, that is precisely why we have the fairness obligation placed on the broadcaster as licensee.

As long as we have the current system of broadcasting with the limited number of channels, the FCC is going to have to decide who is the qualified licensee. I think in making that determination, a very important aspect of it is the question "has that licensee been fair?" Has he covered the controversial issues and has he made sure that all sides are fairly presented? We would like to have the licensee cover points of view and assure that they are covered if the money is not forthcoming to buy time for that purpose.

Mr. BASKIR. This is the second part of your proposal? The straight statutory purchase of time would not be the complete test.

Mr. WHITEHEAD. Oh, no, of course not. When I made those proposals I made it very clear that they were interrelated. These are very complex matters and as you start discussing issues and proposals, you find that they begin to overlap and interlink so you can't always ascribe one issue to one particular proposal.

Mr. BASKIR. Your third proposal was that we start deregulation by taking some parts of broadcasting—I think you were suggesting certain major broadcasting markets perhaps certain portions of the FM band—and deregulate those. It seems to me that the logic of your speech and your statement today would suggest that you want to propose deregulating all of the broadcasting rather than just portions of it.

Mr. WHITEHEAD. There is unfortunately rarely a clear line that you can draw between something that has to be regulated and something that does not need to be regulated. In broadcasting it is more a matter of degree. I think that television, for many reasons is unique and probably is going to continue to have to have a significant amount of Federal regulation.

My proposal was on radio broadcasting. I pointed out that it is quite different from television. It is a case of the tail wagging the dog. We are now regulating radio as a kind of secondhand television. We don't think that is appropriate. But most appropriately of interest to this committee, we gave great weight to first amendment considerations in developing the proposals.

In radio we have a multiplicity of outlets. In almost every community there are more radio voices available than there are, say, newspaper voices. We have a strong belief in this country that the viewer, the listener, the consumer has a certain amount of good sense and can decide what he wants to listen to and what he doesn't want to listen to and discriminate between what he is hearing and what doesn't want to hear.

We simply felt from a First Amendment standpoint and from an economic standpoint, in view of the opportunity for competition in radio, that there was much less need to regulate radio in the great amount of detail that there is in television and probably much less need for all that red tape than you might think from having it there.

Unfortunately that is the kind of thing that is impossible to prove. We could study it for 10 years and never develop, I think, a convincing case one way or the other. We therefore propose to try an experiment in several areas of the country to move as far as we thought prudent within the law, of course, to remove as many of the regulations as seemed prudent and to follow the program, to see what happened. Does the service to the public improve? Or, does the Federal Government need to look over the public's shoulder and tell the public what they will have.

We simply think that kind of thing ought to be tried so that we will know which direction we ought to be going in.

Senator ERVIN. Thank you very much for a very illuminating and very penetrating analysis of the many complex problems that arise in this field under the First Amendment.

Mr. WHITEHEAD. Thank you, sir.

Senator ERVIN. You may call the next witness.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Miss Edith Efron.

Senator ERVIN. We are delighted to welcome you to the subcommittee and appreciate your willingness to express views which were very entertainingly set forth in your book, *The News Twisters*. You may proceed in your own way, Miss Efron.

#### ~~STATEMENT OF MISS EDITH EFRON~~

~~Miss EFRON. Just one prefatory comment. I speak here as a private citizen, not as a representative of my publication.~~

~~Mr. Chairman, members of the committee: A view has crystallized in this country that the bias controversy is a relatively new phenomenon, spawned by a repressive Nixon administration, and bred in the dark shadows of right-wing conspiracies.~~

~~This view is a symptom of our antihistorical age, where memories are increasingly confined to the parameters of the daily press.~~

~~The bias controversy was actually born in the 1930's with the collectivist concept of public ownership of the airwaves. Until that~~