J. Law & Econ.
Oct, 1967 Vol X

BROADCASTING, PUBLIC POLICY AND THE FIRST AMENDMENT*

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THERE continues to be deep interest in the development of a general theory of the First Amendment, especially as cases claiming its protection have become so major a part of the workload of the United States Supreme Court in recent years. Here at least the American lawyer has some appetite for generalization. But as we move from issues of obscenity to those of loyalty oaths to those of public-issue picketing to those of prejudicial publicity during a criminal trial to those of libel, it becomes apparent that our contemporary communications problems have stubbornly distinctive characteristics making them resistant to ready generalization. One of the most awkward areas from the point of "fit" with a free speech theory has been that of broadcasting.

This essay proposes to explore the relationships between broadcasting and the traditions of the First Amendment, in the hope of inducing a wider confrontation of the anomaly of having at the moment in the United States two traditions of freedom of the press—that of the written and spoken word and that of the broadcast word.

THE TWO TRADITIONS

Popular discussion of the matter is rich in paradox. A year or so ago John Pemberton, the Executive Director of the American Civil Liberties Union, speaking at a conference on broadcasting and election campaigns observed that "in terms of the role of free speech in the functioning of a system of self-government, radio and television broadcasting have taken the place of the stump and the soap box in 1791." Having thus placed broadcasting at the very heart of the democratic process, he then quickly added: "Although the stump and the soap box were not subject to regulation in 1791, *it is not*

* This essay is largely based on a memorandum written a year ago for the Columbia Broadcasting System, a circumstance which accounts for certain emphases of style and content. I am most grateful to CBS for their generous support of my study of the broadcasting-free speech problem and for their courtesy in permitting me to borrow so heavily from the memorandum here.

A useful bibliography on the general problem can be found in 1 Emerson, Haber and Dorsen, Political and Civil Rights in the United States 869-901 (1967).

inherently inconsistent with the role of broadcasting as the comparable vehicle for politically influential discussion *that it is comprehensively regulated today*. Nor is it inconsistent with the First Amendment that this is so . . . ."[1]

Then going back a few years, there is that oft quoted remark of Herbert Hoover when as Secretary of Commerce he spoke on behalf of the Radio Act of 1927: "We can surely agree that no one can raise a cry of deprivation of free speech if he is compelled to prove that there is *something more than naked commercial selfishness in his purpose*."[2]

What strikes the ear as odd about these comments is the reversal of role. Mr. Hoover is surely not remembered as a harsh critic of the selfishness of the free market. Yet something about broadcasting as a form of communication has moved him to so speak. The ACLU has for a generation been the conscience of the nation on issues of free speech. Yet Mr. Pemberton, too, is caught by something special in broadcasting which alters his expected reaction to comprehensive government regulation of the most influential channel of political discussion.

In brief, we all take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication.

And when the anomaly is recognized, it sometimes has ironic consequences. Consider for a moment the speech of Bernard Kilgore, President of the Wall Street Journal, at Colby College in 1961 on accepting the Elijah P. Lovejoy Award. In an eloquent defense of the principles of a free press, Mr. Kilgore had these words of caution:

> I would like to make one final suggestion that I know is controversial. But I would like to suggest that we are going to get the issue of freedom of the press obscured dangerously if we try to stretch it to fit the radio and television industries that operate and apparently must operate for some time in the future under government licenses. I concede right at the start that radio and television do transmit news and information about public affairs . . . Yet I do not see the broadcast media becoming an effective substitute for the printed word. Even this is not the main issue. The main issue is what damage we may do to the basic rights of freedom of the press if we undertake to stretch—or more properly limit—this freedom to a concept which somehow makes it compatible with a government license. It seems to me that no matter how loose the reins may be, and I am inclined to think in recent years they have been looser than they are going to be in the future, the argument that freedom of the press protects a licensed medium from the authority of the government that issues the license is double talk . . . .
>
> I think that if we try to argue that freedom of the press can somehow exist in a medium licensed by the government we have no argument against a licensed press.[3]

[1] Address by John de J. Pemberton, Jr., National Conference on Broadcasting and Election Campaigns, October 13, 1965 (emphasis added).

[2] Speech by Herbert Hoover, as Secretary of Commerce, Fourth National Radio Conference, November 9, 1925 (emphasis added).

One is tempted to paraphrase the bon mot that if you have a Hungarian for a friend, you don't need an enemy.

Mr. Kilgore's speech could well be taken as the text for my personal sermon. He confronts the anomaly of the two traditions properly and does not try to gloss over it; *he would solve it cleanly by simply denying to broadcasting any kinship in the free press*. But if Mr. Kilgore is correct, how dismal the position of broadcasting is today. It is cut off from partnership in a great American tradition of freedom. My objective is in effect to show that Mr. Kilgore has given up the battle too quickly.

The split in tradition is illustrated again by two cases decided at approximately the same time. In *New York Times Co. v. Sullivan*,[4] the Supreme Court, in reversing on First Amendment grounds an Alabama libel judgment against the *Times*, restated the American speech principles with an exciting freshness and sweep. The Court spoke of "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." The opinion spoke neither in terms of clear and present danger formula nor of balancing but used a new idiom, finding the "central meaning of the First Amendment" in the principle that there could be no offense of seditious libel in a free society. The exact reading of the case need not be argued here; the point is simply that it was a major liberating event in the traditional world of the First Amendment.[5]

At about the same time in the broadcast world of the First Amendment, the *Palmetto* case[6] was being decided. It marked a revolution in the opposite direction; it was the high point of Commission claims to regulate program content.[7] And while the Commission's claims were not ratified by the Court of Appeals which found alternate grounds for upholding the Commission's refusal to renew the license, the contrast between the two events is

[3] Speech by Bernard Kilgore, Colby College, November 9, 1961.

[4] 376 U.S. 254 (1964).

[5] See Kalven, The New York Times Case: A Note on the Central Meaning of the First Amendment, 1964 Supreme Court Rev. 191; Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965); Meiklejohn, Public Speech and the First Amendment, 55 Geo. L.J. 234 (1966).

[6] Robinson v. FCC, 334 F.2d 534 (1964), affirming, 33 F.C.C. 250 (1962).

[7] The case involving a refusal to renew a license in part because of offensive programming by licensee. The programming, although vulgar, fell short of obscenity as a legal matter.

king evidence that the legal norms are at the moment developing along e separate lines.

f one reviews the legal developments under the Radio Act of 1927 and Communication Act of 1934, one cannot quite suppress the feeling that t is lacking is one good case of injustice by government—which has n corrected by the courts. What broadcasting has needed is its own ger case. The greatest obstacle to the development of a vigorous tradi- of freedom of speech in broadcasting may well have been the placidity the decency of the FCC. The Commission has claimed the widest ers, but it has exercised them with discouraging circumspection.

ut my suspicion is that the two traditions of the press have by today n so far apart that the broadcasting world would not recognize a *Zen-* case if one came along. Indeed, I would be tempted to argue that *metto* and *Pacifica*[8] were just such opportunities for historic contro- y over government control which were largely ignored by the industry.

One Friendly Voice

Perhaps the final irony is that at the moment the chief stirrings of an pulse congenial to the older traditions of a free press comes not from industry, or from the press, but from one of the Commissioners. In at two recent cases Commissioner Lee Loevinger has expressed doubts ut the extent of the Commission's powers with an eloquence and a vigor t to my knowledge has had no counterpart in industry statements.

We will consider below the analytic aspects of the cases. For the moment are concerned only with the Commissioner's rhetoric in dissent. It is the oric of the grand tradition of free speech and free press.

n *In re Lee Roy McCourry*,[9] the Commission set for a hearing an appli- on for a UHF frequency for Eugene, Oregon, because the applicant had d 70 per cent time for entertainment, 30 per cent for education, and ing for the other categories involved in the FCC's quotas for "balanced ramming." In this unpromising context, Commissioner Loevinger filed ery dissent, in which Commissioner Hyde joined, reviewing at length prior cases and concluding:

> Whatever else may be said on this subject, it comes down to this. The Commis- is clearly making a choice between competing interests and values. Presumed ty and balance of TV programming is one choice and preservation of a wider of freedom of expression for the broadcaster is the other. However, if the unity involved here gets an additional television station which devotes only

re Pacifica Foundation, 36 F.C.C. 147 (1964); 6 P. & F. Radio Reg. 2d 570).

P. & F. Radio Reg. 2d 895 (1964).

> 30 per cent of its time, to educational programs and fails to carry agricultural bulletins, local talent, talks or discussion programs, no large injury will be done either to the community or to the society in general. On the other hand if the principle is established that the Commission has the right or power to prescribe either directly or indirectly the kind and quality of programs that must be carried by broadcast licensees then the vital interest of society, the nation and perhaps the world in the fullest freedom of communications and expressions of ideas, in whatever form, may be compromised. As between these interests, I do not believe any clear sighted man can long hesitate. A lack of satisfying programs on TV would be a small price to pay for the maintenance of the fullest freedom of communications and the unimpaired vigor of those private rights which thinkers from Milton, Jefferson, and Mill to the present Supreme Court have disclosed to be fundamental to the existence and preservation of a free and democratic society.[10]

The second case is *Faith Theological Seminary, Inc.*,[11] which involved an application for transfer of a license to an organization controlled by one Rev. McIntyre who had strong views about other religious groups. Over the protests of various community groups, the Commission approved the transfer, holding that the transferee deserved a chance to show that he could comply with the "fairness" doctrine. This time Commissioner Loevinger concurred in the result but wrote a separate opinion full of misgivings about the stance of the Commission. He concluded:

> The mandate to grant licenses that serve the public convenience, interest, or necessity does not constitute the FCC the moral proctor of the public or the den mother of the audience. The Commission is not only forbidden to disqualify an applicant on the basis of his religious and political statements, it is prohibited from inquiring into them as a basis for official action. . . . If the allegations concerning Dr. McIntyre are true, I would disagree strongly with his religious and political views and would find them obnoxious. However, his religious and political views are of no legal significance or proper official cognizance. The Commission has no choice in this case and the result reached is compelled by basic legal and constitutional principles. By upholding today the principles which protect speech and beliefs that are repugnant to me I preserve principles that in another day and in other circumstances may survive to protect views and statements which I cherish.[12]

Is There Really a Problem?

One embarrassment in attacking seriously the topic of free speech in broadcasting is that the admitted benignity of the FCC has made it difficult to mount appropriate indignation. Whatever the posture of the theory, in

[10] *Id.* at 907.

[11] In re George Borst, 4 P. & F. Radio Reg. 2d 697 (1965).

[12] *Id.* at 707.

practice things are not at all bad and broadcasting does not live under a shadow of government tyranny. Why then get excited about it now?

There are several lines of answer. There is the general point that in matters of free speech it is always seasonable to keep the basic doctrine straight. There is the fact that in Commissioner Loevinger the government itself is offering a promising ally. There is the fact that often, as in *Faith Theological Seminary* or *Pacifica*, the decision falls on the right side of the line but only after the claim to control has been made and scrutiny has taken place. There is the still fresh memory of how quickly public opinion can be aroused as with Chairman Minow's famous "wasteland" critique.

But I suspect the big point goes not to these overt issues but to the insidious loss of morale that comes from the recognition that the government is looking over your shoulder while you communicate.

In a talk entitled *Broadcast Licenses and the Freedom of the Press*, before the National Association of Broadcasters some years back, Mr. Richard Salant put his finger on the problem. He reported the extraordinary amount of informal government inquiry, criticism, and surveillance that followed upon CBS's interview in 1957 with Premier Khrushchev, and then sought to explore the implications. Noting that the broadcaster needed a license to go into business he went on:

> This puts us on the spot before we even get started. No matter what the laws may say about immunity from censorship and about our entitlement to the guarantees of the First Amendment there is always the brooding omnipresence that a broadcaster is a licensee and if he is not a licensee, he cannot be a broadcaster.
>
> We are reminded of this basic dilemma with rather frightening regularity. Time and time again we are called to account by those who have, directly or indirectly, power of life and death over us. Every time we deal in our news or public affairs broadcasts with a public controversy concerning which there are strongly contending views, we can at least expect letters from legislators, public officials and private citizens representing important organizations who accuse us of partiality and call on us for an accounting—line by line and second by second.[13]

Mr. Salant, echoing Mr. Kilgore, raised the dismal question whether in a practical world the brute fact of the license spoiled the game.

The psychology of freedom is a subtle business and it may prove to be true that you can't beat the fact of the license. It would seem worth exploring however whether a vigorous redefinition of *freedom within licensing* might work to create a significantly different climate of opinion in the industry, in the government, and in the public.

[13] Speech by Richard Salant, Broadcast Licensees and the Freedom of the Press, before National Association of Broadcasters, 1957.

Regulation by Dossier—the CBS File

It may be useful to pause to document in detail Mr. Salant's point. CBS furnished me with its complete file of FCC complaints covering the period from 1960 through 1964. There are some 35 items in all.

In each case the ceremony is much the same and the files read like the letters-to-the-editor column of a lively magazine, *but with one important difference*. Each time, the Government of the United States has acted as intermediary to pass along the complaint and each time there is the form letter with the telltale paragraph:

> Since it is the practice of the Commission to associate complaints with its files on the licensees involved and to afford them the opportunity to comment thereon, it is requested that you submit a statement concerning the above matter.[14]

Despite this polite wording and despite the bureaucratic triviality of so much of the correspondence, it should not be forgotten that it is the Government that is "requesting" an answer; that it is affording a chance to defend against the complaint; and that it is making the matter one of permanent record on the theory that it is *relevant* to some exercise of power by it. *It is, therefore, a claim to government jurisdiction over the content involved.* The good sense with which the Commission has handled such complaints on the merits does not obscure the fact that it claims jurisdiction to handle them. Nor is there any mystery about the jurisdiction it is claiming—it is storing the complaint and answer for evaluation at the time of license renewal.

Two points should be underscored. So far as I know, the Commission does not attempt at the time to screen the complaints; it apparently follows the rule that any complaint, however trivial or outrageous, deserves to be passed on under government auspices. Nor, so far as I know, does it ever decide that a complaint about programming falls outside its jurisdiction. The second point is that so far as I know no licensee has ever been heroic enough to refuse to answer through these channels on the grounds that it is none of the Commission's business.[15]

The results, although often trivial and often funny, bear a haunting analogy to the FBI files on individuals during the hey-day of the loyalty programs in the 'fifties.[16] The FBI too, had a very low threshold and put virtually everything into the file for evaluation. Thus such questions as "Do you read the New Republic?" or "Do you like Russian ballet?" or "What

[14] The exact wording changes somewhat over the years, but the message remains the same.

[15] But see A Complaint about Complaint, Broadcasting, Jan. 23, 1967, at 47.

[16] See, for example, E. Bontecou, The Federal loyalty-security program (1953).

do you think of Paul Robeson?" were widely thought by the public to indicate that the Government was censoring all these items since it had found it relevant to ask about them.

Perhaps the anxieties in that instance were exaggerated; certainly no one ever lost a Government job just because he read the New Republic. But it is arresting how much more sensitive people were to the implications of that dossier than the industry and press appear to be to those of the FCC dossier. The principle, I think, is that the Government cannot ask colorless questions about the content of communications; once it asks, the matter is no longer colorless. Thus the point about the CBS file is that 35 times in five years the Government has asked pointedly about the content of CBS communications.

A good third of the items are of the kind that CBS must have been glad to have the chance to clear up, as in the instance where the televising of a golf tourney was cut off just as Jack Nicklaus was shooting![17] Or the delightful letter from the parent who protested that her four-year old was being frightened by spot announcements during Captain Kangaroo, apparently urging the building of bomb shelters![18]

The remaining two thirds, however, strike a different note. They deal with the network's fairness in handling controversial public issues from birth control to fluoridation to housing to migrant workers to krebiozen to the Congo to Zionism to firearms control. In most instances the CBS reply is animated and admirable and CBS does not sound in the least intimidated. But the very seriousness and fullness of the replies indicate how strange the ceremony is for the American press.

One example will have to suffice. Item 12 is a series of letters between the FCC and CBS concerning a June 15, 1961, broadcast by Walter Lippmann. The complaint goes to bias in Lippmann's views on foreign policy and to the absence on the program of a counter-view. It appears from the CBS reply that the Lippmann program was so well received that Senator Mansfield had the transcript read into the Congressional Record. Nevertheless the Commission having received a complaint about it, asks CBS to account. Apparently there was some brief delay in replying which elicited the following from the Commission:

> Commission records indicate that as of this date no response to the above mentioned letter has been received. As you are aware, expeditious handling of Commission requests for information is a minimum requirement which the Commission has the right to expect of its licensees. Accordingly, it is expected that you will submit the information requested, in duplicate, within ten (10) days of the date of this letter.

[17] Letter of January 13, 1964; Item No. 29 in the file.

[18] Letter of April 9, 1962; Item No. 16 in the file.

Think of the outcry if some great daily newspaper were requested by government, and so peremptorily requested, to furnish a justification for printing the views of Walter Lippmann! To answer a letter is, to be sure, no great burden. But freedom has in no small part depended on awareness of the difference between doing something as a matter of grace and doing it as a matter of obligation.

In the end there are two important aspects of the FCC dossier technique. First, it serves to extend the appearance of control far beyond what rule-making or formal decisions would suggest, and it does so by a process which is really not public and which is awkward to challenge. Second, as Mr. Salant has pointed up, it serves to create psychologically an atmosphere of surveillance which is destructive of the morale of a free press.

Evolution and the First Amendment

Some part of the current mood is due perhaps to an insufficient familiarity with the movement within traditional speech doctrine, broadcasting apart. The truth is that, as constitutional law goes, it is a young field still very much in a state of development.

The first serious judicial construction of the First Amendment does not come until 1917 with Learned Hand's opinion in *Masses v. Patten*[19] and the famous clear and present danger formula of Justice Holmes does not appear until the *Schenck*[20] case in 1919. Nor is it until *Gitlow*[21] in 1925 that it is held that the First Amendment applies to the states via the Fourteenth Amendment thus creating for the first time a real arena of activity for the Supreme Court in the free speech field. Moreover, as late as 1932 in *Near*[22] it is necessary for the Court to announce firmly that the First Amendment is not limited to the Blackstonian idea of free speech as simply absence of prior restraints. Further, it was not established until *Burstyn* [23] in 1952 that movies too are within the protection of the Amendment. And it was not until *Roth*[24] in 1957 that the Supreme Court first confronted the constitutionality of regulating obscenity. As recently as 1963 the Court in *Button*[25] found that under certain circumstances litigation itself might come under protection as the exercise of First Amendment

[19] 244 Fed. 535 (S.D.N.Y. 1917); reversed on other grounds, 245 Fed. 102 (C.A. 2d 1917).

[20] Schenck v. United States, 249 U.S. 47 (1919).

[21] Gitlow v. New York, 268 U.S. 652 (1925).

[22] Near v. Minnesota, 283 U.S. 697 (1931).

[23] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[24] Roth v. United States, 354 U.S. 476 (1957).

[25] NAACP v. Button, 371 U.S. 415 (1963).

rights. And, as we have already noted, in 1964 in *New York Times*,[26] the Court effected a major shift in its idiom for handling speech problems.

The legal issues as to the status of broadcasting and the Amendment have never been confronted by the Court, despite the oft quoted dictum in the NBC case in 1943. There still remains therefore, the chance for a major collision of broadcasting with existing First Amendment doctrines.

The First Amendment and Policy

I am arguing, as a lawyer, that the legal battle over the application of the First Amendment to broadcasting is not yet over and not yet lost, whatever the general professional impressions to the contrary. It is, I think, of high importance that the industry insist on an authoritative determination of its legal position, but it is equally important that it not overestimate the significance of the law here. The wisest of our commentators on free speech, Professor Chafee, has said of the First Amendment:

> [It] is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. *It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of public discussion of all public questions.* Such a declaration should make Congress reluctant and careful in the enactment of all restrictions upon utterance, even though the courts will not refuse to enforce them as unconstitutional.[27]

The point is that the policy implications of the First Amendment extend farther than its legal inhibitions and that there is no reason why government must exert its legal power over speech to its uttermost boundary. Professor Chafee was speaking of free speech generally, but his thesis has special force for broadcasting where a technical "fluke" may arguably lay a special predicate for legal regulation.

I am thus suggesting there has been a twin error. First, the industry has under-estimated its legal position and given up too soon. Second, on the assumption its legal position is weak, it has neglected the possibility of building *policy*, not legal arguments, upon the First Amendment.

The Statutory Scheme

The history of broadcasting legislation has often been recounted and requires only brief summary here.

The early informal arrangements under the Secretary of Commerce came to disaster with the mandamus in *Hoover v. Intercity Radio*,[28] when the

[26] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[27] Z. Chafee, Free Speech in the United States 6 (1941) (italics added).

[28] 286 F. 1003 (D.C. Cir. 1923).

courts decided the Secretary was powerless to decline to license even on the grounds of interference with signals. There soon followed the 200 days which shook the broadcasting world and left an indelible impression of the dangers of nonregulation. "The result," said Justice Frankfurter, "was confusion and chaos. With everybody on the air, nobody could be heard."[29]

The Radio Act of 1927 was the consequence; it established the basic scheme of an administrative agency (then the Federal Radio Commission), empowered to regulate broadcasting through the device of licensing. In 1934 the current Communications Act was passed and it has remained "the constitution" of broadcasting with few changes over the intervening thirty-two years.

Legal arguments about the powers of the FCC start, of course, with the statute but do not stop there long. The first question always is what powers Congress *intended* to give the Commission. There is some ambiguity in the legislative history and perhaps a very intensive study of it could marshall evidence that the Act has been misread. This seems an unprofitable line of attack at this late date, however, because of the generality of the statute and because of the long history of administrative construction to which the courts are likely to defer.

Further, for our immediate purposes it is evident that two of the key cases on control of programming, *KFBK Broadcasting Co. v. FRC*,[30] and *Trinity Methodist Church v. FRC*[31] in which the Commission action was *affirmed* by the courts, arose prior to the enactment of the Communications Act of 1934 and were known to Congress at the time of its adoption.

There is, therefore, little promise in pursuing the matter as one of statutory construction. The argument, if there is to be one, must move to constitutional ground.

It is true, as Mr. Horsky has suggested that if a court were moved by First Amendment considerations it probably would as a matter of statesmanship avoid the constitutional challenge by finding that the Commission action did *not* serve the statutory standard of "the public interest convenience and necessity," or that it violated the no censorship provisions of Section 326.[32] But it is a mistake to conclude, therefore, that we are reduced to an argument over statutory construction, and nothing more. *Since it is, in effect, the First Amendment which determines what the statute means, the argument must draw directly on the experience with the First Amendment.*

[29] NBC v. United States, 319 U.S. 190, 212 (1943).

[30] 47 F.2d 850 (D.C. Cir. 1932).

[31] 62 F.2d 850 (D.C. Cir. 1932).

[32] Charles A. Horsky, Radio, Television & the First Amendment (Memorandum for CBS, August 3, 1961).

It is worth emphasizing, however, that the statutory scheme, although little changed by Congress since its inception is not the product of a clear, full blown theory of how to handle the special problem of broadcasting, but is a curiously *ad hoc* effort. Except for the specific prohibitions of obscenity, profanity, lotteries and for Section 315 on equal time and fairness, the statute is silent about program control. On the other hand, there is the mandate of Section 326 against censorship, and the key rejection in Section 3(h) of the idea that licensees are common carriers. Further, over-all, there is the basic rejection of the idea of government ownership; stations are to be operated by private owners on a competitive basis. Yet all broadcasting requires a license, and the licenses are not to be issued for longer than three-year periods.

The result is thus a hybrid: There is neither government ownership nor private ownership—the licensee can never acquire property rights in the license. Again, the station owner is a publisher not a facility like the telegraph or telephone, and there is explicit prohibition of censorship by the Commission. Yet on the other hand, there are the equal time and fairness requirements, and over-all the agency is given broad regulatory powers under the vague standard of "public interest, convenience and necessity."

The truth must be that Congress was not sure just how to resolve the tensions between licensing and the First Amendment.

The Problem of Prior Licensing

There are certain confusions about the Anglo-American traditions on prior restraints on speech as applied to broadcasting that need to be put to one side.

They reside in three questions: (i) whether freedom of speech means anything *more* than the absence of prior restraints; (ii) whether prior restraints are *per se* unconstitutional; (iii) whether the licensing of broadcasting is a prior restraint and subject to challenge on this ground.

In the *Dr. Brinkley* case[33] the decision in part rested on the court's assumption that censorship and free speech meant simply absence of prior restraints, and this notion still reappears from time to time in controversy over the Commission's powers. It is true that there the court was construing a statute and not the Constitution, but the meaning is presumably the same for both purposes. In any event, today it is familiar learning that this is a totally mistaken view of freedom of speech. The idea is usually associated with a vigorous passage in Blackstone, and the Supreme Court did not put the matter fully to rest until the opinion of Chief Justice Hughes in *Near v. Minnesota*.[34]

[33] KFKB Broadcasting Ass'n v. Fed. Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).

[34] 283 U.S. 697, 713-716 (1931). "The Blackstonian theory dies hard, but it ought to be knocked on the head once and for all." Z. Chafee, Free Speech in the United States 9 (1948).

The opposite point—whether prior restraints are bad *per se*—has been somewhat more troublesome to put to rest. Because of John Milton and English history, prior licensing has come down to us with a tarnished reputation. Contemporary analysis has, however, found it increasingly difficult to see why the technique of licensing, apart from criteria, poses more of a threat to freedom than does subsequent punishment.[35] And in *Times Film Corp. v. City of Chicago*,[36] the Court squarely held that there could be valid prior restraints, and that there was no "absolute privilege against prior restraints under the First Amendment."

There remains, however, some presumption against the validity of prior restraints, and a momentum on the part of the courts to scrutinize with extra care the procedures used and the ambiguity of the criteria for licensing.[37]

The question, therefore, is whether this presumption against prior restraints can be exploited in argument over the FCC's powers. In *Palmetto*, for example, this was the principal point argued in the amicus brief filed by the American Civil Liberties Union: namely, that the Commission's standards were too vague to satisfy the requirements for prior restraints laid down in cases like *Kunz*.

There are, however, as I see it, two difficulties in this line of attack. First, the formula "public interest convenience and necessity," although enormously vague, has been blessed by the courts so often in areas of agency regulation as to make it most unlikely that it would be found wanting in matters of program regulation. Thus, we find Justice Frankfurter who was the author of the decision condemning the criterion used in *Kunz*, quoting with approval, in his opinion in the *NBC* case the dictum from the *Pottsville* case[38] about the public interest formula: "This criterion is not to be interpreted as setting up a standard so indefinite as to confer unlimited power."[39]

Second, in large part, the problem areas relate to license *renewals* and to appraisal of *past* performance. In these instances the Commission realistically is imposing subsequent punishments if it refuses to renew, and the argument seems to me stronger put in these terms.

And even where initial applications are involved, it would seem better

[35] Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648 (1955); Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533 (1951).

[36] 365 U.S. 43 (1961).

[37] As to procedure, see Freedman v. Maryland, 380 U.S. 51 (1965); as to criterion, see Kunz v. New York, 340 U.S. 290 (1951).

[38] FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

[39] NBC v. United States, 319 U.S. 190, 216 (1943).

to argue the impropriety of the *substantive* criterion and not to rest on vagueness or on an effort to have a little of the historic bad name of prior restraints rub off on FCC licensing practices.

In brief, Milton's *Areopagitica* should not be the first line of argument against the FCC.

Entertainment Versus Public Issues

One of the genuinely interesting issues raised when we attempt to apply a First Amendment analysis to broadcasting is what difference it makes that broadcasting has been essentially an entertainment medium. Is not the free speech tradition primarily devoted to the protection of unpopular *ideas*? In brief, does the subject matter of broadcasting make it more vulnerable to government control?

Mr. Kilgore had something of the point in mind. After "conceding" that broadcasting did transmit news he went on to say: "This does not seem to me to be their basic or anyway their main function—the time and effort they spend on it is generally small in proportion to their entertainment function. But they do carry news."[40] Implicit is the notion that broadcasting raises a free speech issue only because it now carries some news.

I had occasion to explore the underlying problem a few years ago in an article on obscenity, and I shall indulge in a lengthy quotation from myself.

> I suggest that the difficulties in working out the implications of the new free-speech doctrine also reflect a difficulty with the older forms of that doctrine. The classic defense of John Stuart Mill and the modern defense of Alexander Meiklejohn do not help much when the question is why the novel, the poem, the painting, the drama, or the piece of sculpture fall within the provisions of the First Amendment. Nor do the famous opinions of Hand, Holmes, and Brandeis. The emphasis is all on truth winning out in a fair fight between competing ideas. The emphasis is clearest in Meiklejohn's argument that free speech is indispensable to the informed citizenry required to make democratic self-government work. The people need free speech because they vote. As a result his argument distinguishes sharply between public and private speech. Not all communications are relevant to the political process. The people do not need novels or drama or paintings or poems because they will be called upon to vote. Art and belles lettres do not deal in such ideas—at least not good art or belles lettres—and it makes little sense here to talk, as Mr. Justice Brandeis did in his great opinion in Whitney, of whether there is still time for counter-speech. Thus, there seems to be a hiatus in our basic free speech theory.[41]

[40] *Supra* note 3.

[41] Kalven, The Metaphysics of the Law of Obscenity, 1960 Supreme Court Rev. 1, 15–16.

Mr. Meiklejohn, as would be expected, offered a spirited and persuasive rejoinder.

> In reply to that friendly interpretation I must at two points record a friendly disavowal. I have never been able to share the Miltonian faith that in a fair fight between truth and error, truth is sure to win. . . . In my view "people need free speech" because they have decided, in adopting, maintaining and interpreting their Constitution to govern themselves rather than to be governed by others. . . . Moreover, as against Professor Kalven's interpretation, I believe, as a teacher, that the people do need novels and dramas and paintings and poems "because they will be called upon to vote. . . ."[42]

It was always a pleasure to lose an argument to Mr. Meiklejohn. And on closer analysis it is apparent that what we were debating was not *whether* art should be protected as fully as ideas, but rather *why*. We were assuming that society would so protect it and were exploring simply whether, therefore, traditional speech theory did not have a somewhat provincial rationale.

In any event, the courts seem to have had less trouble with the point than Mr. Meiklejohn and I. The law declines to draw a distinction between news and entertainment. The tradition perhaps begins back in 1808 with Lord Ellenborough's opinion in *Carr v. Hood*,[43] vigorously establishing the privilege of fair comment on literary works—in that instance a travel book—as an essential aspect of "liberty of the press." The point is made more explicitly a century and a half later in *Jenkins v. Dell Publishing Co.*,[44] a right of privacy case, in which defendant's claim of a newsworthy privilege was challenged on the grounds that the magazine, Front Page Detective, was designed largely for entertainment. Judge Hastie upheld the privilege although admitting the magazine was sold more for "entertainment" than "information." He held it was neither feasible nor desirable to distinguish between news and entertainment.

The authoritative disposition of the issue at the constitutional level comes in *Burstyn v. Wilson*[45] in which the Court repudiated its prior holding in *Mutual Film Corp. v. Industrial Com'n*[46] that the movies were purely entertainment and beyond the reach of free speech protections. In upsetting the application of the New York movie censorship law on First Amendment grounds, the Court said:

[42] Meiklejohn, The First Amendment Is an Absolute, 1961 Supreme Court Rev. 245, 263.

[43] 1 Campbell 350, 354n (1808).

[44] 251 F.2d 447 (3d Cir. 1958).

[45] 343 U.S. 495 (1952).

[46] 236 U.S. 230 (1915).

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from a direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.[47]

The Court then quoted with approval the following dictum from *Winters v. New York*,

The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another doctrine.[48]

However the issues stands as a matter of theory, it thus appears safe to conclude that for legal purposes nothing turns on a distinction between entertainment and news.

There have been, however, consequences of the fact that broadcasting in contrast to the press is entertainment oriented. First, many of the public controversies have involved matters of *taste* rather than dangerous opinion. It thus has been possible for people to urge government intervention to raise the taste of broadcasting without a sense that they are directly violating a tradition of freedom for the market place of ideas. And, second, it has perhaps caused the members of the industry to think of themselves as show business rather than as editors and publishers, thus fostering the loss of identification with the press.

An Insight More Fundamental Than We Can Use

Everyone is aware of certain differences between broadcasting and the press, and we have dealt with several thus far. But, to my mind, the freshest perspective on the problem comes from confrontation with the economist. However, as will be apparent in a moment there is one embarassment: the perspective is so radical by today's views that although I am persuaded of its correctness, I am not clear how it can be used in public discussion. To anticipate the conclusion, broadcasting may be subject to two errors which cause virtually all of its problems but which are too well and deeply established to hope to eradicate. The problem, therefore, may be to devise a way of living with the errors.

The economic analysis has been put concisely and powerfully by Ronald Coase, in his *Evaluation of Public Policy Relating to Radio and Television*

[47] *Supra* note 44, at 501.

[48] 333 U.S. 507, 510 (1948).

Broadcasting: Social and Economic Issues,[49] I shall only touch the main analysis. To the traditional claim that broadcast frequencies are a scarce resource and, therefore, must be allocated by government, Professor Coase makes the economist's rejoinder that all resources are scarce but that fact alone does not invoke government allocation—and that it does not because elsewhere in our society we use the pricing mechanism to allocate scarce resources. The point of insight in Professor Coase's analysis is not that it was a mistake to license frequencies in order to avoid interference, but that it was a mistake not to use the traditional pricing mechanism to determine who should get the license. In brief, he asks why we have not awarded licenses to the highest bidder. And before one rushes to answer that it would be unseemly and against public policy to award these valuable resources to the highest bidder, it is well to reflect on how we allocate almost all other valuable resources.

It is undoubtedly somewhat late in the day to urge auctioning as the practical remedy for broadcasting's ills, but the point can still be a profitable touchstone for analysis. First, it points up the fact that the decision not to use price as the allocator has imposed on the FCC the impossibly difficult task of deciding who is most qualified to use this means of communication, a question we blissfully do not have to confront with respect to making steel, automobiles, frankfurters, television sets or, for that matter, books. Second, it points up the fact that the current allocation of licenses involves a spectacular *subsidy* since the Government insists on giving them away. We shall suggest later that it may be fruitful to state the basic issue as one of how to allocate communication subsidies without violating the First Amendment. This arrangement has also I suspect, the consequence of trapping the industry into positions of public trusteeship not chargeable to the rest of the press. Certainly the FCC claims of a "public service easement" in programming tie back directly to this initial gift from government. Third, and perhaps most important for us, it provides one analytic answer to the dilemma of how the FCC can rationally choose among two technically qualified applicants for a license if it cannot also consider their programming.

Professor Coase's second point goes to the economic organization of broadcasting in the United States and to the conspicuous fact that it is one market in which the consumer cannot vote with dollars. It is not that advertising sponsorship is evil because it is commercial; it is rather that its logic necessarily seeks programs best for advertising results and this means programs with the largest audiences. The upshot is that broadcasting is programmed for the largest common denominator and that minorities, who

[49] 41 J. Land & P.U. Econ. 161 (1965). See also Coase, The Federal Communications Commission, 2 J. Law & Econ. 1 (1959).

are able to buy their way into other markets, are left out of this one and complain. If there is a legitimate complaint about the quality of programming, it is not that the quality is low but that the programming is, among American communications, uniquely nonrepresentative.

Once again the remedy appears too radical to be helpful. It is, of course, the widespread use of pay TV and subscription radio. But again the point may prove a touchstone for analysis. To a considerable extent the Commission's concern with fairness and with program balance rests on the nonrepresentative nature of broadcasting today. And since these concerns run against the economic self-interest of the broadcaster they are doomed to futility unless the FCC is forced to play a role of so directly controlling programming as to conflict flagrantly with the First Amendment.

In light of these reflections at least one recent case, *Connecticut Committee Against Pay TV v. FCC*,[50] takes on ironic overtones. The court, in assuring the committee which opposed the pay TV experimental trial run that no harm would come from it, said:

> The Commission has declared its determination to oversee carefully the form which programming takes under the subscription system. Surely its power to see that this area of the public domain is used in the public interest is not less for "paid" television than for the existing system of so-called "free" television.[51]

It is, I think, unnerving to realize that what really sets broadcasting apart from, say, book publishing is not licensing as such, but rather the twin economic idiosyncracies that the resources are allocated by government gift rather than by price, and that the consumers cannot vote with dollars to get the programs they want. And it may for at least a moment be worth pausing to ask with Professor Coase what would be left of the case for government control of programming if licenses were allocated to the highest bidder and if there was widespread pay TV. But the key task is to explore what policy can be worked out for the independence of broadcasting *if* we continue to have licensed commercial broadcasting and do not auction the licenses.

A Note on the Common Ground on Which All Speech Can Be Regulated

Communications apart from broadcasting are, of course, not altogether immune to regulation. To some extent, therefore, the regulation of broadcast programs is predicated on these general premises for regulation of speech and press. Insofar as this is true there is no distinctive problem of broadcasting as the First Amendment posed, since presumably no one wishes to argue that broadcasting should be regulated *less* than the press. In theory this *common ground* of prohibited speech would include the direct advocacy of serious criminal action,[52] contempt of court,[53] libel,[54] invasions of privacy[55] and above all obscenity.[56] There is a good deal of controversy still raging as to the precise limits of the First Amendment in these areas and a formidable amount of commentary.[57] The point for present purposes, however, is that whatever the appropriate public policy, it can be worked out without regard to any distinctive vulnerability of broadcasting to government regulation. It, therefore, need not concern us here.

[50] 301 F.2d 835 (D.C. Cir. 1962).

[51] *Id.* at 838.

One Distinctive Ground—The Nature of the Media

A point of general interest is whether something about the *media* justifies regulation of broadcasting which goes beyond that of the press.

The Court, speaking abstractly, has furnished dicta looking both ways as to whether there are relevant differences among the media. Indeed, in *Burstyn v. Wilson*[58] we have examples of both. The basic rationale of the decision rejects various arguments as to why movies are different from other media and places movies squarely under the First Amendment. Yet in the course of its opinion the Court says:

> Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.[59]

And in *Times Film Corp. v. City of Chicago*,[60] the Court is careful to limit its decision upholding prior licensing, ("We are dealing only with motion pictures."), evoking on this point a sharp dissent from four of the Justices.

[52] Compare Dennis v. United States, 341 U.S. 494 (1951) and Yates v. United States 354 U.S. 298 (1957).

[53] Subject however to the serious qualifications found in such cases as Bridges v. California, 314 U.S. 252 (1941) and Wood v. Georgia, 370 U.S. 375 (1962).

[54] Subject to the serious qualifications found in New York Times v. Sullivan, 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967).

[55] Subject to the qualifications found in Time, Inc. v. Hill, 385 U.S. 374 (1967).

[56] Subject to the qualifications found in Roth v. United States, 354 U.S. 476 (1957); Jacobellis v. Ohio, 378 U.S. 184 (1964); Ginzburg v. United States, 383 U.S. 463 (1966).

[57] Chafee, Free Speech in the United States (1948); Meiklejohn, Political Freedom (1960); Emerson, Toward a General Theory of the First Amendment (1966); Kalven, The Negro and the First Amendment (1966).

[58] 343 U.S. 495 (1952).

[59] *Id.* at 503.

[60] 365 U.S. 43 (1961).

Again, in the sound truck case, *Kovacs v. Cooper*,[61] Justice Frankfurter concurring is explicit that there are relevant differences:

> The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. . . . Movies have created problems not presented by the circulation of books, pamphlets or newspapers and so the movies have been constitutionally regulated . . . broadcasting in turn has produced its brood of complicated problems hardly to be solved by an easy formula about the preferred position of free speech. . . .[62]

On the other hand, in *Paramount Pictures*, the Court observed:

> We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.[63]

And in *Superior Films v. Dep't of Education*, Justice Douglas concurring stated:

> Motion pictures are, of course, a different medium of expression than the radio, the stage, the novel or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas.[64]

These generalizations apart, however, there are perhaps three specific places where the nature of the broadcasting medium affects the argument.

First, there is the obvious point about limited channels and interference which lays a predicate for licensing that as a physical matter has no counterpart in the press.

Second, there is the problem of televising trials where the intrusion of the TV apparatus in the courtroom poses a different issue than that of the presence of the press.[65]

Third, and most interesting, is whether the nature of broadcasting requires some adjustment of what is permissible regulation of obscenity. There has been little analysis of this problem thus far. It was a latent issue in *Palmetto* but neither the parties nor the Commission nor the Court of Appeals relied on it. It was the point of the petition, requesting the Court to

[61] 336 U.S. 77 (1949).

[62] *Id.* at 96.

[63] United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

[64] 346 U.S. 587, 589 (1954).

[65] This is currently a hotly debated issue between the press and TV on the one side and the legal profession on the other. See Estes v. Texas, 381 U.S. 532 (1965) and Sheppard v. Maxwell, 384 U.S. 333 (1966). In each case the defendant was granted a new trial because of the disturbance caused by the intrusion of the press.

limit its ruling to books, filed by the Commission itself in *Grove Press v. Christenberry* which involved *Lady Chatterley's Lover*.[66]

The issue turns on considerations of the captive audience possibilities.[67] A fundamental principle of freedom of speech is that one cannot be forced to hear; cannot, that is, be "captured" as an audience.[68] The traditional problem of obscenity law has been whether one can be kept from material *he wishes* to see. The latent issue is whether the law can be used to *protect* people from being *involuntarily confronted* with obscene materials. Arguably, television raises two problems in this connection. There is the chance of sudden intrusion into the home of the "obscene" stimulus. It may be easier to "close the book," as Justice Fairchild of Wisconsin Supreme Court had suggested as the "summary remedy" for those who complained about the *Tropic of Cancer*, than it is to turn off the TV set or change the channel. More important, it may argue for a revision of the holding in *Butler v. Michigan*,[69] that the general circulation of materials to adults could not constitutionally be limited on the grounds they would be harmful to children. Since television is so much the child's medium of entertainment today, it is not altogether easy to decide how far, if at all, general television programming might be regulated on their behalf.

Loyalty Programs for Licensees

Since World War II First Amendment problems have often shifted from a concern with the content of the message to a concern with the loyalty of the speaker. On close analysis, this proves to be the problem at the heart of the Smith Act cases,[70] and this has characterized the loyalty oaths, the administrative loyalty programs, the Congressional investigations, the Communist Control Act registration, the Attorney General's list, etc.

The problems raised touch many areas of the society and are in no sense peculiar to broadcasting. There is one distinctive point of contact to be noted however. It is a by-product of licensing that it serves to facilitate government patrolling of loyalty. Thus, it was never suggested that newspaper editors,

[66] 276 F.2d 433 (2d Cir. 1960). See also Network Programming Inquiry, 25 F.R. 7291 (1960).

[67] This must be the basis also for the statutory prohibition against *profanity*. It is doubtful today that profanity, absent the breach of peace potential of "fighting words" as in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), constitutionally can be made an offense.

[68] Compare the "buscasting" case, Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952). See also Kalven, The Negro and the First Amendment 149-160 (1966).

[69] 352 U.S. 380 (1957).

[70] Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957).

for example, take non-Communist oaths or that it be made a crime to be a publisher and a member of the Party. To a limited extent, however, loyalty has been a concern of the FCC, and has thus generated a special problem of broadcasting and the First Amendment.

The most explosive example of this kind of policing appears to have been in the case of Edward Lamb. Mr. Lamb has written his version of the matter in his autobiography.[71] The role of the FCC appears to have been shocking and an instance of rabid McCarthyism. However, the instance seems an exceptional departure for the Commission; moreover the radical vice, the sponsoring of perjured testimony, appears to have been a totally aberrant feature. The point, however, is that were it not for the fact Mr. Lamb was seeking the renewal of a license to broadcast, which was eventually granted, there would have been no basis for government surveillance of his associations and loyalty.

This was again one of the problems in the *Pacifica* case,[72] although the Commission in the end "cleared" the station of charges of Communist affiliation. And in at least three cases the Court of Appeals has upheld denial of licenses where the applicant has declined to answer questions about his affiliations.[73]

The free speech and other issues raised in such instances can be complex, and perhaps have their closest counterparts in instances where admission to the bar has been denied.[74] The issues are noted here simply because they connect up with the general problems of control of subversive activity and the First Amendment. However, they do bear an interesting analogy to certain cases which are very much within the distinctive problems of broadcasting: where the character of an applicant has been challenged under the fairness doctrine, such as *Lamar Life Broadcasting Co.*,[75] where applicant was a

[71] No Lamb for Slaughter (1963); see also his pamphlet for the Center for the Study of Democratic Institutions, "Trial by Battle," The Case History of a Washington Witch Hunt (1964).

[72] 36 F.C.C. 147 (1964).

[73] Borrow v. FCC, 285 F.2d 666 (D.C. Cir. 1960); Cronan v. FCC, 285 F.2d 288 (D.C. Cir. 1960); Blumenthal v. FCC, 318 F.2d 276 (D.C. Cir. 1963). It should be noted that all three cases involved the issue of licensing radio *operators* rather than radio stations. There was an impressive dissent by Judge Washington in the Borrow case arguing that Congress had not intended the commission to condition licensing on these grounds and questioning the policy that could by this logic deprive Communists of *all* means of livelihood.

[74] Schware v. Board of Examiners 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957); Konigsberg v. State Bar, 366 U.S. 36 (1961); In Re Anastaplo, 366 U.S. 82 (1961); see Kalven and Steffen, The Bar Admissions Cases: An Unfinished Debate Between Justice Harlan and Justice Black, 21 Law in Transition 155 (1961).

[75] 38 F.C.C. 1143 (1965), reversed for hearing, United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

Mississippi segregationist and *Noe v. FCC*,[76] where a Jesuit applicant was challenged as under dominion of the Pope!

The Core Issue—What Follows From the Fact of Licensing

After so long and meandering a preface, we come at long last to the truly distinctive problems of the First Amendment and broadcasting.

They rest on the fact that to avoid the physical interference among signals which could render broadcasting impossible, the Commission must license broadcasters. The fact is obvious but the crucial question is: What exactly follows from it? Does a rational licensing policy require that the Commission to some extent consider the service, that is, the kind and quality of the communications furnished? Does it, therefore, follow, as Mr. Kilgore argued, that because of the brute fact of licensing, the traditions of the First Amendment cannot help the broadcaster?

If this were true, there would be no regulation of content which would not be within the Commission's powers so long as it was not grossly arbitrary and capricious. And interestingly enough the Commission itself has never claimed this degree of jurisdiction. It has always publicly embraced a position against "censorship." Further, Section 326 prohibiting censorship must refer to something; that is, there must be some regulation which the Commission might try that would defeat the intention of Congress.

My thesis is that the traditions of the First Amendment do not evaporate because there is licensing. We have been beginning, so to speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license. What we need to confront is what the policies of the First Amendment imply as to the appropriate criteria for licensing communications.

The thesis would emphasize two points: First, the tensions between licensing and the First Amendment require that judgments about programming be kept to *a minimum*; that ground be yielded grudgingly; perhaps some regulation here is a *necessary evil* but it should always be remembered that that is all it is. Second, if we phrase the question in terms of what are the appropriate criteria for licensing communications we may be able to draw on anologies from elsewhere, such as the allocation of second class mail subsidies, the licensing of the streets for parades, and even the role of the chairman at a town meeting.

What has been missing in the controversy over FCC control is a precedent setting the *outer boundaries* of that control and establishing something that

[76] 260 F.2d 739 (D.C. Cir. 1958).

the Commission *cannot do* despite its power to license. Law, it has been said, is determined by a choice between competing analogies. What is sorely needed in this field is the competing analogy to set against the claims for control. We have at the moment the worst of all possible worlds. There is official lip service to freedom of the press in broadcasting but no agreement that there is anything the Commission cannot do.

It is, of course, easier to rephrase the question than to answer it. In the pages that remain we shall attempt some first steps toward answering by reviewing the judicial experience with the issues, by looking to the analogies from elsewhere, and by suggesting an *anatomy* of kinds of issues of program regulation against which to test policy.

The Problem in the Supreme Court—Cases Other than the NBC Case

The precedents in the Supreme Court having any bearing on the problem are well known and have often been reviewed. Nevertheless it is relevant to review them briefly once again in order to underscore that the issues are still open at the level of the Supreme Court and to emphasize how little the *decisions* themselves have put to rest.

It is generally agreed that *National Broadcasting Co. v United States*, in 1943 is the leading case. Before reading it closely, we shall run through the other seven Supreme Court cases.

Federal Radio Commission v. Nelson Brothers Co.,[77] involved a comparative hearing in which petitioner, the existing station on the frequency, had been denied renewal and the frequency awarded to another applicant. The Court of Appeals reversed, finding the Commission's action "arbitrary and capricious." The Supreme Court reversed, reaffirming the action of the Commission. The Court held that this was not revocation of a license and that the only question was the "equitable distribution of frequencies." It held further that it was not arbitrary, in pursuit of the "public interest convenience and necessity," to allocate frequencies at the expense of an existing station. There was no discussion of programming or the First Amendment.

Federal Communications Commission v. Pottsville,[78] offered a broad opinion on a narrow issue, again unrelated directly to our immediate concerns. The opinion by Justice Frankfurter was an essay in praise of the flexibility and expertise of administrative law and a warning against assuming that the technicalities of the common law will continue to apply to this important new development. It was a warning also that courts were to play a modest role in reviewing agency procedures and decisions. Specifically, the

[77] 289 U.S. 266 (1933).
[78] 309 U.S. 134 (1940).

petitioner had been denied a license because the Commission found him not qualified financially. On appeal, the Court of Appeals had reversed and remanded, holding that the Commission in appraising his financial qualifications had made an error in interpreting state law. On remand, the Commission had set the matter for a comparative hearing joining consideration of petitioner with that of other applicants for the frequency who had filed later. The Court upheld the Commission, saying:

> The fact that in its first disposition the Commission had committed in a legal error did not create rights of priority in the respondent, as against later applicants, which it would not otherwise have possessed.[79]

The two cases read together make it evident that the public interest formula is a powerful and flexible one giving large powers of discretion to the Commission so that it may override the equities of the existing user of the frequency in *Nelson* and the equities of the prior claimant, who loses only because of a Commission error, in *Pottsville*. This does not tell us, however, whether the formula is powerful enough to override the counter policies of the First Amendment.

Federal Communications Commission v. Sanders Brothers Radio Station,[80] is, by dictum, a little closer to our concerns. Petitioner had protested the licensing of an additional station in his community on the ground that it would cause economic injury to him. He had lost before the Commission, but the Court of Appeals had reversed because of the failure of the Commission to make findings on the economic injury issue. The Court upheld the Commission in an opinion which once again sketched the general framework of broadcasting regulation, emphasizing that the field of broadcasting is "one of free competition." It concluded that economic injury, although relevant to considerations of "public interest convenience and necessity" was not "in and of itself" a factor the Commission must weigh. So we add economic injury to the equities the Commission can override in pursuit of the public interest.

However, Justice Roberts in the course of generalizing about the overall arrangement uttered a dictum that has haunted the Commission ever since:

> But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.[81]

[79] *Id.* at 145.
[80] 309 U.S. 470 (1940).
[81] *Id.* at 475.

One cannot, of course, make too much of so casual a remark in a case which did not remotely involve issues of program control. And it has become fashionable to argue that it is erased by the opinion of Justice Frankfurter in the *NBC* case three years later. It might be well, however, not to throw the remark away altogether; it was made by an able justice and for a unanimous court which included Justice Frankfurter. It represents at least a contemporary summing up of the arrangement and certainly suggests that control of programming was not a salient feature of it.

For the moment we will skip the *NBC* case. Next then in chronological order is *Federal Communications Commission v. WOKO*.[82] A license renewal was denied because applicant misrepresented his financial position. The Court affirmed holding it immaterial whether the misrepresentation in fact influenced the Commission's decision. "The fact of concealment," said Justice Jackson, "may be more significant than the facts concealed."[83]

We come next to *Regents of the University System of Georgia v. Carroll*.[84] The precise issue involved a technical point about the relation of state and federal law. The FCC had refused to renew petitioner's license unless it repudiated a contract with T, on the grounds that the contract deprived petitioner of the requisite degree of control over its own operations and programs. Petitioner repudiated the contract and was sued for breach of contract and lost in the state courts. The Supreme Court held on appeal from the contract action that the Commission had no power to adjudicate the validity of the contract but only to decide the status of the license. Impossibility of performance is a matter for state law and although the result here is harsh, the Court will not intervene.

There are just two more cases. *Federal Communications Commission v. ABC Inc.*,[85] is arresting because this time a claim of Commission authority is rejected. At issue are FCC rules prohibiting "give-away" programs. The Court unanimously invalidating the rule, holds that these programs cannot be said to be lotteries within the statutory prohibition and that therefore the Commission has exceeded its authority. As the case is argued, no general premises about program control are implicated; it goes simply on the narrow issue of what a lottery is. Nevertheless the case is a comforting indication that there are some limits to Commission power.

Finally, *Farmers Union v. WDAY*,[86] holds that the equal time mandate of Section 315 coupled with the prohibition against censorship, suspends state law making a station liable for defamation. The rationale is that under

[82] 329 U.S. 223 (1946).
[83] *Id.* at 227.
[84] 338 U.S. 586 (1949).
[85] 347 U.S. 284 (1954).
[86] 360 U.S. 525 (1958).

the federal policy the station owner has been left helpless to protect himself. The Court, it might be noted, although dealing with another subtle point of federal preemption, spoke approvingly of the equal time provision which, however, no one was directly challenging. "The thrust of Sec. 315," said Justice Black, "is to facilitate political debate over radio and television."[87]

The box score then is not impressive for either side of the controversy over Commission power. There is one case finding beyond the Commission's powers an effort to very specifically outlaw a given kind of program (*ABC*) and there is a broad dictum against program control (*Sanders*). On the other hand, there is implicit approval of the equal time requirement (*WDAY*) and approval of rules against surrender of control (*Regents*) or misrepresentations to the Commission (*WOKO*). Finally, the public interest formula under which the Commission acts is powerful enough to override a series of specific equities (*Sanders*, *Pottsville*, *Nelson*).

Whatever the balance of dicta, certainly it cannot be said, the *NBC* case apart, that the Court has ever confronted the application of the First Amendment to agency claims to control programming. We turn then to the *NBC* case.

The Problem in the Supreme Court—The NBC Case

The *NBC* case in 1943[88] was elaborately briefed and argued and served perhaps historically as a great occasion for measuring Commission powers. (Perhaps the industry thought this was to be their *Zenger* case). It produced a major opinion from the Court, and if there is a leading Supreme Court precedent for us, this surely is it.

The *decision*, however, did not involve program control, at least in the critical sense of control of content, but rather the independence of the station owner from outside control. In issue were the Chain Broadcasting Regulations promulgated after elaborate and extensive hearings by the Commission. The effort to enjoin the regulations was unsuccessful in the Court of Appeals, and its action was affirmed by the Supreme Court.

The stance of the case is highlighted by the fact that Mr. Justice Murphy filed a lengthy dissent arguing simply that regulation of this sort should be left to Congress. It is noteworthy that Justice Murphy, who earned the reputation of being second to none in sensitivity to free speech issues, chose not to mention them in this case, presumably on the ground that they were not really involved.

The nature of the issue before the Court is suggested by the seven regulations which were under attack. They covered such matters as: control of

[87] *Id.* at 534.
[88] NBC v. United States, 319 U.S. 190 (1943).

local station rates by the network, network programs, network option time provisions, the length of the contract term, and provisions for territorial exclusivity and exclusive affiliation. They reflect a blend of anti-trust concerns and the policy that the station owner should not delegate his job.

To dispose of the various challenges to the regulations, Justice Frankfurter was moved to write a 35-page opinion. After an elaborate review of the regulations themselves and of the legal history of broadcasting, he turned to the major challenge that Congress had not authorized such rule-making. The argument was predicated on the premise that the Commission was limited to supervision of technical engineering and financial aspects only. In rejecting this claim that the Commission was reduced to a traffic cop, the Justice uttered two oft-quoted dicta:

> The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accomodate all who wish to use them. Methods must be devised for choosing among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.
>
> The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was "the public interest, convenience, or necessity," a criterion which is "as concrete as the complicated factors for judgment in such a field of delegated authority permit."[89]

And again one paragraph later:

> The Commission's licensing function cannot be discharged therefore merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities each of whom is financially and technically qualified to operate a station?[90]

The language must be read in context. First, the Court was simply *construing* the statute at this point in an effort to meet the challenge that the regulations were not authorized. The concern is not with what the Constitution permits but with what Congress intended. Moreover, the Court is engaged in defeating a single narrow counter-argument, namely, that as a matter of Congressional intent, and not of constitutional necessity, the Commission may consider only financial and engineering criteria in licensing. It is this position Justice Frankfurter is rejecting, a position *narrower than*

[89] *Id.* at 215-216.

[90] *Id.* at 216-217.

any free speech concerns would dictate. He is not indicating what criteria *beyond* financial and engineering the Commission may consider—except as it is necessary to dispose of the case before him. Surely he is not saying that since the Commission's powers are not limited to the technical-engineering stopping point, they are unlimited by any other considerations and if the Commission finds it in "the public interest" that certain content not be transmitted over radio and television, that is the end of the matter.

What he had in mind and was addressing his generous language toward was nothing more complex than the *wasting* of frequencies. Thus, in a paragraph not so often quoted, he observes:

> These provisions individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments "to the larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission authority. Suppose, for example, that a community can because of physical limitations be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified might apply for and obtain licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. *The language of the Act does not withdraw such a situation* from the licensing and regulatory powers of the Commission.[91]

The crucial point is that there is *a decisive distance* between what Justice Frankfurter is confronting and endorsing here, and the claim to police vulgarity in *Palmetto*, or the controversial discussion of homosexuality in *Pacifica*, or the concern with Rev. McIntyre's views that upset Commissioner Loevinger in *Faith Theological Seminary*, or the official request for an explanation of the bias in the Walter Lippmann broadcast.

Finally, the opinion does contain some explicit discussion of the First Amendment and provides the only reference we have by the Supreme Court to broadcasting and the Amendment. The petitioners, having attacked on a variety of other grounds appear to have thrown in an appeal to the Amendment as a sort of last resort. In any event it is noteworthy that Justice Frankfurter does not reach it until the next to last paragraph of his lengthy opinion. The passage catches a great judge at an unimpressive moment.

> We come finally to an appeal to the First Amendment. The Regulations even if valid in all other respects must fail because they abridge, say the applicants,

[91] *Id.* at 217-218 (italics added).

their right of free speech. If that be so, it would follow that every person whose application for a license is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic and that is why, unlike other modes of expression, it is subject to governmental regulation.[92]

I find it difficult to construe this passage. Surely petitioners were not arguing that radio could not be licensed at all because of the First Amendment. Yet that is the position that is being answered, Surely Justice Frankfurter is not suggesting that because facilities are limited, radio, unlike other modes of communication, is subject to unlimited government regulation. Yet that is what he has come close to saying.

The remainder of the paragraph, however, makes it clear that Justice Frankfurter is not eliminating First Amendment considerations from broadcasting, but is simply saying that certain criteria for licensing are permissible, and certain are not.

> But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other *capricious* basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, *the issue before us would be wholly different.*[93]

Several things are to be noted here. First, he is consciously reserving for another day "the wholly different" issues that would be presented if the regulation of programming were of another kind. The decision is limited to the narrow question at hand. The Chain Broadcasting Regulations do not offend freedom of speech, although other types of regulation well might. Second, the First Amendment traditions are so strong that regulation on the basis of political, social, or economic views cannot be conceived of as in the public interest, although over the long history of mankind it has more often been so conceived of than not; it would be in his phrase "capricious." Finally, he suggests the limit to the dilemma he has previously posed. If the Commission were confronted with two applicants equal except for their political, economic, or social views, it could not resort to those views in order to choose between them. Therefore, the need to choose among applicants for a license tells us little about the permissible criteria by which such a choice can be made, in a society with a commitment to the values of the First Amendment.

[92] *Id.* at 226.

[93] *Id.* (italics added).

The *NBC* case does not, therefore, alter the impression left by the other Supreme Court cases. The crucial issues about control of programming are yet to be confronted by the Supreme Court of the United States.

The Problem in the Lower Courts

As would be expected, the lower courts and in particular the Court of Appeals for the District of Columbia have had far wider experience with the problem than the Supreme Court. A detailed review of these cases would be inappropriately burdensome at this point.[94] Reading them, however, makes it apparent that control over programming is a highly ambiguous term and there are all gradations of control involved in FCC activity. The choice is not a simple one between no control and total regulation of content. Some of the Commission moves as, for example, with respect to independence of the station owner or the requiring of some sustaining programs or one preferring live local talent or the requiring of investigation into needs of the community or the avoidance of duplicate programs, whether feasible or not, seem to me clearly not interferences with freedom of speech. At the other extreme the concerns with content expressed in *Palmetto*[95] and *Pacifica*[96] and perhaps *Trinity Methodist Church*[97] seem clearly acts of censorship. In between, and posing novel questions, are balanced programming and fairness.

[94] There are upwards of 50 precedents in the lower federal courts involving the FCC and some aspect of control over programming. The ones most relevant for our purposes are noted briefly in notes 95-101. For the most part the others involve such issues as: misrepresentation, independence from outside control, avoidance of duplication, "hobby" broadcasting, preference for local "live" programming, ratio of sustaining to commercial programs, inquiry into community needs, prior conduct of applicant outside of broadcasting. Often such criteria are not sharply tested in the cases, but are given the status of factors in the Commission may consider, along with many others, in weighing applicant's merit. See also Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

[95] 33 F.C.C. 250 (1962). The case involved the refusal to renew the station license because of the vulgarity of a disk jockey's programs. Since the material fell short of obscenity, the case presented a claim by the commission to regulate bad taste. Further, the context was a refusal to renew a license and not a comparative hearing. The case thus might have provided a key precedent. The Court of Appeals affirmed the FCC action on the grounds of misrepresentation, side stepping altogether the First Amendment problem. Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1965).

[96] 36 F.C.C. 147 (1964). Although in the end the FCC renewed the Pacifica license after a sustained public attack on the station, its opinion and order reflect a careful scrutiny of both Communist affiliations of the principals and of the content of five programs including such items as a discussion of homosexuality by eight homosexuals, the Albee play The Zoo Story, and reading of avant-garde poems and fiction. See also 6 P. & F. Radio Reg. 2d 570 (1965), subsequent license renewal limited to one year.

[97] 62 F.2d 850 (D.C. Cir. 1932), Case antedates Communication Act of 1934. Renewal of license denied because of broadcast of "defamatory and untrue" matter.

And, in any event, *Palmetto, Pacifica, Lamar Life*,[98] *McCourry*,[99] and *Faith Theological Seminary*[100] have added some range and variety to that very short standard list of thirty years ago, *KFBK*[101] and *Trinity Methodist Church*.

Fairness and Balanced Programming

These types of governmental concern with programming remain, for me, the puzzle.

They have the virtue of not judging particular content. In theory at least any odious, hated or unpopular message could be expressed, or any level of taste could be expressed, or any level of taste could be indulged, without violating either requirement.

On the other hand they make possible the informal control by dossier which the Commission exercises.

The objections to the program quotas go more to the point that they are futile than that they are dangerous.[102] One need not reach constitutional ground to argue against the policy. In communities served by several stations it is hard to see why this sort of proportional representation of program content is sensible, and there are many examples of high quality specialization. Further, the devastating weakness of the scheme is that everything counts as one, Bach and rock and roll are music, Shakespeare and Westerns are entertainment. The requirements cannot serve to raise the quality of programming; they can only serve to even out the categories of mediocrity. It would clear the "air" if the Commission would give up on this ghost-like claim to supervise programming. And in the end it is well to remember that one Commissioner, at least, has seen in it an unconstitutional claim to censor.

[98] 38 F.C.C. 1143 (1965), question of whether Mississippi licenses could meet the standards of the "fairness" doctrine in handling race news; one year license renewal reversed on appeal and remanded to Commission for a hearing. United Church of Christ v. FCC 359 F.2d 994 (D.C. Cir. 1966). But compare Anti-Defamation League of B'nai Brith, 4 F.C.C.2d 190 (1966), renewing license of allegedly anti-semitic broadcaster.

[99] 2 P. & F. Radio Reg. 2d 895 (1964). Refusal of applicant to promise to do *any* broadcasting to fill 5 of the 7 Commission program quotas for balanced programming. Commissioner Loevinger filed a vigorous dissent.

[100] In re George Borst, 4 P. & F. Radio Reg. 2d 697 (1965). Commissioner Loevinger filed a vigorous dissent. Issue concerns capacity of applicant with strong religious views to meet requirements of fairness doctrine in the handling of religion.

[101] 47 F.2d 670 (D.C. Cir. 1931), antedates the 1934 statute. Court affirms the denial of license renewal to one Dr. Brinkley, who had used station exclusively to vend his "patent medicines."

[102] Kalven and Rosenfield, Minow Should Watch His Step in the Wasteland, Fortune Magazine, Oct., 1962, at 116.

The fairness problems are more lively and closer to fighting issues.[103] It is easy to argue that such regulations are not aimed at content but simply at having both sides heard; that they are supportive of freedom of speech therefore. There are at least three objections, however. First, it misconceives the utility of bias in public discussion. Public discussion is all a sort of adversary process on a grand scale, kept alive by the lively and firm expression of opinions. The Supreme Court has recently recognized the point in the *New York Times* case when it speaks of the commitment to discussion on public issues that is *"uninhibited, robust, and wide open."*[104] It is most unlikely that public discussion will have that muscle tone if each publisher must worry about being fair to both sides. An analogy may help. Think of a town meeting where the chair would rule that *each* speaker must be fair to both sides! Second, it seems an impossibly vague standard for a licensee to follow. What *is* fair treatment of a controversial issue? Third, it easily extrapolates into "anticipatory unfairness" so that a licensee is rejected because he would probably not be able to satisfy the doctrine. This raises the kind of problems posed in *Noe, Lamar Life*, and *Faith Theological Seminary*. Finally, this doctrine in particular is the predicate for regulation by dossier; it is thus invites the widest informal surveillance by the Commission.

Some Analogies

The speech problems posed by broadcasting are probably not unique, but belong to a category that is hard to capture. Various analogies come to mind and suggest the possibility of working toward a firmer theory of how communications problems of this type ought to be handled. There is, for example, the granting of subsidies via the mail; the selection of books for a public library; the selection of courses for a curriculum in a state run school; the rationing of news print during war time; the licensing of parades; the chairing of a town meeting. In all of these, some regulation of "programming" seems inevitable and the problem is nevertheless to stay within a tradition of freedom of communication. Let me consider one or two briefly.

Take the town meeting which is often thought of as a model of free speech in operation. If the Chairman is keeping order he has problems

[103] Indeed, some aspects of the fairness doctrine are currently under constitutional attack in the courts. Red Lion Broadcasting Co. v. F.C.C., 10 P. & F. Radio Reg. 2d 2001 (1967). The litigation may produce the most definitive answer we have yet had on the relation of broadcasting to the First Amendment.

[104] Kalven, The New York Times Case: A Note on the Central Meaning of the First Amendment, 1964 Supreme Court Rev. 191.

somewhat like those of broadcasting. Not everyone can talk at once nor can they talk too long since time is scarce nor can they talk far off the point. *The speakers are in effect "licensed" by the chairman*, yet no one has ever said that this spoiled the game.[105] What is understood by us all here is an implicit standard limiting the chairman to noncontent regulation. He may supervise the program but only in this critically limited sense. Probably the FCC can go somewhat farther, but it may prove profitable to play with the analogy of the FCC as the chairman of the meeting.

Then consider cases like *Cox v. New Hampshire*,[106] holding that it is constitutional to require licensing of parades to avoid having two parades on the same corner at the same time. Here again is an analogy to the Roberts Rules of Order of the town meeting and another firm example of the compatability, at times, of licensing with freedom of speech and press. The case has not yet arisen, but what would we think if the state were to choose between competing parades on the grounds that it preferred the quality or public service of the one parade over the other. Here again is an analogy it may prove profitable to play with.[107]

Finally, there is the mail subsidy and here we have an instructive case from the Supreme Court, *Hannegan v. Esquire*.[108] The Postmaster had revoked second class mailing privileges of Esquire magazine on the grounds that it did not meet the statutory requirement of being a publication "originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts." Having originally held that the magazine was obscene, the Postmaster abandoned this contention and argued simply that it was not up to the standards for the second class mail subsidy. The analogies to the Communications Act seem to me not far fetched. Communications are involved. The government is granting a subsidy under a broadly worded statutory formula and an administrative agency is handling it. Further, as in *Palmetto*, the official wishes simply to extend a bit the boundaries of obscenity.

Yet the judicial reaction is explosive. The Court speaking through Justice Douglas emphatically disavows that Congress meant to give any such power to the Postmaster.

> To uphold the order of revocation would therefore grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.[109]

[105] Compare Meiklejohn, Political Freedom 24-28 (1960).

[106] 312 U.S. 569 (1941).

[107] Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Supreme Court Rev. 1.

[108] 327 U.S. 146 (1945).

[109] *Id.* at 151.

> A requirement that art or literature conform to some norm prescribed by an official smacks of an ideology foreign to our system . . . . Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates.[110]

The *Esquire* case can serve to bring to a close these reflections about freedom of speech in broadcasting. It is a perfect example of the Court beginning in the right corner. By using the free speech tradition as its touchstone the Court readily construes the Congressional grant of power to the Postmaster. And it points up once again that with the allocation of subsidies as with licensing, the First Amendment question is simply: Under *what criteria* may government so act? Perhaps if we begin to push that question, we may slowly begin to integrate our two traditions of freedom of communication in the United States.

[110] *Id.* at 158.

CAPITAL B/CASTING CO., et al. v. MITCHELL, et al.

US Dist Ct, DC, October 14, 1971

[¶10:315(G)(2), ¶29] Constitutionality of Public Health Cigarette Smoking Act.

Provision of the Public Health Cigarette Smoking Act of 1969, which makes it unlawful to advertise cigarettes on radio or television, does not conflict with the First or Fifth Amendments. Whether the Act is viewed as an exercise of the Congress' supervisory role over the federal regulatory agencies or as an exercise of its power to regulate interstate commerce, Congress has the power to prohibit the advertising of cigarettes in any media. The fact that cigarette advertising is covered by the Commission's fairness doctrine does not require a finding that it is to be given full First Amendment protection. As to the Fifth Amendment contention that the distinction drawn between the broadcast media and other media, is arbitrary, there is a rational basis for placing a ban on cigarette advertising on broadcast facilities while allowing such advertisements in print. Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching young people. Congress could also distinguish the media on the basis that the public owns the airwaves and that licensees must operate broadcast facilities in the public interest under the supervision of a federal agency. Capital B/casting Co. v. Mitchell, 23 RR 2d 2001 [1971].

Before: Wright, C. J., and Gasch, D. J., and Green, D. J.:

Petitioners, six corporations which operate radio stations under licenses granted by the Federal Communications Commission, seek to enjoin enforcement of Section 6 of the Public Health Cigarette Smoking Act of 1969 and to have Section 6 declared violative of the First and Fifth Amendment to the Constitution. The National Association of Broadcasters has been permitted to intervene.

The court requested Professor John F. Banzhaf, III to file a brief amicus curiae. Plaintiff and intervenor have filed replies to the amicus brief. The court wishes to take this opportunity of expressing its appreciation of Professor Banzhaf's analysis of the issues and his contribution to their resolution.

This three-judge court was convened pursuant to petitioners' application under 28 USC §§2282 and 2291. We conclude that the Act in question does not conflict with the First or Fifth Amendments.

In 1965, in an attempt to alert the general public to the documented dangers of cigarette smoking, Congress enacted legislation requiring a health warning to be placed on all cigarette packages. 1/ By 1969 it was evident that more stringent controls would be required 2/ and that both the FCC 3/ and the FTC 4/ were considering independent action. Under such circumstances Congress enacted the Public Health Cigarette Smoking Act of 1969, 5/ (hereafter referred to as the Act) which, as pertinent hereto, provides:

> "Sec. 6. After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

Petitioners allege that the ban on advertising imposed by Section 6 prohibits the "dissemination of information with respect to a lawfully sold product..." 6/ in violation of the First Amendment. It is established that product advertising is less vigorously protected than other forms of speech. Breard v. City of Alexandria, 341 US 622, 642 (1951); Murdock v. Pennsylvania, 319 US 105, 110-11 (1943); Valentine v. Chrestensen, 316 US 52, 54 (1942); Banzhaf v. FCC, 405 F2d 1082, 1101 [14 RR 2d 2061] (DC Cir., 1968), cert. denied, 396 US 942 (1969). The unique characteristics of electronic communication make it especially subject to regulation in the public interest. National Broadcasting Co. v. United States, 319 US 190, 226-27 (1943); Office of Communication of United Church of Christ v. FCC, 359 F2d 994, 1003 [7 RR 2d 2001] (DC Cir., 1966). Whether the Act is viewed as an exercise of the Congress' supervisory role over the federal regulatory agencies or as an exercise of its power to regulate interstate commerce Congress has the power to prohibit the advertising of cigarettes in any media. The validity of other, similar advertising regulations concerning the federal regulatory agencies has been repeatedly

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1/ The Federal Cigarette Labeling and Advertising Act, 15 USC §1331, et seq. (1965). The required warning states: "Caution: Cigarette Smoking May be Hazardous to Your Health."

2/ HEW, Report to Congress, 1969, FTC, Report to Congress, 1967, as reported in HR Rep No. 91-566, 91st Cong., 1st Sess. 3-6 (1969).

3/ Id., at 6.

4/ Id.

5/ Pub. L. 91-222 (April 1, 1970).

6/ Petition for Permanent Injunction, p. 4.

upheld whether the agency be the FCC, 7/ the FTC, 8/ or the SEC. 9/ Petitioners do not dispute the existence of such regulatory power, but urge that its exercise in context of the Act is unconstitutional. In that regard it is dispositive that the Act has no substantial effect on the exercise of petitioners' First Amendment rights. Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak – they have only lost an ability to collect revenue from others for broadcasting their commercial messages. See, Business Executives Move for Vietnam Peace v. FCC, ____ F2d ___ [22 RR 2d 2089] (1971) (No. 24,492, decided August 3, 1971) (Slip Opinion at 20). Finding nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question, it is clear that petitioners' speech is not at issue. Thus, contrary to the assertions made by petitioners, Section 6 does not prohibit them from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their First Amendment rights.

The dissent relies upon Banzhaf v. FCC, 405 F2d 1082 [14 RR 2d 2061] (DC Cir., 1968), cert. denied, 396 US 942 (1969), for the proposition that since cigarette commercials implicitly state a position on a matter of public importance, such ads are placed within the "core protection" of the First Amendment. As we read this decision, with which we are in full accord, it carefully distinguishes between First Amendment protection as such, and the rather limited extent to which product advertising is tangentially regarded as having some limited indicia of such protection. Banzhaf, supra, at 1101-02. The fact that cigarette advertising is covered by the FCC's fairness doctrine 10/ does not require a finding that it is to be given full First Amendment protection, especially in light of contrary existing authority. See, Breard v. City of Alexandria; Murdock v. Pennsylvania; Valentine v.

7/ See, New York State Broadcasters Association v. United States, 414 F2d 990 [16 RR 2d 2179] (2d Cir.), cert. denied, 396 US 1061 (1969), upholding the ban on broadcast media of lottery information, 18 USC §1034.

8/ See, FTC v. Standard Education Sec'y, 302 US 112 (1937); Giant Food, Inc. v. FTC, 322 F2d 977 (DC Cir., 1963), cert. dismissed, 376 US 967 (1964), upholding 15 USC §45 which empowers the FTC to prevent unfair and deceptive practices, including advertising.

9/ See, United States v. Ra, 336 F2d 306 (2d Cir.), cert. denied, 376 US 904 (1964), which upheld the Securities Act of 1933, §5, as amended by 15 USC §77 et seq. which empowers the SEC to regulate information disclosed in the solicitation of stock.

10/ We note in passing that the Fourth Circuit has recently upheld an FCC ruling that "smoking and health" has ceased to be a controversial issue. Larus & Brother Co., Inc. v. FCC, ____ F2d ___ [22 RR 2d 2154] (4th Cir. 1971), (No. 15,382, August 20, 1971) (Slip Opinion). It is not necessary at this time, however, to speculate as to any possible effect on the Banzhaf holding.

Chrestensen, supra. We do not understand Banzhaf or any other decision which the dissent cites to go that far and we are unwilling to blaze that trail in this case.

Petitioners' Fifth Amendment contention raises a more direct constitutional question. Petitioners state their objection "is not that any ban upon cigarette advertising would violate the due process clause. Rather, it is Congress' attempt, in Section 6 of the Act, to classify media in two categories – those prohibited from carrying cigarette advertisements and those who are not – which contravenes the Fifth Amendment because the distinctions drawn are 'arbitrary and invidious.'" 11/ To withstand due process challenge a statutory classification must have a reasonable basis, and if such basis exists, the validity of the statute must be upheld without further inquiry. Dandridge v. Williams, 397 US 471, 485 (1970); McGowan v. Maryland, 366 US 420, 426 (1961); United States v. Carolene Products, 304 US 144, 154 (1938). "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical, 348 US 483, 487-88 (1955). Finally, Congress is entitled to a presumption "that if any state of facts might be supposed that would support its action, those facts must be presumed to exist." International Ass'n of Mach. & A. Workers v. National Mediation Board, 425 F2d 527, 540 (DC Cir. 1970).

Under the above criteria there exists a rational basis for placing a ban on cigarette advertisements on broadcast facilities while allowing such advertisements in print. In 1969 Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of cigarette smoking. 12/ Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people. 13/ Thus,

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11/ Brief in Support of Plaintiffs' Cross-Motion for Summary Judgment, p. 13.

12/ Pursuant to Section 5(d)1 of the Cigarette Labeling and Advertising Act, the Secretary of Health, Education, and Welfare, made recommendations to the Congress in his 1968 report which stressed the need for strengthened legislation in the cigarette advertising area. Pursuant to Section 5(d)2 of the Act, the Federal Trade Commission made three annual reports to the Congress stressing the strength of the smoking habit, the persuasiveness of broadcast commercials and the need for new legislation. HR Rep. No. 91-566, 91st Cong., 1st Sess. 3-6 (1969).

13/ The FTC Report of 1967 cited supra, n. 12 at 13, presented strong evidence of a great attraction on the part of young people to the broadcast media. Typical of the data is the following: Teenage boys surveyed averaged 4.3 hours of radio listening daily; teenage girls surveyed averaged 5.3 hours; in every half-hour segment from 8:00 p.m. until 11:00 p.m. radio delivers a minimum [audience] of 24.196 of all teenagers; and 87.996 of teenage girls hear radio on the average day. The statistics for

[Footnote continued on following page]

Congress knew of the close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people, and was no doubt aware that the younger the individual, the greater the reliance on the broadcast message rather than the written word. A pre-school or early elementary school age child can hear and understand a radio commercial or see, hear and understand a television commercial, while at the same time be substantially unaffected by an advertisement printed in a newspaper, magazine or appearing on a billboard.

The fact is that there are significant differences between the electronic media and print. As the court stated in Banzhaf, supra:

> "Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. . . . It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." 14/

Moreover, Congress could rationally distinguish radio and television from other media on the basis that the public owns the airwaves and that licensees must operate broadcast facilities in the public interest under the supervision of a federal regulatory agency. Legislation concerning newspapers and magazines must take into account the fact that the printed media are privately owned. See, National Broadcasting Co. v. United States, supra; Red Lion Broadcasting Co. v. FCC, 395 US 367 [16 RR 2d 2029] (1969).

Thus, Congress had information quite sufficient to believe that a proscription covering only the electronic media would be an appropriate response to the problem of cigarette advertising. Petitioners emphasize that much of the revenue formerly allocated to television and radio cigarette advertisements has been diverted to newspapers and magazines. The fact that the Act may create a new and perhaps potentially serious situation in the print media is not sufficient evidence to establish a due process violation. The Fifth

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13/ [Footnote continued from preceding page]

> television were equally impressive. Id., at 5. Among other reports, Congress had the benefit of the testimony of Joseph Cullman, chairman of Philip Morris, Inc., who stated: ". . . I think further that broadcast is quite different from print media. We think that the print media appeals to a more adult person and as such is a more appropriate place for cigarette ads." Hearings on HR 6543 Before the Consumer Subcommittee of the Committee on Commerce, 91st Cong., 1st Sess., at 115 (1969).

14/ 405 F2d 1082, 1100-01 (DC Cir., 1969), cert. denied, 396 US 842 (1969), (footnote omitted).

Amendment does not compel legislatures "to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another." United States v. Carolene Products, supra, at 151. Speculation concerning the final impact or success of the classification in question cannot erode the valid factual distinctions upon which such classification was predicated.

The petition for injunctive and declaratory relief is, accordingly, denied.

Wright, Circuit Judge, dissenting: Cigarette smoking and the danger to health which it poses are among the most controversial and important issues before the American public today. Yet Congress, in passing the Public Health Cigarette Smoking Act of 1969, 1/ has suppressed the ventilation of these issues on the country's most pervasive communication vehicle – the electronic media. 2/ Under the circumstances, in my judgment, no amount of attempted balancing of alleged compelling state interests against freedom of the press can save this Act from constitutional condemnation under the First Amendment. The heavy hand of government has destroyed the scales.

It would be difficult to argue that there are many who mourn for the Marlboro Man or miss the ungrammatical Winston jingles. Most television viewers no doubt agree that cigarette advertising represents the carping hucksterism of Madison Avenue at its very worst. Moreover, overwhelming scientific evidence makes plain that the Salem girl was in fact a seductive merchant of death – that the real "Marlboro Country" is the graveyard. 3/ But the First Amendment does not protect only speech that is healthy or harmless. The Court of Appeals in this circuit has approved the view that "cigarette advertising implicitly states a position on a matter of public controversy." Banzhaf v. FCC, 132 US App DC 14, 34, 405 F2d 1082, 1102 [14 RR 2d 2061] (1968), cert. denied, 396 US 842 (1969). For me, that finding is enough to place such advertising within the core protection of the First Amendment.

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The Banzhaf case, decided three years ago, upheld an FCC determination that, since cigarette advertising was controversial speech on a public issue,

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1/ 15 USC §§1331-1340 (1971 Pocket Part).

2/ The Act provides: "After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 USC §1335. In addition, the Act slightly modifies the warning appearing on cigarette packs, see §1333, prohibits the states from imposing stricter requirements on cigarette advertising and packaging, see §1334(b), and extends the ban on Federal Trade Commission action against cigarette advertising, see §1336.

3/ See S. Rep 91-566, 91st Cong., 1st Sess., 21-33 (December 5, 1969) (hereinafter cited as "Senate Report"), and sources cited therein; Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act 33 (June 30, 1969).

the so-called "fairness doctrine" applied to it. 4/ Stations carrying cigarette advertising were therefore required to "tell both sides of the story" and present a fair number of anti-smoking messages.

The history of cigarette advertising since Banzhaf has been a sad tale of well meaning but misguided paternalism, cynical bargaining and lost opportunity. In the immediate wake of Banzhaf, the broadcast media were flooded with exceedingly effective anti-smoking commercials. For the first time in years, the statistics began to show a sustained trend toward lesser cigarette consumption. 5/ The Banzhaf advertising not only cost the cigarette companies customers, present and potential; it also put the industry in a delicate, paradoxical position. While cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke. 6/ And after Banzhaf, these advertisements triggered the anti-smoking messages which were having a devastating effect on cigarette consumption. Thus the individual tobacco companies could not stop advertising for fear of losing their competitive position; yet for every dollar they spent to advance their product, they forced the airing of more anti-smoking advertisements and hence lost more customers.

It was against this backdrop that the Consumer Subcommittee of the Senate Committee on Commerce met to consider new cigarette legislation. The legislative prohibition against requiring health warnings in cigarette advertisements 7/ had just expired, and the Federal Trade Commission had indicated that it might soon require such warnings if not again stopped by Congress. 8/

4/ Because some doubt as to the constitutionality of the fairness doctrine existed at that time, the Banzhaf court actually rested its decision on the broader "public interest" standard which broadcasters are required to meet. See 132 US App DC at 24, 405 F2d at 1092. However, Red Lion Broadcasting Co. v. FCC, 395 US 367 [16 RR 2d 2029] (1969), has now made clear that the fairness doctrine is in fact constitutional. This circuit has thus grounded its subsequent extension of the Banzhaf rule squarely on the fairness doctrine. See Friends of the Earth v. FCC, ____ US App DC ___, ____ F2d ___ [22 RR 2d 2145] (No. 24,556, decided August 16, 1971).

5/ See U.S. Department of Agriculture, Tobacco Situation, September 1971, at 5; Hearing Before the Consumer Subcommittee of the Senate Committee on Commerce, 91st Cong., 1st Sess., at 132 (July 22, 1969) (hereinafter cited as "Senate Hearing").

6/ See J. Simon, Issues in the Economics of Advertising (1969), portions reprinted in Senate Hearing at 108-109; Senate Hearing at 117-118 (testimony of Joseph F. Cullman, III, Chairman, Philip Morris, Inc.); Note, Cigarette Advertising and the Public Health, 6 Colum. J. of Law & Soc. Prob. 99, 117 (1970).

7/ 15 USC §§1334(b) & 1339 (Supp. V 1965-1969).

8/ See FTC News Release of May 22, 1969, reprinted as Appendix A to Federal Trade Commission, Report to Congress, supra Note 3.

In addition, the FCC was moving toward rule making which would have removed cigarette advertising from the electronic media. 9/ Thus Congress had to decide whether to extend the ban on FTC action and institute a similar restraint against the FCC or, alternatively, to allow the regulatory agencies to move forcefully against cigarette advertisements.

The context in which this decision had to be made shifted dramatically when a representative of the cigarette industry suggested that the Subcommittee draft legislation permitting the companies to remove their advertisements from the air. 10/ In retrospect, it is hard to see why this announcement was thought surprising. The Banzhaf ruling had clearly made electronic media advertising a losing proposition for the industry, and a voluntary withdrawal would have saved the companies approximately $250,000,000 in advertising costs, 11/ relieved political pressure for FTC action, 12/ and removed most anti-smoking messages from the air. 13/

At the time, however, the suggestion of voluntary withdrawal was taken by some as a long delayed demonstration of industry altruism. 14/ Congress quickly complied with the industry's suggestion by banning the airing of television and radio cigarette commercials. Moreover, the new legislation provided additional rewards for the industry's "altruism" including a delay in pending FTC action against cigarette advertising 15/ and a prohibition against stricter state regulation of cigarette advertising and packaging. 16/ The result of the legislation was that as both the cigarette advertisements and most anti-smoking messages left the air, the tobacco companies transferred their

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9/ See FCC Notice of Proposed Rule Making, FCC Docket No. 18434, 34 Fed. Reg. 1959 (1969); Senate Hearing at 154 (testimony of Rosel H. Hyde, Chairman, FCC).

10/ See Senate Hearing at 78 (testimony of Mr. Cullman). The cigarette companies requested an antitrust exemption so they could reach an agreement among themselves not to advertise on the electronic media without fear of prosecution for restraint of trade.

11/ See Senate Report at 9.

12/ The Chairman of the FTC had made known his agency's willingness to suspend its proposed requirement of health warnings in all cigarette advertisements if the advertising were removed from the electronic media. See Senate Hearing at 172.

13/ See Senate Hearing at 160-162 (testimony of FCC Chairman Hyde).

14/ See, e.g., Senate Hearing at 81 (remarks of Senator Moss).

15/ See 15 USC §1336.

16/ See 15 USC §1334(1).

advertising budgets to other forms of advertising such as newspapers and magazines where there was no fairness doctrine to require a response. 17/

The passage of the Public Health Cigarette Smoking Act of 1969 marked a dramatic legislative coup for the tobacco industry. With the cigarette smoking controversy removed from the air, the decline in cigarette smoking was abruptly halted and cigarette consumption almost immediately turned upward again. 18/ Thus whereas the Banzhaf ruling, which required that both sides of the controversy be aired, 19/ significantly depressed cigarette sales, the 1969 legislation, which effectively banned the controversy from the air, had the reverse effect. Whereas the Banzhaf decision had increased the flow of information by air so that the American people could make an informed judgment on the hazards of cigarette smoking, the 1969 Act cut off the flow of information altogether. 20/

17/ See Advertising Age, January 11, 1971, at 2 ("Cigarets' Exit from Airwaves Brings Repercussions Aplenty Among Advertisers, Media"), Media Decisions, January 1971, at 10 ("Cigarettes in Newspapers").

18/ The figures on total U.S. cigarette consumption from 1967 to the present are quite striking. U.S. consumption reached a peak of 549.2 billion cigarettes in 1967, the year before the Banzhaf ruling. As the Banzhaf messages began to appear on the air in late 1968, consumption began to drop for the first time in two years. It slipped to 545.7 billion in 1968 and 528.9 billion in 1969. Cigarette commercials and most Banzhaf messages left the air on January 1, 1970, and their departure was accompanied by an immediate resumption of the upward trend in consumption. 536.4 billion cigarettes were consumed in the United States in 1970 and the projected figure for 1971 is 546.0 billion. Tobacco Situation, supra Note 5, at 5. The Department of Agriculture has concluded that "U.S. consumption of cigarettes in calendar 1971 likely will gain 2 percent over 1970. . . . Per capita use is steadying after declines for the past 4 years. With prospects for these factors to continue in 1972, cigarette consumption may again show a small gain." Id. at 4. These gains in cigarette consumption are reflected in turn, in a resumption of prosperous conditions in the cigarette industry. See Advertising Age, May 31, 1971, at 1 ("Cigaret stocks, Wrigley pace 71 advertiser issues"); Advertising Age, May 10, 1971, at 91 ("Is cigaret companies' success without tv giving others ideas?").

19/ Banzhaf had required broadcasters carrying cigarette messages to carry the anti-smoking messages free of charge under certain circumstances. With the removal of cigarette advertising, only those anti-smoking groups who could afford to buy time or who succeeded in persuading broadcasters to donate it remained on the air. See Senate Hearing at 160-162 (testimony of FCC Chairman Hyde).

20/ Some of the language in Banzhaf makes clear just how far removed the Public Health Cigarette Smoking Act of 1969 is from the spirit which informed that ruling. The Banzhaf court argued:

[Footnote continued on following page]

Of course, the fact that the legislation in question may be a product of skillful lobbying or of pressures brought by narrow private interests, or may have been passed by Congress to favor a particular industry, does not necessarily affect its constitutionality. Cf. United States v. O'Brien, 391 US 367, 383-385 (1968); Arizona v. California, 283 US 423, 455 (1931). But when the "inevitable effect" of the legislation is the production of an unconstitutional result, the statute cannot be allowed to stand. See Gomillion v. Lightfoot, 364 US 339, 342 (1960). The legislative history related above shows that the effect of this legislation was to cut off debate on the value of cigarettes just when Banzhaf had made such a debate a real possibility. The theory of free speech is grounded on the belief that people will make the right choice if presented with all points of view on a controversial issue. See Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 881 (1963); A. Meiklejohn, Political Freedom 26-28 (1960). When Banzhaf opened the electronic media to different points of view on the desirability of cigarette smoking, this theory was dramatically vindicated. Once viewers saw both sides of the story, they began to stop or cut down on smoking in ever increasing numbers. 21/ Indeed, it was presumably the very success of the Banzhaf doctrine in allowing people to make an informed choice that frightened the cigarette industry into calling on Congress to silence the debate.

II

This is not an ordinary "free speech" case. It involves expression which is ostensibly political, advocating a particularly noxious habit through a medium which the Government has traditionally regulated more extensively than other modes of communication. But the unconventional aspects of the problem should not distract us from the basic First Amendment principles involved. Any statute which suppresses speech over any medium for any purpose begins with a presumption against its validity. If the Government is able to come forward with constitutionally valid reasons why this presumption should be overcome, then of course the statute will be allowed to stand. But where, as here, the reasons offered are inconsistent with the purposes of the First Amendment, it becomes the duty of the courts to invalidate the statute.

20/ [Footnote continued from preceding page]

". . .[I]f we are to adopt petitioners' analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe [sic] to impute such a purpose to Congress absent a clear expression. Where a controversial issue with potentially grave consequences is left to each individual to decide for himself, the need for an abundant and ready supply of relevant information is too obvious to need belaboring."

132 US App DC at 21, 405 F2d at 1089. (Emphasis added.)

21/ See Notes 5 & 18, supra.

Thus it may be true, as the Government argues, that the special characteristics of the electronic media justify greater governmental regulation than would be permitted for the print media. See National Broadcasting Co. v. United States, 319 US 190 (1943). But such regulation is constitutionally justified only because it serves to apportion access to the media fairly. As Mr. Justice Frankfurter argued in National Broadcasting:

> ". . . Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. . . . But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. . . ." 22/

Cases such as Red Lion, 23/ Banzhaf, and United Church of Christ 24/ are consistent with this approach in that they uphold Government power to insure wider access to the means of communication and persuasion. But these decisions in no way serve as precedent for the use of Government power to shut off debate on a vital public issue. If the First Amendment means anything at all, it means that Congress lacks this power. There is no constitutional warrant for Government censorship of any medium of communication. Compare United States v. Paramount Pictures, 334 US 131, 166 (1948), with Citizens Communication Center v. FCC, ____ US App DC ____, ___, ___ F2d ___, ___ [22 RR 2d 2001] (Nos. 24,471, 24,491 & 24,221, decided June 11, 1971) (slip opinion at 27-28.)

Thus the government fails to meet its burden by simply asserting broad regulatory power over the broadcast media. If the statutory ban on cigarette advertising is to withstand constitutional scrutiny, there must be a further showing that either the advertising is not speech within the meaning of the First Amendment or it creates a clear and present danger of such substantial magnitude that governmental suppression is justified. 25/ While the

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22/ National Broadcasting Co. v. United States, 319 US 190, 226 (1943). For a criticism of this "scarcity" rationale as a justification for even limited governmental interference, see Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967).

23/ Red Lion Broadcasting Co. v. FCC, supra Note 4.

24/ Office of Communication of United Church of Christ v. FCC, 123 US App DC 328, 359 F2d 994 [7 RR 2d 2001] (1966), order entered after remand, 138 US App DC 112, 425 F2d 543 [16 RR 2d 2095] (1969).

25/ The majority suggests that the statute can be upheld because "petitioners [the broadcasters], themselves, have lost no right to speak – they have

[Footnote continued on following page]

Government in fact makes both of these arguments, I find neither of them persuasive in the context of this case.

Although the status of commercial or "product" advertising under the First Amendment has not been finally resolved, 26/ it must be conceded that some cases seem to accord it lesser protection than political or artistic speech. 27/ Indeed, as the court in Banzhaf stated: "As a rule, [product advertising] does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression."28/

25/ [Footnote continued from preceding page]

only lost an ability to collect revenue from others for broadcasting their commercial messages." But this argument misconceives the nature of the issues involved. As Mr. Justice White stated in Red Lion Broadcasting Co. v. FCC, supra Note 4:

> ". . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to perserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

395 US at 390. See also Business Executives' Move for Vietnam Peace v. FCC, ____ US App DC ___, ___ F2d ___ (Nos. 24,492 & 24,537, decided August 3, 1971) (slip opinion at 20). Cf. New York Times Co. v. Sullivan, 376 US 254, 265-266 (1964), where the Supreme Court rejected the notion that a newspaper lacked standing to assert the First Amendment interests of its advertisers.

26/ See Cammarano v. United States, 358 US 498, 513-514 (1959) (Mr. Justice Douglas, concurring).

27/ See, e.g, Breard v. Alexandria, 341 US 622, 626 (1951); Donaldson v. Read Magazine, 333 US 178, 191 (1948); Valentine v. Chrestensen, 316 US 52 (1942).

28/ 132 US App DC at 33-34, 405 F2d at 1101-1102. While these words were written in a context involving cigarette advertising, they cannot be cited for the proposition that cigarette messages fall outside the protection of the First Amendment. Indeed, in the very same paragraph the court went on to say: "In the instant case, this argument is not dispositive because the cigarette ruling [applying the fairness doctrine] was premised

[Footnote continued on following page]

Commentators too have argued that product advertising is generally unrelated to the values which the First Amendment was designed to preserve, and that broad state regulation should therefore be permitted. 29/

These arguments are no doubt persuasive when applied to most of the activities of Madison Avenue. But it does not follow from their general validity that the words "product advertising" are a magical incantation which, when piously uttered, will automatically decide cases without the benefit of further thought. 30/ Thus when commercial speech has involved matters of public controversy, 31/ or artistic expression, 32/ or deeply held personal beliefs, 33/ the courts have not hesitated to accord it full First Amendment protection.

In my view, this circuit's decisions in Banzhaf and Friends of the Earth v. FCC 34/ implicitly recognize this special status which certain forms of product advertising enjoy. Both Banzhaf and Friends of the Earth suggest that the fairness doctrine is not relevant to normal commercial messages. 35/ Yet the doctrine was applied in the case of cigarette and automobile advertisements because they, unlike ordinary commercial speech, were controversial statements on important public issues. It can hardly be contended that cigarette commercials are "controversial speech" for purposes of the First Amendment

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28/ [Footnote continued from preceding page]

on the fact that cigarette advertising implicitly states a position on a matter of public controversy." Ibid. The Banzhaf court seems to have rejected petitioners' First Amendment argument principally because "[t]he cigarette ruling does not ban any speech," and because "the First Amendment gain is greater than the loss." Ibid. Neither of these arguments is open to the Government in this case.

29/ See Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191, 1192-1195 (1965).

30/ See Developments in the Law – Deceptive Advertising, 80 Harv. L. Rev. 1005, 1027-1038 (1967).

31/ See, e.g., New York Times Co. v. Sullivan, supra Note 25, 376 US at 265-266; cf. Thornhill v. Alabama, 310 US 88 (1940).

32/ See, e.g., Smith v. California, 361 US 147, 150 (1959).

33/ See, e.g., United States v. Ballard, 322 US 78 (1944).

34/ ____ US App DC ___, ___ F2d ___ (No. 24,566, decided August 16, 1971).

35/ Cf. id., slip op. at 12, 14; 132 US App DC at 31, 405 F2d at 1099.

based fairness doctrine, yet mere "product advertising" for purposes of the First Amendment. 36/ The Banzhaf court recognized that the desirability of cigarette smoking had become a vital question of public concern, and that cigarette advertisements were a part of the debate surrounding that question. The court then went on to hold that "[w]here a controversial issue of potentially grave consequences is left to each individual to decide for himself, the need for an abundant and ready supply of relevant information is too obvious to need belaboring." 37/

Indeed, the desirability of cigarette smoking has become still more controversial since Banzhaf was decided. Issues such as whether Congress should end price supports for tobacco, require stricter health warnings, or even outlaw the sale of cigarettes altogether are matters of widespread public debate. The Surgeon General has stated 38/ and reiterated 39/ his official position that the health hazards of cigarette smoking make it an undesirable habit. The Government is, of course, entitled to take that position and to attempt to persuade the American people of its validity. But the government is emphatically not entitled to monopolize the debate or to suppress the expression of opposing points of view on the electronic media by making such expression a criminal offense. 40/

Of course, it is true that the courts have on occasion recognized a narrow exception to these general First Amendment principles. Where otherwise protected speech can be shown to present a "clear and present danger" of a severe evil which the state has a right to prevent, supression of that speech

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36/ It might be argued that the Public Health Cigarette Smoking Act bars only product advertising and not the sort of general argument about the desirability of cigarette smoking which the First Amendment would protect. But such an argument ignores the full force of the Banzhaf decision. The Banzhaf court did not rely on general "political" messages favoring smoking to trigger the fairness doctrine. Rather, it found that the product advertising itself "implicitly states a position on a matter of public controversy." 132 US App DC at 34, 405 F2d at 1102. Moreover, the Banzhaf court conceded that "the anti-cigarette broadcasts required by the Commission's ruling may include uninformative propaganda as well as hard information." 132 US App DC at 22 n. 25, 405 F2d at 1090 n. 25. The First Amendment does not permit the Government to restrict one side of a controversy to "hard information" while allowing the other side to utilize "uninformative propaganda" as well.

37/ 132 US App DC at 21, 405 F2d at 1089.

38/ See Report of the Surgeon General's Advisory Committee (January 11, 1964).

39/ See Report on Current Information on the Health Consequences of Smoking (1967).

40/ See 15 USC §1338.

has on occasion been permitted. 41/ The argument is made here that the state has an overwhelming interest in the preservation of the health of its citizens and that cigarette advertising poses a clear and present danger to this interest.

Although this argument is superficially attractive, it cannot withstand close scrutiny. The clear and present danger tests has always been more or less confined to cases where the state has asserted an overriding interest in its own preservation or in the maintenance of public order. 42/ While it cannot be denied that public health is also a vital area of state concern, it is different from the state interest in security in one crucial respect. Whereas there are always innocent victims in riots and revolutions, the only person directly harmed by smoking cigarettes is the person who decides the smoke them. The state can stop speech in order to protect the innocent bystander, but it cannot impose silence merely because it fears that people will be convinced by what they hear and thereby harm themselves. As cases like Stanley v. Georgia 43/ and Griswold v. Connecticut 44/ make clear, the state has no interest at all in what people read, see, hear or think in the privacy of their own home or in front of their own television set. At the very core of the First Amendment is the notion that people are capable of making up their own minds about what is good for them and that they can think their own thoughts so long as they do not in some manner interfere with the rights of others.

41/ See, e.g., Schenck v. United States, 249 US 47 (1919); Dennis v. United States, 341 US 494 (1951).

42/ Compare, e.g., Feiner v. New York, 340 US 315 (1951), with Schneider v. State, 308 US 147 (1939). For a general history of the clear and present danger test, see McKay, The Preference for Freedom, 34 N.Y.U. L. Rev. 1182, 1208-1212 (1959).

If the purchase and sale of cigarettes were illegal under state or federal law, the constitutional validity of the Public Health Cigarette Smoking Act of 1969 would, of course, be tested by other First Amendment considerations not relevant here. Cf. Camp-of-the-Pines Inc. v. New York Times Co., 184 Misc. 389, 53 NYS 2d 745 (1945). Since cigarette advertising abvocates conduct which at present is entirely legal, it cannot be said that regulation of such advertising is a necessary incident to congressional control of illicit conduct. See Note, Freedom of Expression in a Commercial Context, supra Note 29, 78 Harv. L. Rev. at 1196. Cf. Griswold v. Connecticut, 381 US 479 (1965).

43/ 394 US 587 (1969).

44/ 381 US 479 (1965).

III

This opinion is not intended as a Magna Carta for Madison Avenue. In my view, Congress retains broad power to deal with the evils of cigarette advertising. It can force the removal of deceptive claims, require manufacturers to couple their advertisements with a clear statement of the hazardous nature of their product, and provide for reply time to be awarded to anti-cigarette groups. But the one thing which Congress may not do is cut off debate altogether.

The only interest which might conceivably justify such a total ban is the state's interest in preventing people from being convinced by what they hear – the very sort of paternalistic interest which the First Amendment precludes the state from asserting. Even if this interest were sufficient in the purely commercial context, the Banzhaf decision makes clear that cigarette messages are not ordinary product advertising but rather speech on a controversial issue of public importance – viz., the desirability of cigarette smoking. The Government simply cannot have it both ways. Either this is controversial speech in the public arena or it is not. If it is such speech, then Section 6 of the Public Health Cigarette Smoking Act is unconstitutional; if it is not, then Banzhaf was wrongly decided. Although I respect the opinion of my colleagues in this case, my own view is that the Banzhaf decision was correct and that this law is unconstitutional. 45/ I come to that position not only because stare decisis dictates it, but also because I think that when people are given both sides of the cigarette controversy, they will make the correct decision. That, after all, is what the First Amendment is all about. And our too brief experience with the Banzhaf doctrine shows that the theory works in practice.

I respectfully dissent.

45/ The recent case of Larus & Brother Co., Inc. v. FCC, 4 Cir., ___ F2d ___ (No. 15,382, decided August 20, 1971), is not opposed to this view. In a fairness doctrine context that case held that it was rational for the Commission to conclude that the health hazard posed by cigarette smoking was no longer a controversial issue. In contrast, we are called upon here to determine de novo whether there is actually sufficient controversy surrounding cigarette smoking to bring it within the core protection of the First Amendment. Many believe that cigarette smoking does not justify the health risk involved. But the millions of smokers who continue to use cigarettes despite their knowledge of the health hazard have apparently reached precisely the opposite conclusion. Under the circumstances to suggest, as the majority apparently does, that no controversy exists concerning cigarette smoking is to blink reality. What Larus & Brother Co. actually demonstrates is that the Public Health Cigarette Smoking Act of 1969 has so succeeded in suppressing ventilation of the cigarette smoking controversy on radio and television that the controversy has disappeared from the electronic media. Thus while the functioning of the First Amendment as to this controversy has been frustrated on the nation's most pervasive information outlets, the controversy itself has in no sense ended. Rather, it has merely been shifted to other communications media where the fairness doctrine is not applicable and cigarette foes have no right of reply. See Note 17, supra.

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NOTES

FREE SPEECH AND THE MASS MEDIA

Any individual or group with muscle or wealth has power to suppress the speech of others. Accordingly, free speech is an artifact: it can exist only where its antagonists are subject to social restraint.

Government, an agency of restraint, has power to protect free speech. Ironically, government has power to censor and suppress as well; but government is not unique in this respect. Other institutions, like "private" corporations, enjoy similar power. For example, the private companies that govern the mass media—the newspaper syndicates and the radio and television networks—regulate the form and content of substantial portions of public discourse. Further, substantial evidence indicates that these institutions can, and do on occasion, exercise their power in a censorial fashion.[1]

The framers of the first amendment contrived to restrict the censorial power of government.[2] Commentators and critics, sensitive to the effective

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[1] Commentators contend that the custodians of the media permit only established views to enter the marketplace of ideas. *See* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Johnson & Westen, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971); Note: *Resolving the Free Speech–Free Press Dichotomy, Access to the Press Through Advertising*, 22 U. FLA. L. REV. 293 (1969). One reason for this may be the technology of mass communication:

> We have seen that the very technology and especially of broadcasting can be realized only when they are reaching very large audiences.... This technological fact predisposes all the mass media to conform to an already widely accepted taste. It also makes it very difficult for a novel point of view or a just emerging problem to gain access to network broadcasts or other mass components of the mass communications system.

D. LACY, FREEDOM AND COMMUNICATIONS 69 (1961). The economic problems of maintaining subscriptions and ratings dictate an editorial policy calculated to woo the majority. As Mr. Justice Douglas, a staunch defender of the press, has noted:

> Money makers have taken over the press. They want readers and advertisers; and so they cater to the low common denominator of the populace.

Quoted in C. LINDSTROM, THE FADING AMERICAN NEWSPAPER 163 (1960). Generally, the absence of price competition (a circumstance obtaining, to some extent, in both publishing and broadcasting) eliminates economic pressure as a means of controlling discriminatory conduct engaged in by the media. *See* Q. VILLARD, THE DISAPPEARING DAILY at V (1944); J. R. WIGGINS, FREEDOM OR SECRECY 178 (rev. ed. 1964); Robinson, *The FCC and the First Amendment: Observation on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 88 (1967).

[2] The press, originally the most significant communications medium, was singled out by the framers of the first amendment as a vehicle of debate to be insulated from governmental restraint. Firstamerica Dev. Corp. v. Daytona Beach News-Journal Corp., 196 So. 2d 97, 99 (Fla. 1966); Barron, *Law and the Free Society Lectures*, 48 TEX. L. REV. 766, 774 (1970). Radio and television have long been recognized as

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censorship emanating from other sources, contend that analogous restraints are now required in areas where *private* power restricts free expression.[3] For example, in this issue of the *Virginia Law Review* Commissioner Nicholas Johnson of the Federal Communications Commission argues that radio and television broadcasters should be, and are in fact, constrained by the first amendment and by statute to sell broadcast time to persons wishing to communicate political speech. He maintains, in short, that the broadcaster's power to regulate the form and content of political speech transmitted in his medium is subject to a right of access-for-purchase, inhering in anyone with the means to buy and the will to speak.[4] This Note examines Commissioner Johnson's argument and questions his conclusion: The constitution does not compel a right of access, policy does not support it, and Congress has foreclosed judicial innovation by adopting a regulatory scheme protecting the interests of the media and the public.

The analysis here is structured by three questions. First, are the custodians of the mass media subject to first amendment restraint? Second, if they are, does the first amendment require them, specifically, to sell air time (or advertising space) to those who wish to buy? Third, do statutes impose such a requirement, if the first amendment does not?

Four Theories of State Action

The first amendment protects free speech by restricting the power of government, but in a proper case the conduct of private individuals may be subject to the same restraint. This occurs where governmental power facilitates private conduct in such a way that the private act becomes, in a constitutional sense, action by the state. If the custodians of the mass media are in fact constrained by the first amendment, it is for this reason.[5]

forms of communication protected by the first amendment. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); *cf.* Z. Chafee, Free Speech in the United States 545-46 (1941).

[3] *See, e.g.*, Barron, *supra* note 1, at 1641.

[4] Johnson & Westen, *supra* note 1, at 633.

[5] The term "state action," and the concept embodied in it, emerged and developed in cases involving the fourteenth amendment. *See* The Civil Rights Cases, 109 U.S. 3 (1883). In that context the word "state" referred to political entities like New York, or Louisiana. Here the term "state action" is employed, by analogy, to describe activity by the Federal Government. If the conduct of broadcasters constitutes "state action" in this sense, it is not because their conduct is facilitated by the power of a *state* (and is subject, therefore, to the prohibitions of the first amendment, through the operation of the fourteenth), but because their conduct is facilitated by *federal* power (and is subject directly to the first amendment restraint). Commissioner Johnson relies on this analogy by arguing from cases that construe the "state action" requirement in the fourteenth amendment context. See pp. 642-44 *infra*.

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State Action and the Newspapers

In recent cases courts have recognized a constitutional right of access to public forums.[6] The courts have held, essentially, that the managers of public facilities—bus terminals,[7] busses,[8] subways,[9] and high school newspapers[10]—cannot exclude some speakers from their forums, while granting access to others. Once the managers have opened the forums to the public, they cannot close them discriminatively. An operative fact in every case was public ownership of the facility in question, yet in some instances direct control over the contested forum was exercised by a private agency, not the Government itself.[11] Thus the discriminatory conduct was that of a private individual, not an officer of the state. In that event the controlling issue was whether the conduct of the private party (the manager of the forum) betrayed "state action." In each case the fact of public ownership appears to have been critical to the affirmative result.

Elsewhere, individuals have sought to vindicate a right of access to *privately* owned forums, and in some cases they have met with success. In *Marsh v. Alabama*[12] and *Food Employees Local 590 v. Logan Valley Plaza*,[13] for example, the Supreme Court held that the Constitution secures a right of access to a privately owned facility, like the streets of a company town or the sidewalks of a shopping center, where the facility serves a function of the kind ordinarily served by a governmental entity.

Few private facilities, however, take the place of a governmental entity. In *Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune*,[14] for example, a union submitted a full page editorial advertisement to each of the four general circulation newspapers in Chicago. The ad showed a picket line in front of Marshall Field & Co.'s store and set forth the union's reasons for picketing the company. Each of the newspapers refused to publish the advertisement. The union then sought injunctive relief in the federal district court to compel the newspapers to publish its advertisement. The District Court granted the newspapers' motion for summary

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[6] For a discussion of recent developments relating to the rights of access to public forums see Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969).

[7] Wolin v. Port Authority, 392 F.2d 83 (2d Cir. 1968).

[8] Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

[9] Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967).

[10] Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

[11] *See* Barron, *supra* note 6, at 489.

[12] 326 U.S. 501 (1946) (company town's refusal to permit distribution of religious literature on streets held to violate first amendment).

[13] 391 U.S. 308 (1968) (shopping center's refusal to permit picketing on shopping center property held to violate first amendment).

[14] 307 F. Supp. 422 (N.D. Ill. 1969).

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judgment on the ground that the newspapers' conduct did not violate the first amendment.[15] On appeal, the Seventh Circuit affirmed. The state involvement in the publication of the newspapers did not constitute "state action." The first amendment did not constrain the publishers to sell advertising space.[16]

Relying on *Marsh v. Alabama* and *Food Employees v. Logan Valley Plaza,* the union had argued that a special relationship exists between the state and the newspapers in light of state laws which exempt newspaper employees from jury service; require newspapers to publish legal notices, notices of elections, and municipal ordinances; and grant newspapers certain tax exemptions. The union also cited a Chicago regulation which restricted newsstand sales on public streets to daily newspapers printed and published in Chicago, and the common custom of providing a designated space in public buildings for the use of the press and other news media.[17]

Rejecting this argument, the circuit court concluded that, whatever the relationship between government and the press, newspapers do not serve a "public function" of the kind contemplated by the Court in *Marsh* and *Logan Valley*. The contention that they did was inconsistent with traditional notions about the role of the press in American society. Rather than "exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power."[18] Interpreting the public function theory narrowly, the court viewed *Marsh* and *Logan Valley* as holding that private property remains unburdened by constitutional obligations unless it becomes a functional equivalent of municipal streets or sidewalks.[19] The court then distinguished the present case on the grounds that (1) the sidewalks and streets of a company town or shopping center are not analogous in function to the advertising pages of a newspaper, and (2) the newspapers do not grant the general public unrestricted access to their advertising pages. Rather, the newspapers select their advertisers by contract.[20]

The union had also relied on *Burton v. Wilmington Parking Authority*.[21] In that case the Supreme Court found state action in the discriminatory conduct of a private restauranteur, who leased space in a publicly owned building and operated his enterprise in furtherance of "public purposes." The circuit court distinguished *Burton* on the grounds that a publicly owned building sustained the restaurant and that the private business con-

[15] *Id.* at 425-29.

[16] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970).

[17] *Id.* at 473.

[18] *Id.* at 474 (quoting the District Court opinion below, 307 F. Supp. at 427).

[19] *Id.* at 474-75.

[20] *Id.* at 475.

[21] 365 U.S. 715 (1961).

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stituted a "physically and financially integral, and indeed, indispensible part of the State's plan to operate the project as a self-sustaining unit." [22]

The court's conclusion that the *Burton* concept of state action is inapplicable to newspapers seems correct. In *Burton* the Supreme Court noted that the Parking Authority could have prohibited the discrimination by inserting appropriate conditions in the lease.[23] Since the state's failure to do so contributed to the discrimination by making it possible in the first instance, the discrimination arguably became state supported. Moreover, the state could have withdrawn its support without invading other legitimate interests, i.e., the state could have insisted on appropriate conditions without unduly burdening the lessee. By contrast, in *Chicago Joint Board* it is arguable whether the state could have required the newspapers to publish the union's advertisement without invading the newspapers' first amendment rights.

A weakness of the circuit court's opinion was its failure to recognize the broad implications of the public function theory.[24] Thus in *Marsh* the Supreme Court adopted the following language to describe the theory of the public function approach:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[25]

This statement embodies an expansive conception of the constitutional obligations of property owners. Now unquestionably, recognition of a first amendment right of access was peculiarly appropriate in *Marsh*, given the facts of the case. But the principle stated there is a broad one. Liberally construed, the principle would subject the management of private property to first amendment restraint whenever the property is opened to public use for the owner's advantage. Thus, in *Logan Valley* the public function rationale extended to the sidewalks of a privately owned shopping center. The Court found that the factual differences between the cases did not require a different outcome. It reasoned that a shopping center served the community in the same way as a business block, and, therefore, the owners of the shopping center could not exclude from their sidewalks "those members of the public wishing to exercise their First Amendment rights . . .

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[22] 435 F.2d at 476.

[23] 365 U.S. at 725.

[24] Professor Barron suggests that these cases represent an awareness by the Court of the growing importance of private facilities in guaranteeing first amendment rights and a willingness to look beyond the issue of private ownership in finding state action. Barron, *supra* note 6, at 493-94.

[25] 326 U.S. at 506.

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in a manner and for a purpose generally consonant with the use to which the property is actually put." [26]

In spite of its breadth, however, the public function theory should not subject newspapers to constitutional demands. Under the better view of *Marsh* and *Logan Valley*, private property serves a "public function" only when it is used *as public property is used*. Thus, while a newspaper "serves" the public in a general sense, it serves no "public function," because no public property is normally used in an equivalent way. In short, the public function theory comprehends only those public services that have counterparts in the service of facilities that are owned by the public. A newspaper is not one of these.[27]

This "public equivalence" analysis is supported by *Evans v. Newton*.[28] In that case the Supreme Court found state action in the operation of a public park under the direction of private trustees. The Court stated that its finding was

> buttressed by the nature of the service rendered to the community by a park. The service rendered even by a private park . . . is municipal in nature. . . . Like the streets of the company town in *Marsh v. Alabama* . . . the predominant character and purpose of this park [is] *municipal* [and should] be treated as a public institution . . . regardless of who now has title under state law.[29]

Even though a newspaper is a public institution to the extent that it provides a service to the public, by no stretch of the imagination can its function be considered *municipal*. The newspaper has no equivalent in the service of ordinary governmental functions.

The public equivalence theory was properly used by the *Chicago Joint Board* court as a basis for rejecting the union's argument that state action inheres in the conduct of newspaper publishers, because a newspaper "'enjoys monopoly power in an area of vital public concern.'" [30] The

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[26] 391 U.S. at 319-20.

[27] While the critique of the public function analysis is developed here by reference to newspaper publishing, it applies with equal force where broadcasting is concerned. Commissioner Johnson argues that broadcasters serve a "public function" under the *Marsh* rationale. Johnson & Westen, *supra* note 1, at 591. But broadcasting is not a public function in the narrow sense urged here. Broadcasting has no functional equivalent in services rendered by publicly owned facilities, see pp. 650-53 *infra*.

[28] 382 U.S. 296 (1966). In *Evans* a state court permitted a municipality to transfer its control over a public park to private trustees who denied Negroes access to the facility. The Supreme Court barred the discrimination. The park had been placed in trust for use by "the white race only," under the terms of Senator Bacon's will.

[29] 382 U.S. at 301-02.

[30] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune, 435 F.2d at 477.

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union based its argument on a recent case in which a regional educational association responsible for the accreditation of colleges and secondary schools was found to be subject to constitutional restraints in the performance of its accreditation function.[31] The court quite correctly distinguished this case, noting that the regional educational association, unlike the newspapers, acted "in a quasi-governmental capacity by virtue of its role in the distribution of Federal funds under the 'aid to education statutes.'"[32]

Thus *Chicago Joint Board* was decided on state action grounds. But the union's complaint presented a more fundamental issue. If the court *had* found that state involvement in the publishing process was sufficiently intimate to bring the first amendment into play, it would have faced the question whether the first amendment compelled the newspapers to sell advertising space. Did that amendment, conceived to protect the press from the coercion of law, burden the press with legal obligations in and of itself? The union insisted that it did. The issue awaits analysis.[33]

State Action in Broadcasting

If there is a distinction of constitutional significance between the newspaper industry and radio and television broadcasting, it is that state involvement in the latter is more pronounced. Broadcasting, unlike publishing, is a regulated industry,[34] a circumstance which in other contexts has supported a finding of state action.[35] Broadcasters, unlike publishers, are licensees of the state. They broadcast over allocated frequencies under a three year license granted by the Federal Communications Commission.[36] Furthermore, the scope of the Commission's control over the licen-

[31] Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 302 F. Supp. 459 (D.D.C. 1969), *rev'd on other grounds*, 432 F.2d 650 (D.C. Cir. 1970).

[32] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune, 435 F.2d at 476.

[33] See discussion of constitutional right of access at p. 650 *infra*.

[34] Communications Act of 1934, 47 U.S.C. §§ 301-609, *as amended*, (Supp. V, 1970). For a background on the problems raised by governmental regulation of the mass media, see Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Marks, *Broadcasting and Censorship: First Amendment Theory after Red Lion*, 38 GEO. WASH. L. REV. 974 (1970); Robinson, *The F.C.C. and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

[35] In Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), the Court held that a privately owned bus company was to be treated for constitutional purposes as a governmental entity, relying on the fact that the bus company "operate[d] . . . under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." *Id.* at 462. *Cf.* American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[36] 47 U.S.C. §§ 307, 309 (1964).

sees is very broad indeed. It comprehends technical matters, like the allocation of broadcast frequencies and the maintenance of technical and financial competence; but it comprehends policy matters as well. In insuring that licensees operate in the public interest, the FCC exercises a limited power of review over the content of broadcast materials.[37]

Any attempt to find state action in broadcasting, however, would be paradoxical. Each element in the regulatory scheme is carefully designed to assure that governmental intervention will not invade the first amendment rights of the broadcasters or destroy the essentially private nature of the media.[38] To treat this limited and necessary state involvement as a predicate for a far broader, constitutionally imposed scheme of limitations on first amendment rights would be bootstrapping at its worst. More importantly, this approach would ignore the basic and desirable antagonism between the Government and the broadcaster. In short, the fact that the broadcaster exercises governmental power in a fiduciary capacity

> must not obscure his role, within the framework of the first amendment, as a speaker whose basic interests are directly, fundamentally opposed to those of the government, in its role as the potentially most dangerous censor.[39]

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[37] The statutory source of regulation of program content is the "public interest" standard of 47 U.S.C. § 309(a) (1964). The Commission requires each broadcaster to cover controversial issues of public importance in a fair manner, presenting opposing viewpoints on each issue under the fairness doctrine announced in 1949. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Congress implicitly approved the doctrine in amending the equal time for political candidates requirement of § 315 by stating that its action constituted no exception "from the obligation imposed upon [the broadcasters] under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Act of September 14, 1959, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1964). The Supreme Court upheld the constitutionality of the fairness doctrine as well as the personal attack and political editorial doctrines, 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1970), in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[38] Radio and television broadcasts have long been recognized as forms of communication protected by the first amendment. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). In addition, section 326 of the Communications Act of 1934, 47 U.S.C. § 326 (1964) prohibits censorship by the FCC. In enforcing the fairness doctrine the FCC has assumed that it lacks authority to require licensees to broadcast specific programs. *Cf.* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 709 (1964). In fact, "no licensee has ever been disciplined for failure to perform his duties under the fairness doctrine." Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974, 976 (1970). *See also* Renewal of Licenses, 9 P.R.F. RADIO REG. 2d 687 (1967); Renewal of Licenses, 10 P.F.R. RADIO REG. 2d 944 (1967); Commercial Practices of Broadcast Licensees, 2 P.S.F. RADIO REG. 2d 885 (1964) (dissent of Chairman Henry, joined by Commissioner Cox); Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 27 MD. L. REV. 221, 248 (1967).

[39] Marks, *supra* note 38, at 993 n.89. The opposite view is expressed by Commissioner

In his article Commissioner Johnson relies on *Public Utilities Comm'n v. Pollak*[40] to support the contention that the conduct of broadcasters constitutes state action. In *Pollak* the Court found state action in the conduct of a privately owned bus company, a public utility under "the regulatory supervision of the Public Utilities Commission of the District of Columbia."[41] Since the broadcast industry is also under the supervision of a regulatory agency, Commissioner Johnson argues that its actions constitute state action as well. This argument is contradicted by judicial decision. In *McIntire v. Wm. Penn Broadcasting Co.* Reverend Carl McIntire sued a radio station for violating his first amendment right by refusing to broadcast his religious programs.[42] The court held that, although a radio station is a public trustee under the Communications Act of 1934, it "is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones."[43] Moreover, the court held that broadcasters cannot be regarded as instrumentalities of government for the purpose of establishing state action. This result is consistent with the holding in *Chicago Joint Board* and with the "public function" analysis advanced above. Broadcasting serves the public, but it does not (indeed, it must not) serve a function analogous to that served by governmental entities or, for that matter, by public utilities. The fact of its service alone must not be regarded as a predicate for the imposition of constitutional restraints.

State Action and the Courts

Commissioner Johnson urges that state action may be found in the judicial or administrative resolution of controversies that arise between broadcasters and individuals who have been denied access to the media.[44] As authority for this proposition he cites *Shelley v. Kraemer*.[45] In that case the Supreme Court held that judicial enforcement of private restrictive covenants against Negroes was state action in itself and, as such, was violative of the equal protection clause. But courts and commentators disagree over the implications of *Shelley*, and the nature and extent of the judicial involvement necessary to constitute state action is unclear.[46] Con-

Johnson in Johnson & Westen, *supra* note 1, at 604. *See* Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964).

[40] 343 U.S. at 451 (1952). *See* Johnson & Westen, *supra* note 1, at 592.

[41] 343 U.S. at 462.

[42] 151 F.2d 597 (3d Cir. 1945).

[43] *Id.* at 601.

[44] *See* Johnson & Westen, *supra* note 1, at 595.

[45] 334 U.S. 1 (1948).

[46] *Shelley* has been called "constitutional law's *Finnegan's Wake*." Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 148 (1964). *See, e.g.*, Henkin, *Shelley v. Kraemer:*

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struing the *Shelley* rationale narrowly, some commentators accept Justice Black's view that the doctrine applies only in cases like *Shelley*, where the court refuses to disrupt a transaction between a willing purchaser and a willing seller by enforcing a prior agreement between the seller and a third party.[47] On the other hand, some commentators argue that state action exists wherever the state determines the legal relations of its citizens, and that in such a case the role of the court is to balance the conflicting constitutional rights involved.[48]

According to FCC Commissioner Johnson,[49] the resolution of a right-of-access controversy under the balancing theory must involve a weighing of the plaintiff's right to free speech against the rights of the defendant, who has denied him a forum.[50] Commissioner Johnson notes the analysis adopted in *Marsh*. There the Court

> balance[d] the Constitutional rights of owners of private property against those of the people to enjoy freedom of press and religion, . . . [recognizing] that the latter occupy a preferred position.[51]

Commissioner Johnson views *Marsh* as standing for the proposition that whenever the state determines the legal relations of its citizens, "if it would be unreasonable to prefer [a particular person's] . . . interest[s] [over

Notes for a Revised Opinion, 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1108-20 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). *Shelley* has also been subject to severe criticism. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).

[47] Bell v. Maryland, 378 U.S. 226, 331 (1964) (Black, J., dissenting). Apparently this is also the view of Mr. Pollak. "The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained." Pollak, *supra* note 46, at 13.

[48] The inquiry is "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action." Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208, 209 (1957). Mr. Henkin takes the view that the state is responsible whenever its courts enforce private discrimination. Limitations on the applicability of the doctrine come from a more restrictive definition of equal protection. He suggests that there exists countervailing rights of liberty and privacy, including a protected right to discriminate preferred by the constitution over the victim's claim to equality. This right the state may constitutionally be permitted to support. Henkin, *supra* note 46, at 487-88.

[49] Johnson & Westen *supra* note 1, at 596, 597.

[50] The victim's right to equality must be balanced against the discriminator's countervailing rights to liberty and privacy. In a first amendment context the individual's right of free speech is balanced against the countervailing rights of free speech and the rights of private property.

[51] 326 U.S. at 509.

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another's], it would also be unconstitutional."[52] It would seem, however, that the *Marsh* approach is inapposite in this context. There are two reasons for this. First, in that case state action inhered, not in the court's resolution of a private controversy, but in the conduct of a private owner, whose facility served a "public function." Second, in *Marsh* the asserted rights in conflict were, on the one hand, the preferred right of the Jehovah's Witnesses to distribute religious literature[53] and, on the other, the non-preferred right of the owner to regulate access to sidewalks open to public use. Thus the adoption of a "balancing" analysis produced, in *Marsh*, a happy and a comprehensible result: weighed against the non-preferred right, the preferred right prevailed. In the context of broadcasting, however, two preferred rights collide: the first amendment right of those who seek access to the media, and the first amendment right of the broadcasters themselves. It may be doubted whether a balancing analysis is helpful where the "weights" involved are so nearly equal.

Commissioner Johnson also relies on *New York Times Co. v. Sullivan*[54] to establish the proposition that judicial denial of a right of access constitutes state action. In *Sullivan* the Court held that the state courts of Alabama could not apply the common law of libel in a suit between private parties, when application would infringe first amendment rights. While *Sullivan* did not hold that state action inheres in every adjudication of legal rights, the case did significantly expand the circumstances in which judicial resolution of a private dispute will constitute state action. The case suggests, as *Shelley* certainly does, that the Court will likely adopt an expansive view of state action when a restrictive approach would jeopardize an interest otherwise subject to constitutional protection.

But *Sullivan* does not suggest that the concept of state action is flexible enough to comprehend the variety of official conduct contemplated by Commissioner Johnson. When a court or agency refuses to recognize a right of access to a broadcast facility, it acquiesces in the conduct of the broadcaster. If that conduct is discriminatory, the court acquiesces in private discrimination. Mere acquiescence, however, may not qualify as state action. An affirmative exercise of state power enforcing or compelling private discrimination seems to be required. As the Court said in *Sullivan:* "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power *has in fact been exercised.*"[55] This interpretation of the state action requirement receives substantial support from the decision in *Adickes v. S. H. Kress & Co.*, where the Court held that state

[52] Johnson & Westen *supra* note 1, at 596 (quoting Edwards v. Habib, 397 F.2d 687, 695 (D.C. Cir. 1968).

[53] 326 U.S. at 509.

[54] 376 U.S. 254 (1964).

[55] 376 U.S. at 265 (emphasis added).

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power must compel private discrimination before discriminatory state action appears.[56] In many ways this is a sound result. If state action were found in any adjudication where a court "acquiesced" in private discrimination, state action would inhere in virtually every judicial determination of private rights; and few private discriminations would be immune from constitutional prohibition. In that event, those constitutional safeguards that now protect the liberty of the individual from the encroachments of government would operate against the individual himself, with a consequent loss of the liberty the safeguards were designed to protect.

Should the Court accept the argument that state action inheres in a judicial denial of access to the media, it would then confront the difficult task of balancing an asserted right of access against the freedom of the press. The result would depend on the Court's view of the service now rendered by the mass media, assessed in light of the policy underlying the first amendment—the maintenance of free and open debate. If the Court accepts the argument that the concentration of private power over the media now operates to restrict the spectrum of views presented to the public, then the Court might conclude that the right of the press to operate free from restraint is subject to a private right of access. But the persistence of what Professor Barron has called the "romantic view" of the press cannot be underestimated.[57] It would be difficult for the Court to accept the notion that the free press is no longer a fundamental element of American democracy, but is, rather, a threat to its existence. And it is possible that the sheer difficulty of balancing the rights involved would precipitate at the threshold an adverse decision on the state action issue.

The Public Domain Theory of State Action

In a recent FCC decision Commissioner Johnson suggests that because broadcast frequencies are "public property," any action taken by the broadcast licensee is state action.[58] To establish the premise that broadcast frequencies are public property, Commissioner Johnson relies on language in *United Church of Christ v. FCC*,[59] where Judge, now Chief Justice, Burger said: "[a] broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."[60] Now if, as the Commissioner contends, the electromagnetic spectrum is part of the public domain, the question here is little different from the question involved in *Burton*, where the Court found state action in the conduct of a lessee of

56 398 U.S. 144, 170 (1970).
57 Barron, *supra* note 1, at 1642.
58 *In re* Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 254-55 (1970).
59 359 F.2d 994 (D.C. Cir. 1966).
60 *Id.* at 1003.

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public property. The licensee's use of the broadcast frequencies is analogous to the lessee's use of the building owned by the Wilmington Parking Authority, and the character of the state involvement in the two cases must be the same. State action inheres in both. But to quote Professor Moore: "There are two things wrong with this argument, its premise and its conclusion." [61]

First of all, it is misleading to characterize the broadcast frequencies as "public property." Modern commentators define ownership in terms of the owner's power to elicit the aid of the state in excluding others from the use or enjoyment of the property in question.[62] But this right to exclude is rarely absolute. The seventeenth century notion of absolute dominion has given way, and today we freely recognize the diverse public obligations attendent upon ownership. Thus the owner of real estate is subject to zoning regulations,[63] the automobile owner is subject to licensing and safety regulations,[64] and the farmer is subject to certain health and output regulations.[65] But it does not follow from the fact of regulation that real estate, automobiles, and farms are "public property." Likewise, it does not follow, as Judge Burger and Commissioner Johnson appear to argue, that the public "owns" the broadcast frequencies simply because Congress has chosen to regulate their use.[66]

But has Congress appropriated the broadcast frequencies for public use, as, in other contexts, it has appropriated real property for the same purpose? Commissioner Johnson argues that Congress has done just that by specifying in section 301 of the Communications Act that licensees do not have an ownership interest in the broadcast frequencies.[67] He contends that if the licensees do not "own" the frequencies, the public must. But the effort to describe the impact of the Act in terms of public ownership obscures the original legislative purpose. Congress passed the Communications Act to regulate the broadcast frequencies, because, potentially, there are more broadcasters than frequencies.[68] Thus the regulatory scheme limits the number of licenses granted and, quite properly, attaches conditions—in the form of public obligations—to licensure.[69] But the traditional justification

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[61] Speech by J. N. Moore, Virginia Law School, Dec. 8, 1970.

[62] *See, e.g.*, Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

[63] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[64] Kane v. New Jersey, 242 U.S. 160 (1916).

[65] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

[66] 47 U.S.C. §§ 151-609 (1964).

[67] Johnson & Westen *supra* note 1, at 589.

[68] National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943); F.R.C. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933). For general background on the problems posed by the technology of the mass media see Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947).

[69] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

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for this derives from the scarcity of broadcast frequencies, not from the fact of public ownership, and the power to regulate derives from Congress' well-established power to regulate commerce among the several states.[70] Further, the nature and extent of these obligations are severely limited by constitutional and statutory provisions.[71] Finally, to the extent that the "ownership" issue is controlled by congressional intent, evidence indicates that Congress intended to subordinate the public interest in the broadcast frequencies to that of the private user. Thus, while Congress has exempted government-owned stations from the licensing procedure of the FCC, it has subordinated them to privately owned stations by requiring that they "conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe." [72] If Congress had appropriated the frequencies for the public use, it is not at all clear why it would then have given priority to private users.

Even if the broadcast frequencies are public property in some sense, Commissioner Johnson's reliance on *Burton* appears to be misplaced. *Burton* does not stand for the broad proposition that the conduct of all lessees of public property constitutes state action. Rather, in *Burton* the operative fact was that the state had neglected to insert a nondiscriminatory clause into its lease, in contravention of a well-established policy requiring governmental encouragement of nondiscriminatory treatment of Blacks. In the words of Justice Clark: "By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." [73] Thus in a sense, the state action issue was the only real issue in the case. If indeed the contested conduct was state action, there was no doubt about its unconstitutional character. By contrast, there is no well-established governmental policy of providing for individual access to the privately owned broadcast facilities. The very heart of the present controversy is whether such a right exists.[74] And until a court, the FCC, or Congress decides that

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[70] 47 U.S.C. § 151 (1964).

[71] *Id.* at § 326. *See* Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2d Cir. 1965) (§ 326 should be read with § 303 in determining the extent of the Commission's power).

[72] 47 U.S.C. § 305 (1964). *Cf.* L. B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir., 1948) where the court said:

> That private as well as public interests are recognized by the Act is not to be doubted. While a station license does not under the Act confer an unlimited or indefeasible property right . . . nevertheless the right under a license for a definite term to conduct a broadcasting business requiring—as it does—substantial investment is more than a mere privilege or gratuity.

Id. at 798. *See also* FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) (Communications Act protects the private as well as the public interest).

[73] 365 U.S. 715, 725 (1961).

[74] See text p. 653 *infra*.

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there is a right of access, it simply cannot be said that the state has a duty to act in the sense required by *Burton*.

Finally, the public domain theory, as described by Commissioner Johnson, proves too much. If one assumes that the broadcast frequencies are public property and that private use of broadcast frequencies is state action, it is difficult to discern factors that would limit the theory's general application. Would any private use of any public property be state action as well? Arguably, if the Commissioner's principles were the law, the private user of public streets or the private speaker employing the air itself (a part of the public domain) to communicate his speech to others, would be subject to the constitutional restraints that now restrict the exercise of state power.

Two Possibilities for a Right of Access

A Constitutional Right of Access

If the conduct of broadcasters or publishers does in fact satisfy the state action requirement, the remaining question is whether a substantive right of access actually exists. To answer the question the first task is to determine whether the cases discussed above which have posited a right of access to "public facilities" are applicable.[75] Are radio and television stations "public facilities?" Sound considerations suggest that they are not. The forum provided by the privately owned media is qualitatively different from the forum provided by public facilities in this sense. The essence of a free press is independence. The private media must have unrestricted freedom to challenge the government's policies and propaganda in the marketplace of ideas. Commissioner Johnson compares the broadcaster to the gate keeper of a public park, contending that their functions and obligations are the same.[76] But the analogy does not work. The broadcaster is not merely a custodian, he is an advocate. It is true that the broadcaster must present representative community views as well as his own,[77] but in this respect he is more like a public defender than a custodian of a public forum. The government has effective advocates of its own,[78] and the broadcaster must act as an adversary by presenting contrary points of view. Thus the broadcaster plays a dual role: just as the public defender opposes the government in a court of law, the broadcaster opposes the government in the marketplace of ideas; just as the public defender has duties as an officer of the court, the broadcaster

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[75] See text at notes 6-11 *supra*.

[76] Johnson & Westen *supra* note 1, at 583.

[77] See text at note 97 *infra*.

[78] In addition to the coverage given to public officials as a matter of course, the Government often has its own mechanisms for disseminating information. An interesting and controversial case study of this phenomenon, *The Selling of the Pentagon*, was a television documentary presented by C.B.S. on February 23, 1971.

has a fiduciary duty to the public to present representative community views. The question, then, is whether this dual role requires the broadcaster to sell broadcast time.

Professor Barron has addressed this problem and has recognized that the first amendment protects competing interests: the public interest in the free flow of ideas and the public interest in the right of the media to be free from governmental control.[79] He argues for a constitutional right of access by constructing the following syllogism: access to the media is necessary to accomplish the first amendment policy of encouraging "the widest possible dissemination of information from diverse and antagonistic sources";[80] the media's freedom to restrict access can be curtailed without impinging on the constitutionally protected freedom of media content;[81] hence, the courts should recognize a constitutional right of access.

Although judicial recognition of a right of access would be consistent with the underlying policies of the first amendment, it does not follow that recognition is constitutionally compelled. A distinction must be drawn between the obligations Congress has power to impose, and the obligations imposed by the Constitution itself. In *Red Lion Broadcasting Co. v. FCC*, for example, the Court held that the first amendment does not preclude congressional regulation designed to assure some individuals a right of access in some cases.[82] The Court did not hold, however, that the Constitution itself guarantees a right of access; nor has any other court so held.[83]

From a policy standpoint this approach is appropriate. The difficult task of striking the proper balance between the broadcaster's liberty and the individual's right to use broadcast facilities requires a judicious division of labor between the courts and the legislative branch. Recognition of a right of access would necessarily work substantial changes throughout the broadcast system, changes the courts have little capacity to evaluate. This means that the courts should defer to the superior expertise, fact-finding, and policy-making ability of Congress and the administrative agencies.

One of the changes wrought by legislative or judicial recognition of a right of access would be increased governmental regulation of the content of speech communicated over the media. Effective recognition of a right of access cannot be accomplished by granting unlimited access to all who desire it. Indeed, this would be technically impossible: "what is essential is not that everyone shall speak, but that everything worth saying shall be said. . . ."[84] But what is "worth saying"? Given the diversity of the speech

[79] Barron, *supra* note 1, at 1641, 1656.

[80] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[81] Barron *supra* note 1 at 1651.

[82] 395 U.S. 367 (1969).

[83] Barron *supra* note 1, at 1667-69.

[84] A. MEIKEL-JOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

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not being heard at a given moment, how is government to determine what speech merits publicity? Professor Barron himself admits that there are many problems here:

> What is a minority point of view? When and where shall such opinions be heard? Has some significant space already been given to the particular controversy? Must every issue of the publication contain a reference to a particular controversy? Isn't it possible to reach saturation of a given subject? When is the decision not to publish on a particular issue a "news" decision and when is it a decision based upon an effort to obstruct the opinion process? Surely resolving these problems is no less baffling than deciding when a book is "without redeeming social importance" or when it is marketed against a "background of commercial exploitation." [85]

Thus it is apparent that recognition of a right of access would engender content-oriented regulation of speech, under standards difficult to administer. At what point would such regulation become unconstitutional? Would it be possible for Congress to expand the existing statutory right of access, recognized in *Red Lion*, without infringing first amendment rights?

As the court in *Chicago Joint Board* pointed out, the American concept of the free press is grounded on the assumption that governmental control over the media should be limited, lest the antagonistic roles of the government and the press be upset.[86] Until now, courts have ignored the right of access problem and have tipped the scales in favor of the media's right to be free from government control. If the pendulum should swing the other way, it should do so only after a regulatory scheme has been devised which carefully preserves the traditional role of the media as an "'independent check on governmental power.'" [87] Congress has conceded power to regulate the broadcast media. Arguably, it has power to expand the limited right of access now secured by the personal attack and fairness doctrines. But, if Congress exercises this power, the courts should, as they have in the past, adopt a strict standard in reviewing the legislation. Any other approach would, in effect, allow Congress to sit in judgment over its own case. In the continuing and desirable controversy between the broadcasters and the Government, the courts, not Congress, should mediate.

Do the facts of the present case demand that the courts assume a more active role than the one suggested above? An enduring justification for judicial activism is legislative inaction.[88] If, under ordinary circumstances,

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[85] Barron, *supra* note 6, at 496.

[86] See text at note 18 *supra*.

[87] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470, 474 (7th Cir. 1970).

[88] *See* Cox, *Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

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fulfilling its obligations under the public interest standard by presenting "representative community views and voices on controversial issues which are of importance to . . . [its] . . . listeners," [98] and that the public interest standard does not entail a right of access "over and beyond the fairness doctrine right of the public to be informed." [99] The majority argued that the language of section 3(h) of the Act—providing expressly that a broadcast licensee is not to be regarded as a common carrier—[100] implies that a broadcaster does not have to grant access to all who request it. Rather, the broadcaster satisfies his statutory obligations by presenting representative community views. In this respect, recognition of a right of access would be contrary to the express provisions of the Act. The majority pointed out the danger that a new right of access, together with the established fairness doctrine, would defeat the policy of the first amendment by allowing wealthy and powerful groups to monopolize the issue coverage. Finally, the majority asserted that promotion of FM radio, UHF television, and cable television would be a much better way to increase the total coverage of issues.

In *BEM* an organization of business executives filed a complaint against a Washington, D.C. television station for refusing to sell time for one-minute announcements urging immediate withdrawal of American troops from Vietnam. The majority, rejecting *BEM*'s argument that this denial of access violated the fairness doctrine, found that the broadcaster had fulfilled its duties under the fairness doctrine by presenting representative community views on controversial topics. At the core of the majority opinion was the principle that

> [n]o particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual or group to present personal views.[101]

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an exception to its general rule of not selling time for controversial issue programs when major political parties made such requests. DNC also requested time to solicit funds for the party. NBC and ABC said they would sell time for advertisements soliciting funds; CBS initially rejected the request but subsequently revised its policy to permit spot announcements for solicitation. The Commission stated its approval of the ABC policy allowing spot announcements for solicitation "on a reasonable basis."

[98] 25 F.C.C.2d at 222.

[99] *Id.* at 223.

[100] 47 U.S.C. § 153(h) (1964) provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

[101] 25 F.C.C.2d at 244.

a proper regard for legislative power compels the courts to await legislative initiatives, the courts may take the initiative when the legislature does not.[89] But in the area of broadcasting there is no history of legislative inaction. In fact, Congress and the FCC have been active in dealing with the specific problem of access to the media. In 1949, the FCC used its broad powers under the public interest standard of the Communications Act of 1934 to create the fairness and equal time doctrines,[90] and Congress codified these doctrines in its 1959 amendments to the Act.[91] Moreover, in *Red Lion* the Court indicated its approval of the broadcaster's performance under the regulatory scheme designed by Congress and the FCC: "The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard." [92]

A Statutory Right of Access

If there is no constitutional right of access, the remaining question is whether Congress has created one. With respect to the electronic media the relevant legislation is the Communications Act of 1934. In two recent decisions, *In re Democratic National Committee* (*DNC*)[93] and *In re Business Executives Move for Vietnam Peace* (*BEM*),[94] the FCC ruled that there is no general right of access granted by the Act. The Commission held that any right of access under the Act is limited to the equal time and fairness doctrines, and absent the special circumstances which bring those doctrines into play, the broadcasters have complete discretion to deny access. Commissioner Johnson dissented to both decisions,[95] arguing that a right of access was created by the Act.[96]

In *DNC* the Committee sought a declaratory ruling on the question whether the CBS television network had violated the public interest standard of the Act by refusing to sell prime time to the Committee for an issue oriented program.[97] The Commission found that CBS was substantially

[89] *See* Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (Sup. Ct. 1961).

[90] Report of the Commission on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[91] 47 U.S.C. § 315(a) (1964).

[92] 395 U.S. at 393.

[93] 25 F.C.C.2d 216 (1970).

[94] 25 F.C.C.2d 242 (1970).

[95] 25 F.C.C.2d at 230; 25 F.C.C.2d at 249.

[96] He also made several constitutional arguments which have been partially dealt with in the previous sections of this Note and which appear elsewhere in this issue. Johnson & Westen, *supra* note 1.

[97] A similar request to buy time was granted by NBC. It was not clear whether ABC had been approached. ABC issued a statement, however, that it would make

ELECTRONIC JOURNALISM AND FIRST AMENDMENT PROBLEMS

This memorandum considers the First Amendment issues raised by Government regulation of electronic journalism. Specifically, the paper treats briefly problems as to (1) the fairness doctrine, both in broadcasting and cable television; (2) the policies of the Federal Communications Commission (FCC) as to slanted or staged news; and (3) those raised by Section 399 of the Communications Act of 1934, as amended 47 U.S.C. 399, banning editorializing by noncommercial educational broadcast stations. In each area, recommendations are made based upon analysis of the problems.

A. THE FAIRNESS DOCTRINE IN BROADCASTING

1. The Duty to Present Controversial Issue Programming

The first requirement of the fairness doctrine is that the broadcaster devote a reasonable amount of time to discussion of controversial issues of public importance. 1/ Given the present public trustee system of broadcasting, we believe that the FCC may enforce this obligation, based on the following rationale of the Commission:

> The radio spectrum is limited, and broadcasting must compete with many other uses. The FCC has allocated a very large portion of the spectrum to broadcasting, as against these other competing demands. And it has stated that a main reason why it has allocated so much spectrum space to broadcasting is because of the contribution that it can make to an informed electorate. 2/ There is also an explicit Congressional policy here. See Section 315(a). If a broadcaster does not make the above contribution, he is thus undermining a basic allocations policy. Stated differently, the FCC should not allocate spectrum to obtain specific benefits, and then be indifferent whether those benefits in fact result.

1/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1968).

2/ See Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1248, (1949); Storer Broadcasting Co., 11 FCC 2d 678 (1968).

Further, both the FCC and the broadcasters have argued successfully to the Supreme Court that there is no need for any constitutional right of access by persons to the broadcast media because of the unique nature of the broadcast forum -- namely, the "affirmative . . . obligation to provide full and fair coverage of public issues." 3/

The issue then becomes how to enforce the obligation. The FCC now purports to implement its policy by examining renewals. However, in its entire history, it has never designated a renewal for hearing on the ground that the applicant failed to devote a reasonable amount of time to controversial issue programming. Yet the record indicates that there have been instances where FCC action was called for on this score. 4/

There is the further consideration of the comparative renewal hearing. A broadcast licensee is subject to comparative challenge when his license comes up for renewal (i.e., a newcomer can compete with the renewal applicant and, if successful in the comparative hearing that must then be held, obtain the license to operate on the channel in contest). The Courts and the Commission have recognized that the public interest in stability of broadcast operations would suffer if the license of a broadcaster who rendered meritorious past service was not renewed when challenged by a newcomer seeking his frequency. 5/ But this in turn raises the question:

3/ CBS v. DNC, 412 U.S. 94, 117 (1973).

4/ See, e.g., Herman C. Hall, 11 FCC 2d 344 (1968), granted even though the applicant proposed zero programming in news/public affairs; see also 42 FCC 2d 3, 17 (1973); 14 FCC 2d 1, 12-13 (1968); FCC Public Notice B-13087 (1968).

5/ See Notice in Docket No. 19154, FCC 71-159; Further Notice in Docket No. 19154, FCC 71-826; Second Further Notice of Inquiry in Docket No. 19154, FCC 73-1040; Citizens Communications Center v. FCC, 447 F.2d 1210, 1213, (n. 35) (D.C. Cir. 1971).

What constitutes meritorious service in this critical allocations area of informational programming?

We recommend that the FCC adopt a general percentage guideline for informational programming, the latter defined as all programming other than entertainment and sports. 6/ This allows the licensee maximum discretion as to the choice of particular programs or program categories -- yet it focuses on the basic allocations area. The percentage guideline chosen should therefore reflect FCC judgment and expertise as to implementation of allocations policy. The matter is not one of industry averages (although industry statistics can and should be examined as one factor in determining the reasonableness of the percentages adopted). And it is certainly not a matter of ever-advancing percentages for informational programming, to the detriment of other popular programming that the public reasonably wishes to receive, and has come to expect.

We do not find persuasive the arguments against this guideline approach. The argument that the approach emphasizes quantity over quality is shortly answered: A government agency cannot and should not deal with quality. The approach focuses on a matter within the agency's ambit: How can a licensee be said to meet basic allocations goals in a meritorious manner if he does not devote a reasonable amount of time to these areas?

And because the guideline is limited to such a basic area, there is no violation of the First Amendment by skewing the licensee's choice of programming to government preference. Indeed, far from violating the First

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6/ Valuable informational material can be presented in entertainment programming, and our approach does not encompass such programming. The renewal applicant should be permitted to develop this, both in his application and certainly in any comparative hearing that might be held. See 38 Fed. Reg. at p. 28797 (Question 7(B)).

Amendment, the guideline is needed as a matter of law and policy in order to promote the purposes of the Amendment. For it is not a matter of the Commission avoiding appraisal of the incumbent's programming under one approach as compared with another; under the statutory scheme, the critical issue is the incumbent's record, and programming is the essence of that record. So the question is whether in this sensitive area involving an important press medium, the First Amendment is served by examination of an incumbent's programming without any objective standards which the licensee has the opportunity to meet.

It is also argued that however reasonable the percentage adopted may be initally, it will inevitably go up -- to the detriment of the public's real interest. Or, the FCC will specify a percentage guideline not merely in this broad allocations area (and the similar one of local programming), but in every programming category (e.g., agricultural, instructional, minority). But again there is a short answer: One should not fail to adopt sound policy today based on the supposition that a future Commission will act unsoundly.

Finally, the FCC emphasis on this first duty of the fairness doctrine would do far more to promote the goals of the First Amendment -- robust, wide-open debate on matters of public concern -- than any policy or ruling in the second part of the doctrine -- whether the licensee has been fair in covering some particular issue. The FCC has unwisely focused its regulatory efforts on the wrong part of the doctrine.

We strongly endorse the present FCC policy of refusing to second-guess what particular matters of public concern are covered in the news or other public affairs programming. 7/ Absent independent extrinsic evidence that

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7/ See Letter to ABC, 16 FCC 2d 650 (1969).

the licensee has deliberately chosen not to cover some issue for private reasons, the FCC cannot intervene by making a judgment on the basis of what topics were covered as compared with those not presented. This is a First Amendment quagmire that must be avoided. As the Court stated in CBS v. DNC, supra, at p. 124, "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material . . . Calculated risks of abuse are taken in order to preserve higher values."

B. THE SECOND PART OF THE FAIRNESS DOCTRINE

1. Constitutionality

The second part of the fairness doctrine requires that the broadcaster be fair in the coverage of issues -- that he afford a reasonable opportunity for the discussion of contrasting viewpoints. 8/ This raises the issue whether the Government (the FCC) can constitutionally regulate broadcast journalism to insure fairness.

Opponents of the fairness doctrine cite the 1974 Miami Herald decision, 9/ particularly the Court's conclusion that

> . . . The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials -- whether fair or unfair -- constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

The Florida statute has the same commendable purpose as the Commission's

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8/ Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at p. 377; Section 315(a), 47 U.S.C. 315(a).

9/ Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

fairness doctrine and related rules -- the right of the public to be informed on public issues. Why is the FCC's rule as to broadcast journalism consistent with the First Amendment and Florida's print statute inconsistent?

The answer is not in the relative importance of the two media. The New York Times or Washington Post are certainly not of lesser importance than WQXR or WTOP-TV. It is not that one medium requires the act of reading and the other watching and/or listening. The sole distinction lies in the broadcast scheme of short-term licensing as public trustees: There are many more applicants than frequencies available; 10/ the Government must therefore license or there will be engineering chaos; and Congress has chosen a system not of auction or rent but of short-term licensing on condition that those volunteering for these licenses will serve the public interest. It is this public trustee scheme that leads to the fairness doctrine and sustains the constitutionality of the doctrine. i.e., the Act makes it Constitutional!

First, basic fairness is an essential element of the public trustee notion. 11/ Suppose, for example, that there are only two VHF channels in a community. While many would like to use the channels, only two parties are given the license to use them, with all others enjoined by the government

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10/ As the Court pointed out in the Red Lion case, supra, at pp. 396-400, in the large markets with the great majority of the U.S. population, there is not one AM, FM, or VHF broadcast frequency available, and most of the allocated UHF assignments are being used; indeed, others covet the broadcast band for nonbroadcast use. Critics of the fairness doctrine thus miss the point when they argue that there are thousands more radio broadcast licensees than daily newspapers. The matter is not a question of the scarcity of broadcast facilities as compared to daily newspapers. Whatever the economics of the daily newspaper field, it is technologically open to all. Radio is inherently not so open. The government must license or there will be a pattern of frequency interference. It chooses one licensee for a frequency and forecloses all others -- a crucial difference from the print media. ✓

11/ See, e.g., Office of Communication of the Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 994, 1009 (D.C. Cir. 1966) (". . . adherence to the Fairness Doctrine is the sine qua non of every licensee").

from their use (wholly unlike the case of print media). As stated, these parties do not purchase the privilege, but rather are given the short-term license to use the frequencies solely on the ground that they will operate in the public interest. 12/ Suppose further that one or indeed both parties present only viewpoints with which they agree on matters of great public concern. 13/ The consequence would clearly be a pattern of operation inconsistent with the statutory scheme of a public trustee -- of a fiduciary given the use of scarce radio frequencies as a proxy for the entire community. 14/

assuming natural limitations require all of the 34 Act.

Second, the basic public interest licensing scheme has been held constitutional. 15/ This means that again unlike in the case of the print media, there is permitted considerable Government involvement with broadcast operations -- licensing and renewal in the public interest; comparative hearings; public interest regulation such as prime time access, 16/ multiple ownership, 17/ sponsorship identification, 18/ etc. If the public

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12/ Indeed, Congress even requires a comparative hearing to choose the applicant that will best serve the public interest when there are competing applications for the same frequency. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

13/ This is not a fanciful situation. In the Church of Christ case cited above (n. 11), the licensee stated that it would not cover the issue of integration for fear of inducing community violence -- yet it had no trouble presenting advertisements of the White Citizens' Council or of editorializing in the strongest terms against school integration (on the grounds that its editorial stand involved "states' rights" not school integration). See Lamar Life Broadcasting Co. (WLBT-TV), 38 FCC 1143, 1146-1147, 1160-1163 (1965).

14/ See Red Lion Broadcasting Co. v. FCC, supra, at p. 389.

15/ NBC v. U.S., 319 U.S. 190, 226-227 (1943); Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at pp. 386-92.

16/ Mt. Mansfield Broadcasting Co. v. FCC, 442 F.2d 470 (2d Cir. 1971).

17/ U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956).

18/ 47 U.S.C. Sec. 317.

interest regulatory scheme is constitutional, it follows that fairness -- an essential and obvious element of operation in the public interest -- is also constitutional, and of course the Supreme Court has so held. 19/

Further, because of the existence of this pervasive public interest regulatory scheme, elimination of the fairness doctrine would not accomplish the goal sought by its critics -- placing broadcast journalism in the same position regarding the Government as print journalism. There has been legitimate concern that Government might use improper means to "chill" critical journalistic efforts. 20/ But an Administration with such an improper purpose would be most unlikely to proceed through haphazard, skewed fairness rulings, which in any event would be subject to searching judicial review. 20a/ The Government (FCC) can affect the economic health of the licensee or network in so many important and vital respects -- for example, by delaying the renewal, changing the multiple ownership rules applicable to networks or large VHF stations, or changing the network programming process through prime-time access and syndication rules. 21/ Thus, so long as the public interest licensing/regulatory scheme is maintained (as contrasted with the notion of the Government as only a traffic officer), elimination of the fairness doctrine will not insulate broadcast journalism from the possibility of improper Government activity, but it will have the result of not protecting the public

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19/ Red Lion Broadcasting Co. v. FCC, supra; see also CBS v. DNC, supra.

20/ See Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 78 (D.C. Cir. 1972) (dissenting opinion of Chief Justice Bazelon), cert. denied, 412 U.S. 922 (1973); F. Friendly, "Politicalizing TV," Columbia Journalism Review, March-April 1973, p. 9.

20a/ See Brandywine-Main Line Radio, Inc. v. FCC, supra, 473 F.2d at pp. 52; 63.

21/ For example, a notice of proposed rule making to reduce network prime time access or VHF holdings in the top 10 markets might be issued, and thereafter an Administration official might "visit" the networks for discussion of mutual problems.

interest in flagrant situations such as Church of Christ (WLBT-TV), supra. In short, fairness and the public trustee notion are integrally linked.

Indeed, fairness may not only be consistent with the First Amendment, but it -- or some form of access -- may be constitutionally required. As stated, the Government licenses one party to use Channel 3 in Jackson and enjoins all others from using that frequency. Suppose the Government were to license the use of the main park in Jackson to one party, the White Citizens Council, for three years, and allow no one else to use that park for parades, rallies, etc.; and suppose black groups sought the right to present their parades or rallies. Clearly they would succeed in striking down the above governmental action as unconstitutional. But the Government has done the equivalent as to Jackson Channel 3. There are thus indications in Red Lion that some form of access by the public is constitutionally required. 22/ The Government has determined upon fairness to afford that access. 23/ Perhaps it would have been wiser policy under the First Amendment to have simply

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22/ See Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at p. 389:

> . . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount [cases omitted]. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee [cases omitted] . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

23/ See CBS v. DNC, supra. Significantly, in their arguments in that case, broadcasters relied heavily upon the existence of the fairness doctrine to fend off any right of access. Similarly, in the multiple ownership field, broadcasters have pointed to the fairness doctrine in support of their position for liberalized standards. Thus, if the doctrine were eliminated without any access substitution, it would be necessary to re-examine policy in several areas (e.g., duopoly; the 7 aural or 5 VHF TV station limitation).

afforded a specified portion of time for use by the public, on a first come, first served basis (e.g., an hour or so a week, available in ten-minute segments, on a rotating basis, and with the requirement that the material presented must meet standards of lawfulness). But that may be a matter of policy for Congress, rather than a requirement of Constitutional law.

2. Implementation

While the doctrine is constitutional, its implementation should be consistent with the First Amendment, and specifically, should conform to the basic principle set out in the introductory discussion that the Government should intervene as little as possible in this sensitive area of broadcast journalism. Accordingly, we recommend the following approaches, discussed below:

- o Substitution of access programming for governmentally-regulated fairness. But if the latter is retained, then
- o Continuation of wide discretion in the licensee to make fairness judgments.
- o A renewal-only approach to fairness, under a standard akin to New York Times v. Sullivan.

We also recommend that there be an experiment whereby fairness is inapplicable to the newscast, regular or special.

Substitution of Access Programming for Governmentally-Regulated Fairness. We believe that Government intervention to regulate broadcast journalism, even accepting its necessity (page 9 , supra) and the best of good faith, has serious drawbacks and is to be kept at the very minimum required to meet

constitutional and policy goals. We therefore strongly urge the substitution of access programming opportunities for governmental regulation of fairness. The heart of the fairness obligation, and the constitutional issue, is not that the other side be presented, but that there be opportunity for the contrasting viewpoint -- that the licensee's "park" be shared with others. Access programming can accomplish that, without the need for detailed Governmental supervision of what the licensee did on each issue.

In radio, for example, there is usually no shortage of available response time. Why then cannot the licensee simply broadcast announcements that contrasting views to those presented on the station will be welcome in appropriate talk periods? Other than the notification requirement in the personal attack or political editorializing rules (and here see discussion within, pp. 26-31), it is difficult to perceive why as a general matter fairness complaints should arise in the radio field. The station should welcome the added controversy or interest in presenting views on issues covered by it.

In television where time is much more at a premium, the Commission should also encourage the substitution of access for fairness. For example, suppose the three TV stations in South Bend, Indiana, agreed to provide a significant number of spots each week and a reasonable block of prime time (e.g., one half hour per week on a rotating basis -- one week on station A, next week on station B, etc.) for those wishing to present contrasting viewpoints (or possibly to open the discussion of a new issue) and to make periodic announcements of the availability of this time (particularly after a discussion of a controversial issue). This would constitute compliance with the statutory requirement in Section 315(a) -- to afford reasonable opportunity for the discussion of contrasting viewpoints. It could also constitute compliance with the Commission's direction in the recent Prime Time Access report that the licensee has the duty to use the cleared time, in part, to present

locally significant material. 24/ The licensee would remain the public trustee, and could, of course, reject material on such grounds as poor taste or total lack of public significance. By proceeding with an experiment of this nature -- joined in by all the stations in the community -- the Commission, the broadcasters, and the public would receive valuable information as to whether access works, and is a better device to accomplish both goals of the fairness doctrine -- that broadcasters contribute to an informed electorate and that they do so fairly.

But is this possible under FCC?

Continuation of Wide Discretion in the Licensee To Make Fairness Judgments. The FCC has stressed that the licensee has wide discretion to make reasonable judgments, in good faith, as to the viewpoints to be presented, the appropriate spokesmen, the format of the program, and other similar programming decisions. The Commission's role in enforcing the fairness doctrine is limited to determining, upon appropriate complaint, whether the broadcaster's judgment can be considered reasonable, not whether it is wise or whether the FCC would agree with it. 25/ And the Courts also have stressed the crucial importance of giving wide scope to the licensee's judgment in this sensitive fairness area. 26/

We strongly concur in this approach. The FCC should heavily weight the licensee's judgment, and upset that judgment only in the clear-cut case where there is no question but that the action has been arbitrary. For, it is more important that the FCC not intervene too deeply into the journalistic

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24/ Second Report and Order in Docket No. 19622, FCC 75-67, par. 60.

25/ Fairness Doctrine and Public Interest Standards, 39 F.R. 26372 (1974); Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).

26/ NBC, Inc. v. FCC (The Pensions Case), ___ F.2d ___ (D.C. Cir. 1975), vacated as moot, ___ F.2d ___ (1975); Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).

process than that it try to ensure fairness in every instance. Admittedly, it is difficult to articulate the approach so as to preclude such inappropriate FCC actions. It is, in effect, an expression of mood. 27/ But such a mood, if applied conscientiously by the Commission and reinforced by the Courts, should have both significance and permanence.

Use of the Renewal-only Approach to Fairness. Prior to 1962, the FCC considered fairness complaints only at renewal time, and in the context of the overall operation of the station. 28/ In 1962, the Commission changed its procedure to resolve all fairness matters as they arose and, if the station was found to have violated the doctrine, to direct it to advise the Commission within 20 days of the steps taken "to assure compliance with the fairness doctrine." 29/ We believe that the Commission's practice of ad hoc fairness rulings has led it ever deeper into the journalistic process, and has raised most serious problems:

A. Defining balance or reasonable opportunity. The doctrine requires that reasonable opportunity be afforded the contrasting viewpoints on an issue. There has therefore been inherent in the doctrine a very difficult problem -- namely, at what ratio (i.e., 2-to-1, 3-to-1, etc.) would the FCC say that the opportunity for presenting opposing viewpoints has not been reasonable? Further, how does frequency of presentations or choice of time (e.g., prime or non-prime time) affect this evaluation? Not only have these problems

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27/ Compare Universal Camera Corp. v. NLRB, 340 U.S. 374, 487 (1951).

28/ See, e.g., Dominican Republic Information Center, 40 FCC 457, 457-588 (1957).

29/ Letter to the Honorable Oren Harris, 40 FCC 582 (1963).

arisen recently, 30/ but this basic issue of reasonable balance had led to other difficulties.

B. The "stop-watch" problem. In order to ascertain whether there has been reasonable balance, the FCC literally has used a stop-watch to time the presentations that have been made on the various sides on an issue. 31/ Even more difficult can be the problem of judging whether a program segment is for, against, or neutral in regard to a particular issue. In the gray areas that are bound to arise in this respect, it is not appropriate for a governmental agency to make such sensitive programming judgments.

C. The "stop-time" problem. An associated problem arises from the fact that during and after the period in which the FCC makes a decision on a fairness complaint, a broadcaster frequently continues his coverage of an issue for a number of reasons (e.g., new developments).

30/ See Concurring Statement of Chairman Burch in Complaint of the Wilderness Society against NBC (ESSO), 31 FCC 2d 729, 734-39 (1971).

31/ Id. at pp. 735-739. In that case the staff set forth the following "stop-watch" analysis of the material broadcast on the issue (pp. 738-739):

Date of Broadcast	Pro	Anti
June 7, 1970	4:40	5:35
September 10, 1970	:20	1:00
January 13, 1971	:06	:15
February 14, 1971	----	:10
February 16, 1971	:49	1:05
February 24, 1971	:15	1:30
February 28, 1971	1:32	----
June 4, 1971	1:58	----
July 11, 1971	:27	2:15
August 6, 1971	:45	1:10
August 26, 1971	----	:15
September 15, 1971	----	8:00
Total	10:52	21:15

See also Sunbeam TV Corp., 27 FCC 2d 350, 351 (1971).

The FCC then finds that the circumstances upon which it made its decision have changed significantly. For example, in one case, during the period between the time of the original FCC decision on the complaint and the Commission's action on reconsideration, the licensee broadcast several presentations that crucially affected the FCC's judgment on whether reasonable opportunity had been presented. 32/

Another example is the KREM-TV Spokane case. 33/ Analysis of this case -- routinely issued by the Commission -- is set forth as Appendix A to this report. It shows, we believe, a chilling effect on robust, wide-open debate as a result of the Commission's case-by-case implementation of the fairness doctrine.

In short, it does not follow that because the fairness/public trustee notion is consistent with the First Amendment (pp. 6-10, supra), the Government (FCC) can therefore interfere unduly or deeply with daily broadcast journalism -- that the First Amendment considerations in Tornillo suddenly vanish. The Commis-

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32/ Complaint of Wilderness Society against NBC (ESSO), supra, 31 FCC 2d at pp. 733, 735.

33/ Complaint of Sherwyn H. Heckt, 40 FCC 2d 1150 (1973).

sion's essential duty is to insure that the broadcast licensee acts consistently with his *public trustee* role -- that, for example, one of the two TV licensees in Jackson, Mississippi does not present only the segregationist viewpoint during its license term 34/ or that the Media, Pennsylvania station WXUR does not flagrantly ignore the requirements of the fairness doctrine. 35/ The Commission cannot properly strive for fairness by every broadcaster on any particular issue. That route results in undue governmental intrusion into day-to-day broadcast journalism.

This is the clear teaching of the *CBS* v. *DNC* case. 36/ The Court there rejected any First Amendment right of access of individuals or groups to broadcast facilities for editorial advertisements (i.e., advertisements on controversial issues). The Court pointed out that granting such a constitutional right would inevitably push the FCC into reviewing, "case-by-case," licensee operational decisions such as determining if a viewpoint or group had been given sufficient broadcast time. 37/ The Court's decision thus relies heavily on the consideration that a constitutional right of access for editorial advertisements would involve the government (the FCC) far too much in the "day-to-day editorial decisions of broadcast licen-

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34/ Lamar Life Broadcasting Co. (WLBT), supra.

35/ Brandywine-Main Line Radio, Inc. (WXUR), 24 FCC 2d 18 (1970); affirmed on other grounds, Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972), cert. denied 412 U.S. 922 (1973).

36/ 412 U.S. 94 (1973). Chief Justice Burger's majority opinion consists of four parts, with four other justices concurring in Parts I, II, and IV, and two others concurring in Part III (the state action holding). The holdings cited in the above discussion command a majority of the Court. And while it is unnecessary to cite points in Part III, those relied upon here merely repeat earlier holdings in the other three points.

37/ Id. at pp. 126-27.

ses . . ."; that the essential and "unmistakable Congressional purpose [is] to maintain -- no matter how difficult the task -- essentially private broadcast journalism held only broadly accountable to public interest standards." 38/

These two pegs of the Court's decision are repeatedly stressed. Thus, the opinion first establishes with great thoroughness the Congressional choice to ". . . leave broad journalistic discretion with the licensee . . ." (p. 105); ". . . to maintain a substantial measure of journalistic independence for the broadcast licensee . . ." (p. 116); ". . . to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations . . ." (p. 110).39/ Second, it also establishes that the Governmental oversight to insure consistency with public interest obligations is to be on an overall basis. Thus, the Court states (412 U.S. at pp. 110, 120):

> . . . Only when the interests of the public are found to outweigh the legitimate journalistic interest of the broadcasters will government power be asserted within the framework of the Act. License renewal proceedings, in which the listening public can be heard, are a principal means of such regulation. *Office of Communication of the United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966). . .

38/ *Id.* at p. 120; see also pp. 109-110, 116.

39/ See also p. 105 ("Congress appears to have concluded, however, that of these two choices -- private or official censorship — Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.").

The legislative history support for the Court's conclusion is fully set out in the opinion and will not be repeated here. To the same effect, see the Sen. Rept. No. 562, 86th Cong., 1st Sess., p. 13. Significantly, when the Congress codified the fairness doctrine in the Communications Act in 1959 (see Section 315(a), 47 U.S.C. 315(a); H. Conf. Rept. No. 1069, 86th Cong., 1st Sess., p. 5), it did so at a time when fairness was enforced only on an overall basis at renewal. Indeed, the legislative history shows explicit Congressional recognition that Commission action under the fairness doctrine was restricted to "... the time [broadcasters] went before the Commission for the renewal of their license. . ." See 105 Cong. Rec. 14445; see also 105 Cong. Rec. at pp. 14440, 14662.

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> . . . Congress had affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard . . .

Clearly, if the foregoing precepts are true as to a right of access by persons to broadcast facilities for editorial advertisements, they are also true as to the application of the fairness doctrine. The doctrine deals directly with broadcast journalism, and thus the above described Congressional purpose must also be followed in its implementation. The Commission, in its implementation of the fairness doctrine, must afford broadcasting "the widest journalistic freedom consistent with its public obligations"; must not interfere with "day-to-day editorial decisions of broadcast licensees . . ."; and must generally confine its efforts to determining whether on an overall basis (i.e., at renewal) the broadcaster has met its public interest obligation. Indeed, the Court in the *CBS* v. *DNC* case significantly stated the doctrine in terms that meet that Congressional purpose:

> Under the fairness doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained, good faith effort to meet the public interest in being fully and fairly informed [fn. citing *Editorializing Report*].40/

In light of *CBS* v. *DNC*, the Commission's present implementation of the fairness doctrine contravenes both the statute and the First Amendment. The Commission should therefore return to its pre-1962 practice of considering

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40/ Id. at p. 127. See Comment, "The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After *CBS*?", 122 U. of Pa. Law Review 1283, 1293 (1974) (". . . Thus all of the Justices who concurred in the CBS result indicated that the broadcaster enjoys a substantial first amendment

compliance with the fairness doctrine only at renewal; at such time no effort should be made to rule on particular complaints perhaps years after their receipt, and the renewal standard in this respect should be like that in The New York Times Company v. Sullivan:[41] the absence of an indicated pattern of a flagrant nature, akin to "malice" or bad faith (e.g., the substantial claims in the WLBT case) or "reckless disregard" of fairness obligations (e.g., the indicated pattern in the WXUR case).

Red Lion will undoubtedly be cited as contrary to the above position, on the ground that the Court there affirmed the legality of the fairness doctrine and the FCC regulations on personal attack and political editorializing in the context of an ad hoc ruling. But the case involved a general attack on the doctrine and rules; the Court's holding is that generally the doctrine and the related rules are constitutional. The Court did not pass on the manner of application of the doctrine or rules (i.e., ad hoc as against on an overall basis at renewal). As the Court noted in NBC v. FCC (Pensions), supra, (Sl. Op. at p. 26), the legal point

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right to control the content of his broadcasts, and that the FCC review of that content is not to be on a case by case standard, but rather on an overall good faith effort standard. . . ").

41/ The New York Times Company v. Sullivan, 376 U.S. 254 (1964). In order to promote robust debate, the Court there held that the First Amendment ruled out libel actions as to public figures except where there is a showing of malice (including reckless disregard of truth). If that standard is sound and necessary in the libel field, something roughly akin to it -- i.e., the flagrant pattern -- is clearly in order in the equally sensitive renewal-fairness area where the same goal of promoting robust debate is involved.

here being advanced was not raised or considered in Red Lion; it was considered in CBS v. DNC, and the latter case is controlling.

There is also an argument that the personal attack rules should remain an area appropriate for ad hoc rulings, because this area does not involve the "stop-watch" and similar considerations involved in the general fairness area. On reflection, however, it would appear that the Commission cannot properly proceed in the personal attack area with ad hoc rulings. The guiding statutory criterion is avoidance of undue intrusion into daily broadcast journalism. Even if the "stop-watch" problem is avoided, ad hoc administration of the personal attack rule simply cannot meet that goal. As shown by a number of cases, 42/ it involves the Commission in review of such daily and sensitive licensee judgments as whether an attack has been made -- whether a controversial issue has been covered -- or whether the response is going too far afield or the licensee is unreasonably restricting the response. There is thus no sound basis for exempting personal attack from the statutory scheme delineated in CBS v. DNC -- that here also the Commission should examine

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42/ Compare Straus Communications, Inc., FCC 75-22, ___ FCC 2d ___ (1975), appeal pending sub. nom., Straus Communications, Inc. v. FCC, D.C. Cir. , with Philadelphia Federation of Teachers, 31 Pike and Fischer Rad. Reg. 36 (1974); WMCE, Inc., 26 FCC 2d 354 (1970); WCMP Broadcasting Co., 41 FCC 2d 201 (1973); University of Houston, 11 FCC 2d 790 (1968); J. Allen Carr, 30 FCC 2d 894 (1971). See Letter to WALG, supra; Letter to Oren Harris, 40 FCC 582, 585-86 (1963).

problems only at renewal on an overall basis and under the above-described New York Times v. Sullivan standard. Indeed, this renewal approach is required under the statutory scheme in all fairness areas except one -- the political broadcast. 43/

The foregoing legal analysis is dispositive of the propriety of the case-by-case approach, and the policy reasons advanced in opposition to the renewal approach are thus entitled to no weight. This is certainly so as to the policy reasons given by the Commission in its July 18, 1974 Report for rejecting the renewal approach. 44/ Thus, the Commission, just as the

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43/ There is a clear need for prompt fairness rulings as to political broadcasts. The Congressional scheme is one of timely rulings in the equal opportunities area. Sen. Report No. 562, 86th Cong., 1st Sess., p. 12. But if the equal opportunities provision is inapplicable to a political broadcast situation, Congress specifically intends to have the fairness doctrine apply in order to protect the public interest. See Section 315(a); H. Conf. 1069, 86th Cong., 1st Sess., p. 5; Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at pp. 382-384; but cf. legislative history cited in Note 39, supra. Fairness rulings in this area, therefore, must also be prompt; it makes no sense to inform the candidate that the fairness doctrine is applicable, rather than the equal opportunities provision, but the Commission will not rule on whether or not the candidate is entitled to broadcast time during the election period. This again points up the difference between the goal of equal opportunities (and fairness) for candidates in each instance and that the broadcaster operate generally in the public interest as to controversial issues; as noted in CBS v. DNC, supra, 412 U.S. at pp. 105-09, 122, Congress rejected the notion of requiring strict equality (". . . no discrimination . . .") in the broadcaster's coverage of public issues.

44/ See Fairness Report, supra, 39 Fed. Reg. at p. 26378-79 (pars. 47-48

State of Florida, may deem it good policy to have the public informed promptly on each issue as to which there is a substantial fairness dispute, but that is a goal ruled out by the statute and the First Amendment. The Commission may wish to rely almost entirely upon fairness complaints, but it cannot properly encourage such complaints by promising to intervene into the day-to-day operation of broadcast journalism. The Commission may think it expedient to impose some inhibition upon daily broadcast journalism to lessen the chance of serious trouble at renewal (see, however, discussion at p.24 , infra), but it cannot properly proceed in that fashion. 45/

45/ In any event, the Commission's points are not well taken, even assuming that the course of *ad hoc* consideration of every fairness complaint were legally open to it. The Commission would not have to inquire into every fairness complaint at renewal; the very great majority of such complaints would not indicate any flagrant pattern of violation, but simply a good faith licensee judgment such as in this case. Further there have been only two fairness renewal cases that have been decided -- *WLBT* and *WXUR*. Neither turned on individual complaints over the license years; in both the most important aspect was monitoring for several weeks prior to renewal by listener groups. The Commission could continue to rely upon such efforts by interested groups; and rather than monitoring itself, it could adopt the so-called ten-issue approach. Briefly stated, this approach would require the TV licensee to list annually the ten issues, local and national, which it chose for the most coverage in the prior year; to set out the offers for response made; and to note representative programming that was presented on each issue (i.e., a brief description of the programming, including partisan spokesmen presented, source, and time of broadcast). This would more than compensate for any reduced complaints from listeners, and would do so without Governmental intrusion into daily broadcast journalism.

The argument will be made by public interests groups that under this general renewal approach the public will not be afforded a reasonable opportunity to hear contrasting viewpoints by some licensees on some particular issues. That is true: The focus would be on whether the licensee has fulfilled his essential public trustee role, not on whether he has made an "honest" mistake or error in judgment"46/ in affording reasonable opportunity for contrasting views on some particular issue. For, as shown, to pursue the latter approach draws the FCC deeply into daily broadcast journalism. As the Commission recently stated, ". . . the crucial consideration is whether, on balance, Governmental intervention to attempt to secure perfect fairness will serve the public interest; [we] have concluded that it will not."47/ Indeed, the FCC eschewed the search for "perfect fairness" in 1949, when it held that each program need not be balanced to ensure that the same audience hears both sides.48/ Such a rigid search for strict fairness would run counter to the goal of promoting unrestricted debate. Similarly, there are unlikely to be benefits in any particular "balance" case from some different audiences hearing an additional presentation of the contrasting viewpoint that would outweigh the fundamental detriments noted above. And the renewal approach does not gut the fairness doctrine: As shown by *WLBT* and *WXUR*, *supra*, it remains an important overall presence or mood that the broadcaster licensee must generally and in good faith take into account in the operation of the station.

Some broadcasters argue that complaints will

46/ *Editorializing Report*, 13 FCC at p. 1255.

47/ *Gary Lane*, 39 FCC 2d 938 (1973).

48/ *Editorializing Report*, 13 FCC at p. 1250-51.

accumulate from previous years at renewal time, particularly for stations doing a large amount of controversial issue programming, and that the accumulation would cause the FCC to schedule a renewal hearing. This could be even more inhibiting than the issue-by-issue complaint process, particularly if the licensee finds itself "sandbagged" as it tries to deal with stale controversies two or more years old. But all significant complaints will be referred to the licensees as they are received; the licensee will thus have a timely opportunity to react to them. The FCC could expect at renewal to have a number of complaints against the broadcaster vigorously pursuing his controversial issue responsibility; it could also expect that in some cases there may have been an honest error of judgment. That would not, however, jeopardize the station's renewal, even if there were a score of good faith, close judgments such as in the instant case. The FCC would not be concerned with having contrasting views broadcast on some issue years later but rather with determining whether a flagrant pattern of violation is indicated — the *New York Times* v. *Sullivan* standard noted above. No conscientious broadcaster need fear review with a standard so heavily weighted in his favor. 49/

49/Two other points should be noted in this respect. First, even with the present *ad hoc* procedure, the broadcaster could find that the accumulation of complaints has contributed to the need for hearing. For, while the broadcaster may comply with an FCC fairness directive, his violation of the doctrine, particularly if gross or if in bad faith, is not thereby excused but rather can be taken into account in the renewal process. See *Lamar Life Broadcasting Co., supra,* 38 FCC at pp. 1145-46; cf. Sen Rept. No. 562, 86th Cong., 1st Sess., on S. 2424, p. 12. Second, the experience with the renewal approach between 1949 and 1962 does not bear out the above fear: Not one renewal was designated for hearing on fairness grounds.

Admittedly, this is a difficult area calling for "a delicate balancing of competing interests." 50/ The FCC, however, has not charted a workable "middle course" 51/ -- and sought ". . . to walk a 'tightrope' to preserve First Amendment values written into the Radio Act and its successor, the Communications Act." 52/ It has pursued the Tornillo course of trying to insure fairness on every issue. It should cease this interference with day-to-day broadcast journalism and instead focus on the goal laid down by the statute and permitted by the First Amendment -- insuring that on an overall basis the licensee remains faithful to his public trustee role in this important area of fair coverage of controversial issues. Thus, the Government will be concerned with character of the licensee -- not of his particular broadcasts dealing with controversial issues.

D. Elimination of fairness requirement as to newscasts. We believe that the fairness doctrine should in any event have little if any relevance to straight news reporting. The broadcast journalist necessarily must report the news as he sees it, culling out the items he deems important and emphasizing and analysing some aspects over others. Such choice and editorial judgment are inherent in the news process. 53/ Government cannot and must not intervene in that process. Therefore, absent the unusual case involving independent extrinsic evidence of slanting or staging the news by the licensee or its top management, the FCC should not skew the

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50/ CBS v. DNC, supra, 412 U.S. at pp. 102, 117, 118, 125.

51/ Id. at p. 120.

52/ Id. at p. 117.

53/ CBS v. DNC., supra.

straight news process (i.e., newscast or news special) by application of the fairness or related doctrines.

We would therefore urge that the Commission proceed under this approach for a period of two years (i.e., eliminate application of the fairness requirement to all aspects of the regular or special newscast, except for editorials or appearances of political candidates -- see n. 43 , supra). It could then evaluate whether the approach does not serve the public interest on the basis of complaints, abuses, etc. -- as against the clear gain of reduced governmental intrustion in this most sensitive area of journalism. We believe that the Commission could lawfully proceed in this fashion as a reasonable construction of Section 315 in light of CBS v. DNC.

3. Revision of Personal Attack and Political Editorializing Rules

Personal Attack Rule. It is important to bear in mind that the personal attack principle is a logical extention of the general fairness doctrine. The discussion of a controversial issue has involved a personal attack on some person or group. The fairness doctrine imposes an affirmative obligation on the licensee to try to present the opposing side. But in the case of a personal attack, it would make no sense to broadcast an announcement inviting the presentation of the contrasting view, since there is one clear and appropriate spokesman to give the other side of the attack issue -- the person or group attacked. Hence, the licensee

should notify that person or group of the attack and offer time for a response.

All this applies in the case of a licensee who is relying on over-the-air announcements for compliance with the doctrine. But the fairness doctrine is satisfied if the licensee himself has presented the contrasting viewpoint. The personal attack rule makes allowance for this in the case of newscasts, news interviews, and on-the-spot coverage of bona fide news events (including commentary and analysis in such shows). None of these news programs comes within the personal attack rule. Thus, if the licensee covers a personal attack on his newscasts, and presents (or plans to present) the side of the person attacked (e.g., by having a news announcer state that side or by presenting a news clip featuring the person attacked), fairness is achieved; if he does not, he should notify the person or group attacked and offer time.

In the case of a personal attack made in programming outside these exempted categories, however, the rule places a different and greater burden on the broadcaster. Thus if a personal attack occurred in a news documentary and in that documentary the licensee himself presented the opposing viewpoint to

the attack exactly as he did in the newscast (i.e., by having his news commentator set forth that viewpoint), the rule still requires that the person attacked be notified and given the opportunity to present his viewpoint.

There is a "crazy-quilt" pattern of exemptions here. As stated, news documentaries are not exempt from the rule's requirement, 54/ but news interviews or on-the-spot coverage of a news event are exempt. Commentary in the newscast is exempt, but the same commentary repeated outside the newscast is not. Editorials as distinct from commentary of the newscaster are not exempt, even if in a newscast.

There is a rationale for having the person attacked, rather than the licensee, present the opposing viewpoint, because, as the Supreme Court noted in the Red Lion case, 55/ that person, of course, strongly believes in his views and is thus the most effective spokesman for that side. The FCC has also set forth its rationale for the somewhat bizarre exemption pattern described above -- its attempt largely to parallel the 1959 exemptions to the "equal opportunities" requirement. 56/

54/ A responsible broadcaster would, of course, cover the views of the person or group attacked in any documentary. But the network might well interview the person and then, in exercising its journalistic judgment, use that portion it thought best fit into the limited time span of the program. The FCC has held that the person attacked should not be unreasonably restricted in his response. See Letter to WALG, supra 40 FCC 632, 634 (1965). This could obviously lead to controversy over the portions not used, and could have the effect of requiring either a further presentation or the elimination of the attack altogether, in order to avoid this controversy. Plainly, this is an area best handled under the flexibility of the fairness doctrine.

55/ Red Lion Broadcasting Co. v. FCC, supra, at p. 392.

56/ See Section 315(a). In order not to restrict broadcast journalism, Congress exempted from the equal opportunities requirement four categories: newscasts, news interviews, news documentaries and on-the-spot coverage of news events. For the same reason, the FCC stated that it was exempting from the personal attack rule three of these categories, but not news documentaries. As to the latter, the FCC noted that they were prepared over a considerable period of time and thus could readily follow the requirements of the personal attack rule (query whether this is always the case).

But the FCC should end this detailed and tortured categorizing and return to the basic principle of fairness; namely, determining whether the licensee has afforded reasonable opportunity for the contrasting viewpoint. This would afford the responsible broadcaster greater discretion -- a factor conducive to more wide-open debate, and, we believe, would not result in any significant lessening of such debate by a failure to present the side of the person attacked fairly and robustly. In any event, if the licensee can be trusted to achieve fairness as to personal attacks in important informational areas such as newscasts or news interviews, why should this not be the standard in all cases? The rule, or better still, policy should state simply that where the licensee has presented a personal attack as a part of the discussion of a controversial issue of public importance and has not achieved fairness or made timely plans to do so, he should notify the person or group attacked within a reasonable time period and offer the opportunity for response. The responsible broadcaster would thus have the same leeway here as he has in dealing with all other facets of fairness. To an irresponsible broadcaster who ignores his fairness duties, the revision will lead to the same result -- denial of renewal for failure to comply with the requirements of the doctrine.

Political Editorializing Rule

Similar considerations call for revision of the public editorializing rule. The FCC should return in this area also to the underlying fairness concepts. Its present approach cannot be squared with the previously described concept of flexibility and great discretion afforded to the licensee under the fairness doctrine.

This can best be shown by considering the FCC's disparate treatment of a ballot issue and a candidacy. A station that has presented extensive programming

covering the contrasting views on a ballot issue could broadcast a brief editorial stating its support for side x for the reasons already given by that side, without any need to notify the other side and allow it further opportunity to respond. But if the station had followed an identical pattern as to another part of the ballot -- the candidacy of x -- it would have to notify x (if it opposed him) and afford him an opportunity to reply. Why has this marked difference in treatment occurred, particularly under a doctrine that does not require equal time but only reasonable opportunity for the discussion of the conflicting views on an issue? This approach represents a hostility to political broadcasts, because it imposes a burden, with the threat of forfeiture, that does not exist in the case of the usual editorial. 57/

Here again, therefore, the FCC should revise the rule to state that where the licensee has presented a political editorial and has not achieved fairness or made plans to do so in a timely manner within the election period, he shall notify the candidate and give him or his spokesmen the opportunity to reply. This revision would make a marked difference. Thus when the licensee presents considerable material setting forth the positions of the candidates and then editorializes in support of one (or against one), the rule now requires that he notify the candidate(s) not supported and

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57/ It is interesting that the number of broadcast stations engaging in political editorializing declined after adoption of the rule on July 5, 1967. The FCC 1964 Political Broadcast Survey showed 17 TV and 140 AM stations broadcast political editorials (p. vii, July 1965); and in 1966 the figures were 21 TV stations and 110 AM stations (Survey, p. 4, June 1967); in 1968, the figures declined to 10 TV and 80 AM stations (Survey, p. 4, August 1969). Because of this small number, the Commission dropped this question in its 1972 survey. No definitive conclusion can be drawn from this decline without research into the reasons why the particular stations stopped political editorializing (and note that the number of AM stations declined from 140 to 110 in the period before the rule). It would be very useful if the FCC should attempt to obtain this information, along with current data on political editorializing.

equal time?

afford an opportunity for a response. Under the proposed revision, if the licensee had afforded reasonable opportunity for the presentation of views contrasting to those presented in his editorial, he would have no further fairness obligation. This would not solve all the problems raised by the rule, 58/ but it would be a significant step toward affording the licensee greater leeway in this area, and thus promote political editorializing.

C. FCC POLICIES ON SLANTED OR STAGED NEWS

The FCC policy here was established in a 1968 ruling on complaints of TV news bias in covering the Democratic National Convention. 59/ It was charged that the networks had edited their coverage of the riots during the 1968 Convention in such a manner that a distorted picture was presented The FCC pointed out that it could not properly proceed to ascertain what "truly" had happened, and then make a finding of bias by comparing that "truth" to what the networks actually presented. In cases in which the complainant's allegation is slanted news, the FCC stressed that it cannot intervene "where the charge is not based upon extrinsic evidence but rather on a dispute as to the truth of the event . . . . The Commission

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58/ The main problem raised by the rule is the burden that it imposes upon any licensee who wishes to follow the practice of many newspapers and simply list the candidates supported by office. Where there are just a few candidates for an office, the burden is manageable; further, under the above revision, either the station would not have to take any further action (if it had already presented the candidates not supported) or merely invite the spokesmen of a few. But where there are many candidates, the burden becomes impractical, particularly as a brief few seconds mention by the station on some list would entitle the candidate not supported to a more reasonable time period to respond -- see Memorandum Opinion and Order on Personal Attack and Political Editorializing Rules, 8 FCC 2d 721, 727 (1967). There is no easy answer here, as the candidate not supported certainly has a solid claim that he should be given some chance to tell his side. By striking the balance in favor of that valid consideration, the rule does have the effect of inhibiting political editorializing in the above circumstances.

59/ Letter to ABC, 16 FCC 2d 650 (1969).

is not the national arbiter of the truth. 60/ The FCC defined "extrinsic evidence" as evidence independent of inferences from the broadcast itself (as contrasted with what should have been presented); for example, evidence by a newsman that he was instructed to slant or stage some news event.

Further, in the CBS case, the FCC delayed the renewal of CBS's TV licenses until it ruled in favor of the licensee. The Commission stated that ". . . in the future we do not intend to defer action on license renewals because of the pendency of complaints [on slanted news] -- unless the extrinsic evidence of possible deliberate distortion or staging of the news . . . involves the licensee, including its principals, top management or news management." The reason for this policy is obvious: In an extensive news operation, there is the possibility of "the occasional isolated lapse of an employee," and it would be unjust and "tend to discourage broadcast journalism" if the licensee were placed in jeopardy because of such occurrences. 61/

We support the above FCC policy but believe that it does not go far enough. The Commission will not hold up renewal unless there is extrinsic evidence of top management involvement. But if the allegations of slanting or staging the news are supported by extrinsic evidence, even if top management is not involved, the FCC now will either investigate or refer the matter to the station for an investigation and report -- and may further question the efficacy of the investigation, all in the name of assuring proper licensee supervision of its policies. 62/

60/ CBS ("Hunger in America"), 20 FCC 2d 143, 150-151 (1969).

61/ Letter to ABC, 16 FCC 2d 650, 657 (1969).

62/ See Letter to ABC, supra, at p. 657; CBS, supra, at p. 151.

Thus, in a September 27, 1962 letter to CBS, the FCC listed six incidents of alleged slanting or staging in CBS news presentations that were referred to in recent House testimony, noted the CBS policies against slanting or staging, and then stated:

> The Commission requests that you furnish it with your comments on the allegations made regarding the above-listed programs; that you state whether the actions of your employees in each case were consistent with your policies; that you describe your efforts to assure compliance by your employees with your policies; that you state whether you have investigated each of these incidents and, if so, that you furnish the Commission with a copy of your report on each investigation. It is requested that you supply the above within thirty days of the date of this letter, as well as any information or comment that you may wish to submit regarding other allegations during the hearings which referred to your operations. 63/

But the Commission is intervening here in the most sensitive journalistic area. No really hard-hitting journalistic enterprise can flourish in an atmosphere where there is, in effect, a deep intrusion by the government into the journalistic processes -- either by direct FCC investigation, or by the FCC's review of the licensee's investigation. 64/

The FCC investigation of the WBBM-TV Pot Party newscasts illustrates these difficulties. In this case, 65/ WBBM-TV telecast a pot party at the Northwestern University campus to show the pervasiveness of this kind of drug violation. The party depicted was authentic in that it did involve pot

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63/ FCC 72-871; see also Letter to ABC, FCC 72-870.

64/ Further, any investigation inevitably garners much raw material that is conjecture. But here governmental examination and possible disclosure of the licensee's investigation with all its raw material is in the news field and could thus have an inhibiting effect in this respect also on the journalistic process.

65/ CBS (WBBM-TV), 18 FCC 2d 124 (1960).

smoking by students at a campus rooming house; further, the public obviously knew that "this was a televised pot party -- an inherently different event from a private, non-televised pot-smoking gathering." 66/ But the FCC found that the public was incorrectly ". . . given the impression that WBBM-TV had been invited to film a student pot gathering that was in any event being held, whereas, in fact, its agent [a young newsman] had induced the holding of the party." 67/ Since this newsman had encouraged the commission of a crime, the FCC called for stricter policy guidelines to the licensee's staff in this respect. This exhaustive hearing, during which WBBM-TV's renewal was in jeopardy, did not serve any overriding policy need. Query, however, what effect it had on other broadcasters who might have been interested in breaking new ground in TV investigative journalism. The purpose of open debate would have been much better served if the FCC had simply referred the complaint to the licensee in this case, since the case did not in any way involve top management but rather only the actions of one newsman.

We urge a "hands-off" policy in this area of alleged news distortion, with only one narrowly limited exception -- namely, where there is extrinsic independent evidence (e.g., the statement of a station newsman) that the licensee (i.e., the owner or top management) has given instructions to deliberately slant the news (the so-called Richards issue). 68/ In all other instances -- and there are bound to be cases where an overambitious newsman

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66/ Id. at p.

67 Id. at p. 134.

68/ KMPC (Richards), 14 Fed. Reg. 4831 (1949).

goes too far -- the matter should be left to resolution by the media -- that is, the complaint should be referred to the licensee, with no FCC follow-up. It is not imperative that the government ferret out every case of slanting or staging of news, and its efforts to do so, we suggest, can run counter to the goal of promoting robust journalism. 69/

The above course is patterned on the approach urged in this report as to fairness: to focus on the public trustee role and not the narrow or isolated incident. This course thus fits with the Court's basic thrust in CBS v. DNC, supra, where the Court stressed the Congressional scheme to afford the broadcaster "the widest journalistic freedom consistent with its public obligations." 70/ By focusing on the Richards issue, the FCC would be ensuring the preservation of the public trustee role. And by not going beyond the Richards issue to investigate every "extrinsic evidence" case of abuse by some newsman within the extensive news organization maintained by broadcasters, the FCC would be acting in accordance with the Court's admonition in the CBS v. DNC case that "calculated risks of abuse are taken in order to preserve higher values." 71/

69/ Under this suggested approach, the FCC would not be inquiring of CBS and ABC how they handled the investigation of certain incidents involving their newsmen in the recent letters referred to on page 33. If the networks were unaware of the incidents, the matter should have been brought to their attention, without any further FCC policing of the networks' internal journalistic processes. As noted, such policing, in the name of assuring proper licensee supervision of anti-slanting/staging news policies, can become a vehicle for undue governmental intrusion in broadcast journalism; if top management is not involved, the gains from such a policy are dubious and the potential detriments large.

70/ See pp. 16-18, supra.

71/ 412 U.S. at p.

D. SECTION 399 OF THE COMMUNICATIONS ACT

Section 399 of the Communications Act of 1934, as amended, 47 U.S.C. 399, provides that "[n]o noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office." We believe that this provision is unconstitutional as a prior restraint of speech in violation of the First Amendment.

The legislative history is set forth in Toohey, "Section 399: The Constitution Giveth and Congress Taketh Away," Educational Broadcasting Review, Volume 6/1, pp. 33-35. Section 399 was added "out of abundance of caution," as a "safeguard" against the Corporation for Public Broadcasting becoming a propaganda machine for political parties or presenting only a particular point of view. 72/ The Congressional remarks on the floor were more direct: They indicated that Congressmen did not like any television stations, commercial or noncommercial, editorializing on candidates and wanted to prevent noncommercial broadcasters from imitating their commercial brethren. 73/

The latter purpose is patently unlawful. And the stated purpose in the reports has no merit: The fairness doctrine is fully applicable to noncommercial licensees and would prevent public broadcasting from becoming a "propaganda machine" for the Government or any other viewpoint. It cannot seriously be argued that the way to prevent possible abuses in this respect is to cut off all speech. 74/

72/ 1967 C Q Almanac, p. 1042; see 1 U.S. Code Congressional and Administrative News 1810 (1st Session, 1967).

73/ See Vol. 113, Cong. Rec., No. 149, H. 12277, H. 12280-2 (1967).

74/ As a further matter, Section 399 proscribes editorializing even if the noncommercial station did not receive any federal funds.

And the law is clear here. See New York Times Co. v. U.S., 91 S.Ct. 2140, ____ (1971) ("Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity"); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Mills v. Alabama, 384 U.S. 214, 218-219 (1966) (striking down a ban on "last-minute" editorials in political campaigns). Significantly, in Red Lion, the Court stated: 75/

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to Section 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. (Emphasis supplied).

That is the precise case presented by Section 399.

75/ Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at p. 396.

APPENDIX A

Analysis of the FCC's KREM-TV Fairness Ruling

(Complaint of Sherwyn H. Heckt, 40 FCC 2d 1150 (1973))

In this case, Station KREM-TV, one of whose top officials was associated with an Expo 74 proposed for Spokane, editorialized strongly in favor of the project and its supporting bond issue. There was considerable disparity in the amount of time actually afforded the anti-bond viewpoints, and the station rejected one of the spokesmen for that viewpoint. But the station had a reasonable explanation for its rejection (i.e., the spokesman did not appear to represent groups for which he claimed to speak), and showed that it solicited opposing viewpoints. 76/ Further, the station actively sought to obtain the views of leading spokesmen for the opposition and did present them. On the basis of these facts, the FCC staff ruling found that the licensee had afforded reasonable opportunity.

However, the FCC process for resolution of the significant issues was a long, arduous one -- licensee response to complaint on October 12, 1971; further investigation on June 5 through 9, 1972; licensee response on February 6, 1973; and finally, the decision on May 17, 1973, 21 months after the broadcasts in question (40 FCC 2d at p. 1151). The licensee's letter of February 6, 1973 concludes:

> Finally, apart from the merits of the controversy engendered by the Heckt complaint, we desire to comment briefly upon the procedures followed here. With due respect for the Commission's important responsibility in administering the fairness doctrine, we

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76/ The station's editorial, with an offer of time to respond, was mailed to 194 community leaders and 400 members of the public; the station contacted 22 area organizations. 40 FCC 2d at p. 1152.

> think there is a grave question whether it serves the public interest to require a station to account in such minute detail for everything it has said and done on a particular issue. We cannot believe that such a requirement contributes to an atmosphere of licensee independence or robust presentation of issues; we know that it is tremendously burdensome. We hope the Commission can find a way to give reasonable consideration to individual fairness complaints without the kind of exhaustive investigation that has apparently been thought necessary here. 77/

In order to quantify the extent of burden, a Rand Study inquired of the licensee as to the amounts of time and money expended in the handling of this fairness complaint. The licensee reported legal expenses of about $20,000, with other expenses (e.g., travel) adding considerably to the total; this is not an insubstantial amount, in light of the fact that the total profits reported by all three TV stations in Spokane for 1972 was about $494,000. 78/ However, from this licensee's standpoint, the important factors were the amount of time spent by top-level station personnel and the emotional strain on them.

Thus during the period from September 14, 1971 to May 18, 1973, the president and vice-president of the station devoted a total of about 80 hours; the station manager, 207 hours; and six members of his staff, an additional 194 hours. The station pointed out:

> In round numbers, then 480 man hours of executive and supervisory time was spent on this matter. This, of course, does not include supporting secretarial or clerical time attendant to the work

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77/ KREM-TV letter of February 6, 1973, pp. 31-32.

78/ See H. Geller, The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action, The Rand Corporation, R-1412-FF, December 1973 (Rand Study), p. 41; TV Broadcast Financial Data, 1972, FCC 05693, Table 17.

carried out. This represents a very serious dislocation of regular operational functions and is far more important in that sense than in the simple salary dollar value. 79/

Finally, there is the factor of deferral of license renewal. The KREM-TV renewal would normally have been granted on February 1, 1972; because of the fairness complaint, however, its application for renewal (and that of its companion AM station) was placed on deferred status until May 21, 1973. The FCC has recognized that placing the renewal in jeopardy because of licensee activity in the news field can have a serious inhibiting effect and should be done only when a most substantial and fundamental issue is presented. 80/

Consider here the possible impact of such deferral upon a station manager or news director. Because of editorials such as that on Expo 74, the renewals of the station's license can be put in question and for a substantial period. What effect -- perhaps even unconscious -- does this have on the manager or news director the next time he is considering an editorial campaign on some contested local issue? What effect does it have on other stations? These questions raise a most important consideration -- namely, that what may be crucially significant here is not the number of fairness rulings adverse to the broadcaster, 81/ but the effect of such rulings as KREM, whatever their number.

All the above considerations raise a basic issue: Is the goal of promoting robust, wide-open debate better served by focusing on whether the licensee has been fair in handling a particular issue or on whether he has generally remained faithful to the concept of a public trustee over his license period?

79/ Rand Study, supra, pp. 41-42.

80/ See CBS ("Hunger in America"), 20 FCC 2d 143, 150 (1969).

81/ Thus, the Commission misses the mark when it states that "only 94" fairness complaints were forwarded to licensees in the fiscal year 1973. Fairness Report, supra, 39 Fed. Reg. at p. 26375 (par. 19).

action, and (15th Amendment) regulatory jurisdiction was thus established.

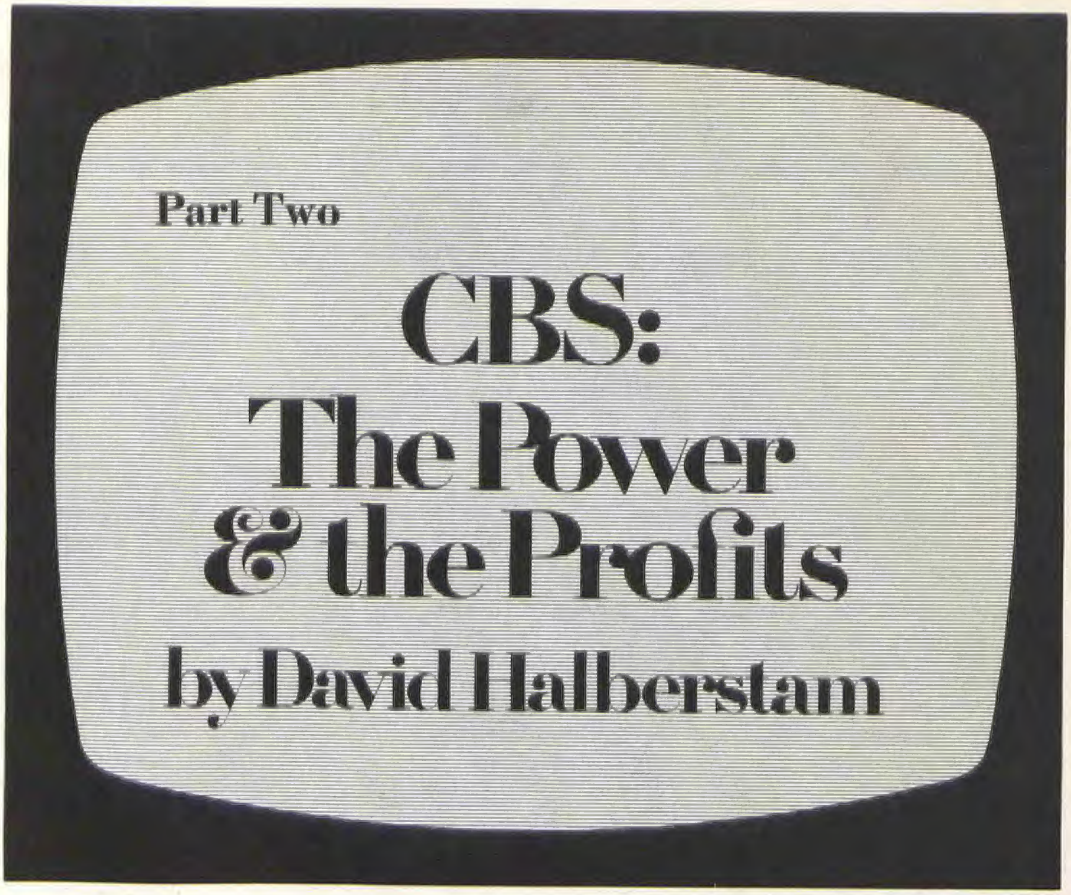
If the whites-only Democratic primary of Texas in 1944 represented so much of the political process that it could no longer be called "private", how long will it be until the major media fall afoul of a kindred standard? Richard Reeves, Edward Hunter, Jeffrey Hart, Pat Buchanan and others have all bluntly described the relentless flow of political and quasi-governmental power into these private hands. And even New York Times television reporter Les Brown, urging greater TV coverage, has characterised the networks a "government of leisure" because of the average 6-7 hours the average American family views TV each day.

Which brings us back to the question of "the media" as "a power center." Speaking of the national media, of course, they are -- one that will get bigger and bigger and bigger without effective counter-measures. And the politics of the next few decades will be in no small measure determined by <u>what</u> people like those in this room are <u>courage</u>ous enough to do about it.

Agree with description & tendencies — but people buy it, watch it.
Media will tend to be more objop
(but so will other bus; consrv ignore product objop as freedom but get nervous abt idea objop)

But FA keeps goal purely human apart from govt — "consrv" should not stampede into taking that away.
— In long run, liberals will be better at using regulation of media content for their purposes. Issue is not productive "us" v "them" but free + indiv use v controlled + collectivist use.
Proper remedy is to keep media "private" by ATT similar approaches.

, publicpolicy + pers factors are at work:
- efficiency not affil agreements are allowed
- ATT prices minimum to encourage above
-
-



The advent of the half-hour news program made television the major source of news for many Americans and the only source for a dismayingly large number of them. This vested in broadcasters awesome responsibilities, and a sense that they had ventured into a political minefield. In the first installment of his two-part examination of the growth of broadcasting, television journalism, and the CBS network in particular, David Halberstam showed how the medium became both a shaper and a creature of politics, both a maker and a prisoner of public tastes. In this installment he tells how three Presidents influenced and were influenced by TV, how TV made Vietnam into an electronic war, and how, reluctantly, it dealt with the Watergate tragedy.

1. The 30-Minute National Séance: A New Kind of News

By 1961 the people at CBS News knew that they were at a threshold, about to make a breakthrough in technology that would almost surely mean a comparable jump in power and influence. Men like Sig Mickelson, president of CBS News until 1959, and Dick Salant, who succeeded him, had been pushing for years for a half-hour news show. Now developments in technology promised to make it possible. They had been lobbying with CBS chairman William S. Paley and CBS president Frank Stanton for the longer show, drawing up plans to prove that they could fill the time if it was granted. They argued that film was getting faster, color was on its way, cameras were getting smaller, and the arrival of satellite stations meant that there could be live feeds from the far reaches of the country and the world, instant images from the other side of the earth. Doubling the amount of news-show time from fifteen to thirty minutes was not without its

Swiftly Djorworshin'n deployed his small force. He put ten men in a row near the foot of the round hill and ten more near its top. The rest he sent to crouch in a coppice halfway up the slope. He told the first group to wait until they knew the approaching bowmen meant to attack; when this was apparent, he said, they should fire their rifles at the warrior chiefs, reload, fire again, and then run like colts all the way around the hill.

"When you see the enemy again," he said, "you may help destroy the last of him."

The assault of the bowmen came as anticipated; they came bounding through the knee-high grass, and seven fell with the first volley.

The two forces stood staring. Echoes of gunfire clapped back from distant ridges. The bowmen, of whom there were perhaps a hundred, set up a fierce cry and came forward again, and again the row of ten aimed and fired.

Then, as if in panic, the riflemen ran. Their hoarse cries were desperate and they flew with elbows high, with bouncing powder horns and hats falling behind them.

Momentarily the attacking force regarded this cowardice and, heartened, resumed the charge.

Djorworshin'n sliced his saber down, and the men with him on the hilltop fired and, when they were ready, repeated the volley.

The effect of their marksmanship was vicious. Four times the bowmen had been halted, but never long enough for them to nock their arrows and retaliate. Once more they set forward, those still untouched, and now it seemed they might overrun the strangers. Djorworshin'n, however, was signaling again; his saber circled, catching light, making it blaze in his hand.

From the hillside grove to the right came ten fresh men with the zeal of assassins; they ran against the bowmen's flank and paused and fired. Djorworshin'n's band atop the hill fired. The battle hesitated, and then the first group of ten, puffing gleefully, reappeared hallooing.

The bowmen turned in terror and ran away, and many were shot as they fled. The few who escaped never looked back.

Djorworshin'n inspected the bodies in the grass. He saw that many wore jewels, and many had valuable dirks and hatchets. He caused these to be collected and distributed fairly among his men, none of whom was wounded or even tired. He kept nothing for himself but a strangely woven belt.

A survivor was found. A young man with a helmet of leaves and a bullet in his thigh had pulled himself into a cluster of pawpaws. His face seemed to have shrunk away from his eyes. He gestured threateningly and fainted.

Djorworshin'n had the youth's wound washed, and he fed him meaty soup. The warrior lad was a prince, and he gave Djorworshin'n a flint amulet and swore fealty before dying of a blackened leg a week after the battle.

When autumn came, Djorworshin'n ordered the canoes turned back upstream. He continued his mapping as the men hunted, taking pelts of animals they could not identify, rolling guts into the river into a froth of giant catfish. Once he saw a couple of birds, in size between a swan and a goose, and in color somewhat between the two, being darker than a young swan and of a more sutty color; the cry of these was as unusual as the birds themselves, and Djorworshin'n had never heard any noise resembling it before.

They crossed the great barrier mountains to the east and returned home.

Before the party was disbanded, Djorworshin'n paid each man and gave him a burden of furs. He made a speech, and in it asked all to thank God for the bounty they had received, for their achievements at arms, and for the marvelous places in the wilderness they had been privileged to travel.

In time he filed claims for tracts carefully surveyed on two great rivers and their tributary waters, totaling 50,000 acres more or less, and these were in time duly granted.

Landed property cannot, of course, provide a measure of the greatness of Djorworshin'n. His fame derived much more from what he did. □

Wallace Knight is a Kentucky poet and prose writer whose most recent story in *The Atlantic* was "Making History" (October, 1975).

problems in terms of pressures that CBS thereby brought upon itself. The rise in television's influence was creating executive sensitivity to the implications of news.

In 1952, the year television first covered the political conventions, Sig Mickelson, in charge of CBS television news coverage, went to Chicago and had a wonderful time and a free hand. Four years later everyone had come to understand how powerful television was, and hands were not so free. Three corporate superiors sat with Mickelson at the 1956 conventions: Stanton, the corporation's top Washington lobbyist, and its chief lawyer. (Once Sander Vanocur, discussing the growth of timidity within NBC, said that there was always an invisible vice president in charge of fear.)

The old fifteen-minute "talking heads" news show was not so different from radio's method of broadcasting. There was very little live film or real action. The half-hour show meant that there were new bureaus to be opened, correspondents to be hired, and more time to be filled; and for politicians, there was now a national platform in the form of the three network news shows. In some 20 million American homes, voters could tune in every night to the evening news, in what Daniel Schorr aptly called a national evening séance.

The selection of the anchorman for the new thirty-minute news show was crucial, for the anchorman would determine the style, tone, and limits of the show. Therefore the anchorman had to be someone who had an intuitive feel for the political dangers ahead, and a sense of the minefield that television journalism was becoming.

Mickelson had been looking for a replacement for Douglas Edwards as the anchorman of the fifteen-minute evening news as far back as the mid-fifties. Edwards was the anchorman in the very early days of television, when it was something of a stepchild and looked down on by the great radio giants, and he had done well in standing off John Cameron Swayze and the *Camel News Caravan* at NBC. But the rise of the Huntley–Brinkley news team on NBC in place of Swayze changed the balance. CBS executives feared that Edwards didn't project the kind of weight that a modern television news program required. In the mid-fifties Mickelson tried to replace Edwards with Charles Collingwood, for two reasons. Collingwood, talented, attractive, a graceful writer, an heir apparent to Ed Murrow (indeed, Murrow's own choice as his successor), was the member of Murrow's radio team who had made the smoothest transition from radio to television; second, Collingwood had been in London during World War II and had forged a personal friendship with Bill Paley, and was thus well thought of in executive reaches. But in those days sponsors were extremely powerful. One advertiser sponsored the entire show, and for their own reasons the Pall Mall people were not interested in switching from Doug Edwards to Charles Collingwood. The pressure at CBS to find a new anchorman grew as the importance of the news show grew, and as Huntley–Brinkley's ratings at NBC mounted.

At the same time the range of the anchorman's role was narrowing, much as Murrow's role had narrowed. Murrow symbolized an era and form of radio commentary that was deemed unacceptable on television. The time for the new thirty-minute evening news show was going to come in part from time formerly allotted to documentaries of the sort Murrow had done.

Of the potential new CBS evening news anchormen, both Howard K. Smith and Eric Sevareid had by the late fifties run into problems in making the move from radio to television, and from being foreign correspondents to reporting on the nation. Both of them were broadcasting superstars, and their commentary was okay with CBS for a time, particularly when it was done from foreign countries. But Sevareid came home, and he was angering the brass with regular criticism of the rigidity of John Foster Dulles' foreign policy. And Howard Smith, based now in Washington, was in constant trouble. There was a lot of blue-penciling of his copy; he was seen as even more of a problem than Sevareid. Part of the trouble, their friends thought, was the difference in style. Sevareid was a subtle, deft writer, and he had learned to make a point almost by implication, whereas Smith was more forceful, given to straight, declarative sentences, and there was no mistake about what he was saying or how he was saying it. Both Sevareid and Smith had wanted to meet with Bill Paley and talk about their problems. But Paley was not anxious for a meeting: to discuss the tightening laws was to admit they existed; to discuss the difference between the present and the past was to admit that there was a difference. Finally a meeting between Paley and Sevareid was arranged. It was not a success. Sevareid talked about how much more difficult it was

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David Halberstam, author of *The Best and the Brightest*, is at work on a book about centers of power in America. This article and the one in the January *Atlantic* are parts of that new work.

to say anything, and about how much more editing there was. But Paley was adamant—he kept talking about the fairness doctrine. Sevareid talked about the need to lead: CBS had always been a leader. Paley talked about the dangers of being licensed. Sig Mickelson, sitting in on the meeting, had a feeling that Paley had decided not to hear a word Sevareid was saying, that all the decisions had been made.

The tensions between Smith and Paley were more explosive although the grievances were not very different. The atmosphere was tense. Blair Clark, who was the general manager of CBS News, pleaded with Smith not to force a confrontation; Clark knew that Paley was spoiling for a fight, and that there was a backlog of grievances against Smith. But Smith wanted the collision. He wrote out a brief statement on what commentary should be, and repeated that he was not doing anything now that he and Murrow and others had not done for years from overseas.

The meeting between Paley and Smith, with Salant, Stanton, and Clark present, was bitter. Paley told Smith that he obviously did not understand the rules of CBS, and Smith answered that Paley didn't either, that they had no idea what CBS was and was not. Paley repeated that television was a licensed medium. As for the definition of commentary that Smith had drawn up, a definition which allowed the networks the same freedom of the press as newspapers—despite the licensing—Paley said he was tired of all this, he had heard it before, and he wanted no more of it. Smith would have to conform to CBS standards. Smith said he had no intention of doing banal commentary. Perhaps, said Paley, Smith ought to look elsewhere. That ended the meeting.

Smith thought he had been told to get another job; Salant told him that was not right, he was not supposed to leave the network. But a few minutes later Fred Friendly called to say that Smith rather than Salant had understood the Chairman.

Smith immediately began serious negotiations with the archrival, NBC, and a major job seemed assured. It was virtually wrapped up, signed, and delivered, and his old friend Chet Huntley called to urge Smith to accept the NBC offer. But at the last minute the offer went cold. Bill McAndrew, the head of NBC News, called to apologize and say that the decision against him had been made at the highest level of NBC. Smith was convinced that the highest level of CBS had called the highest level of NBC to warn NBC against a troublesome, dissident correspondent. Shortly after, he left for ABC.

2. CBS Anchors for the Night

So then there were three. Smith's departure left open the question of who was going to be the anchorman of the evening news show: Sevareid, Collingwood, or an outsider, Walter Cronkite. The job was now the most prestigious one for a journalist that CBS News could offer.

Sevareid and Collingwood might be the protégés of Murrow, and Cronkite the outsider who had never crashed the club, but his style was compatible with what the show needed in its signature figure. Collingwood's and Sevareid's roots were in commentary; they had been picked by Murrow for their analytical ability and intelligence. Cronkite's roots were in the wire service; he was the embodiment of the United Press tradition, a latter-day Hildy Johnson with his shirt-sleeves rolled up, single-mindedly pushing to get that story. He came through as straight, clear, and simple, more interested in hard news than analysis or deeper meanings. There was little of Murrow's introspection in him. Viewers could more readily picture Walter Cronkite jumping into a car to rush out and cover a ten-alarm fire than they could picture him doing analysis on a great summit meeting in Geneva; and they were right, he was most at ease with a narrative story with limited social and political implications.

Sevareid, by contrast a complicated, brooding figure, was the most consciously cerebral of the three men (one of his closest friends once noted that the greatest tragedy in Eric's life was that he had not been one of the Founding Fathers). Collingwood was less intellectual than Sevareid, but extremely serious, and closest to Murrow in style, looks, and ability; if there was a consensus Murrow-clique candidate for the job, it was Collingwood. But it was as if Collingwood had been such a natural as a young man, so talented, graceful, and stylish, that success had come too easily, so that he lacked the hunger for the job. No one, particularly anyone who had ever worked on a story against him, would ever accuse Walter Cronkite of a lack of hunger; he was, from his earliest days, wildly competitive—no one was going to beat Walter Cronkite on a story.

As he grew older and more successful, the marvel of it was that he never changed, the fires still burned. When he became the CBS anchorman at the 1952 political conventions, he was determined to go to Chicago better versed, better prepared

than his competitors. If, fifteen years later, he was scheduled to cover a space shot, no one was going to sit up more nights in advance mastering space technology, filling his own loose-leaf notebooks on the subject. While he would use various assistants to check facts and do additional research, no fact produced by an assistant would ever go into Walter's book until the assistant had proven under the harshest kind of questioning that he could vouch for the fact. The men who had known Cronkite as a young reporter were impressed by his capacity to grow and to learn, but in one sense he had remained constant; he had brought to the United Press, and then to radio, and finally to television, the fiercest kind of competitive instinct. Yet, fortunately for his television career, he did not *look* competitive. He looked comfortable, reassuring, and very much in control. It was an admirable and lucky combination.

Walter Cronkite, 1952

In the late fifties Walter Cronkite suffered slightly within CBS because he was not one of the Murrow boys, but there had been a point when he almost became one. That was during World War II, when he was a United Press correspondent in London. He was, in the eyes of the man then running the United Press bureau, Harrison Salisbury, the best on his beat. It was the fall of 1942, and the American military presence was still small. The first B-17s were arriving in England, and Cronkite had the Eighth Air Force story, a prime journalistic assignment then. Every day Cronkite and the other reporters went out to the various air bases and interviewed the young fliers as they came back; it was a terrible time, for the attrition rate was very high—twenty planes would go out, ten might come back. The essence of the story was the hometown angle. The reporters never wanted to get too close to a flier because he might be gone the next day.

Cronkite was involved in intense competition with Gladwin Hill, then of the Associated Press, later of the New York *Times,* and Homer Bigart, then of the New York *Herald-Tribune.* Cronkite caught Murrow's eye (as did another young wire-service man in London named James Reston). Murrow was interested in offering Cronkite a job, and arranged to meet him at the Savile Club (which Cronkite, an unreconstructed Middle American, thought was the Saddle Club). They lunched amicably. Murrow offered the job and Cronkite accepted it on a handshake. He had been making $67 a week at the UP, and Murrow was offering $125 a week plus fees (which Cronkite, like most print reporters, thought were nonexistent; in fact, they probably would triple his salary).

Cronkite returned to bid farewell to his colleagues at the UP, and Salisbury, a very shrewd operator, immediately said that this was too bad because that very moment a huge raise had come in which would boost Cronkite $12.50 a week, and the UP at home was so pleased that it had come up with a second raise, also for $12.50, which meant a grand total of $25 in raises, to $92 a week. Cronkite was impressed by this vast commitment of the UP's resources and double sign of its belief in him. Because he loved the United Press with the simple fanaticism of the devoted wire-service reporter to whom the greatest thrill in the world is to beat the AP by ten minutes—a kind of nirvana, or at least a ten-minute nirvana—he turned Murrow down. The incident produced some tension between them over the years, in no small degree on Murrow's part because he simply could not understand the values of a man who would prefer the United Press over the more *raffiné* world of CBS.

Cronkite stayed with the UP and covered the war as it moved across Europe. His coverage was simple, straight Ernie Pyle reporting, with traditional wire-service emphasis on names and hometowns. He was with the American units liberating Bastogne when the relief mission arrived. Just outside Bastogne, Cronkite, eager for an eyewitness account, slipped out of his jeep, edged toward a barn, finally spotted a soldier, and began interviewing him in the Pyle tradition—Soldier, what's your name?

"Well, gee, you ought to know that, Mr. Cronkite," the GI said.

"Why's that?" Cronkite asked.

"Well, sir," said the kid, "I'm your driver."

After the war, Cronkite was sent to Moscow, allegedly a choice assignment. But Moscow in 1946 was not very great fun, nor, for that matter, was the United Press. The Russians were pulling back from their policy of limited friendship to brotherly Western correspondents. In addition, the financial generosity of the United Press, never excessive, was diminishing. The UP car was an antique, and when, during one of the worst winters of recent Russian history, Cronkite asked for permission to buy a new car since even the Russians were complaining about the condition of his vehicle, his superiors suggested that he get a bicycle. Soon Cronkite asked to be brought out of Moscow. He returned to America for a year with a promise that he would return to Europe shortly as the number one man on the Continent. His salary was then $125 a week and, with family obligations growing, he asked for more. The UP executives assured him that he was already the highest-paid man on the staff. But he wanted more. He loved the United Press. He relished scooping people and getting the story straight, clear, and fast, with no frills. Even years later, when he reminisces about the old UP days, there is a kind of love in his voice. He liked the feel of dirt on his hands as a wire-service reporter; he felt more at home at the UP than in the lofty world of television commentary. But love or no, there had to be some money. So Earl Johnson, his superior, said that he thought it was time that he and Walter had a little talk, since Cronkite apparently did not understand the economic basis of the United Press.

"No, I guess I don't understand it," Cronkite said, and so Johnson explained: "We take the best and the most eager young men we can find and we train them and we pay them very little and we give them a lot of room, and then when they get very good they go elsewhere."

"Are you asking me to go somewhere else?" Cronkite asked.

"No, no," said Johnson, while adding: "$125 a week is a lot of money for us, though probably not for you."

Cronkite returned to Kansas City, whence he had come, on a kind of extended leave, and while he was there he saw an old friend named Karl Koerper, who was the head of KMBC, a big CBS affiliate. Cronkite remarked to Koerper that Kansas City seemed to have died; there was no spirit and excitement anymore. What had happened? Then he answered his own question: it was the death of the Kansas City *Journal.* You get monopoly journalism, he said, and something goes out of a city. When newspaper competition dies, something dies with it. Kansas City is a duller town now.

"What do you mean?" Koerper asked.

"It's your fault," Cronkite continued. "You radio guys cut the advertising dollars so much that you drove the newspapers out, but you haven't replaced them. You have no news staff."

"We certainly do—we have eight men," said Koerper proudly.

"Do you know how many reporters the Kansas City *Star* has?" Cronkite asked.

"But that's their principal business," Koerper answered.

"*There!*" said Cronkite, seizing on it. "That's the answer!" The upshot of the conversation was that Walter Cronkite was hired in 1948 by Karl Koerper to work as Washington correspondent for his station and a string of other Kansas and Missouri stations. He was thirty-one years old, and though his salary was $250 a week, in the pecking order of American journalism there seemed to be something slightly demeaning about Walter Cronkite, who had been a big man during the war, hustling around Washington as a radio man for a bunch of small midwestern stations. Cronkite did not find it demeaning. He liked the excitement of Washington, and anyway, he intended to return to Kansas City soon as general manager of the station.

Then the Korean War broke out and he got a phone call from Ed Murrow asking whether he might be willing to go to Korea and cover the war for CBS. Would he? Well, Murrow had better believe that he would, it was exactly where he wanted to be. There was, Murrow said, no great problem in Cronkite's employment by KMBC, since it was a CBS affiliate. In the meantime, Cronkite should get himself ready to go overseas again. But there was some delay because his wife, Betsy, was about to have a baby.

At just about this time CBS bought WTOP, which had been a locally owned Washington television station, and wanted to build it up as a major outlet, a kind of political flagship. WTOP's news director asked Cronkite to do the Korean story every night. What did Cronkite need in the way of graphics? It turned out to be nothing more than chalk and a blackboard. Events had gotten more complicated, and Cronkite, typically, was trying to make them simpler. It was deceptively simple—Cronkite in front of a blackboard—but he

Sig Mickelson

worked so hard in preparation for the assignment, backgrounding himself, going to the Pentagon to develop independent sources, that his mastery and control of the subject were unique. He had *weight,* and projected a kind of authority. The WTOP people asked him to do the Korean War story twice a day, and very soon after that the entire news program, and then two news shows a day. He was an immediate hit, a good, professional reporter in a new medium. He began to do network feeds from Washington back to the network news show in New York. The idea of going over to Korea began to fade away.

Among those aware of Cronkite's talents was Sig Mickelson, then in charge of television news at CBS. He was in effect the head of the stepchild section of CBS News, trying to build up television, but forced to work against the grain. He had no bureaucratic muscle in comparison with Murrow; the Murrow group included all the stars of the news department, all the men who had ties to Paley and who had come out of the war as heroes. Mickelson saw Cronkite as the man around whom to base his television staff.

As the 1952 political conventions approached, radio was still bigger than television, although the conventions themselves would help tip the balance in favor of television. The Mickelson group wanted a full-time correspondent who would sit there all day and night and hold the coverage together without getting tired. Mickelson asked for Murrow, Sevareid, or Collingwood. But the radio people told Mickelson to get lost. Further negotiation with the radio people produced a list of men who were ostensibly second-stringers. On the list was precisely the name that Mickelson had wanted in the first place—that of Walter Cronkite. Whatever else, Mickelson knew, Cronkite was dogged.

Cronkite went to the conventions, both held in Chicago that year, knowing that this was his big chance. He was thoroughly prepared, knew the weight of each delegation, and was able to bind the coverage together at all times. He was a pro in a field still short on professionalism. By the end of the first day, in the early morning, the other people in the control booth just looked at each other; they knew they had a winner. (They knew it even more the next day, when some of the Murrow people began to drift around to let the television people know they were, well, available for assignment.) Cronkite himself was so obsessed by the action in front of him that he had little immediate sense of the good reaction to his performance. On the last day of the Republican convention, he went for an early morning walk with Sig Mickelson along Michigan Avenue. Mickelson said Cronkite's life was going to change now, and that he was going to want to renegotiate his contract for a lot more money.

"Do you have an agent?" Mickelson asked.

"No," said Cronkite.

"Well, you'd better get one," Mickelson said. "You're going to need one."

"No, I won't," Cronkite said.

"Yes, you will," Mickelson said.

3. Walter Cronkite's Iron Pants

That solidity and enduring professionalism which Cronkite had first shown in 1952 set him apart when the time came to choose an evening news anchorman. He was by television standards an easy man to work with. What was on the outside was on the inside; he liked, indeed loved, being Walter Cronkite, being around all those celebrities, but it was as if he could never quite believe that he was a celebrity himself. Why, who was it John Glenn's mother most wanted to meet at the ceremonies marking her son's return from the first orbital space flight? Walter Cronkite, of course. Cronkite felt an enthusiasm for life and for his work that smacked of the country boy let loose in the big city; it was all wonders and magic. His was a profession filled with immense egos, crowded with very mortal, often quite insecure men blown overnight to superstar status. Cronkite too had considerable ego, but unlike many of his

John F. Kennedy

colleagues he had considerable control over it, and his vanity rarely showed in public. He knew by instinct the balance between journalism and show biz; he knew you needed to be good at the latter, but that you must never take it too far. He was enough of an old wire-service man to be uneasy with his new success and fame. He was just sophisticated enough never to show his sophistication.

In addition, he had physical strength and durability. Iron pants, as they say in the trade. He could sit there all night under great stress and constant pressure and never wear down, never blow it. And he never seemed bored by it all, even when it got boring. When Blair Clark and Sig Mickelson recommended him for the anchorman job, that durability, what they called the farm boy in him, was a key factor. He was the workhorse. After all, an anchorman did not necessarily have to be brilliant; he had to synthesize others, and there were those who felt that Sevareid had simply priced himself out of the market intellectually. Eric was thought to be too interested in analysis and opinion, and thus not an entirely believable transmission belt for straight information.

But there was a part of Cronkite that had never left St. Joe, Missouri, and which he consciously advertised. Though he had been a foreign correspondent, in his television incarnation he had been definitively American: air power documentaries, political conventions, space shots. When there was an Eisenhower special to do, Walter did it, and that too was reassuring. (Among those not reassured was John F. Kennedy, who, right after his election, cornered CBS producer Don Hewitt and complained that CBS was against him. "Walter Cronkite's a Republican, isn't he?" the President-elect asked. Hewitt allowed as how he didn't think so. "No, he's a Republican, I *know* he's a Republican," Kennedy said. Hewitt said he thought Cronkite was probably an independent who had voted for Ike over Stevenson and for Kennedy over Nixon, but that was only a guess. "He's always with Eisenhower," Kennedy replied, "always having his picture taken with Eisenhower or going somewhere with him . . .")

The men who ran broadcasting had become sensitive about going against the American norm, and being ahead of it. For their purposes now, Walter was perfect, he *was* the norm. For him to go against the norm was like going against himself. In addition, he had a strong self-imposed sense of what the limits of his role were, and the dangers of violating the trust that had been given to him. So it worked; he became over the years one of the most trusted men in America. His more elitist colleagues in print journalism, even if they found him on occasion slow in picking up on certain stories, nonetheless respected his integrity. When political pollsters wanted to check on the credibility of possible presidential candidates, they always included Walter Cronkite on the poll as a bench mark against which the trust and acceptability of the candidates could be measured, and Cronkite often scored very high.

He was compatible with the style of the news show that CBS executives had in mind. Television reporting was evolving into a special form: a good "page one," not much more, not that much explanation of events. The correspondents were to be part wire-service men (in terms of the restraints on personal expression) and part superstars, more recognizable on national political campaigns than some of the candidates. They were intelligent and sophisticated, but they were often underemployed. The contrast between the shorthand of their regular appearances and the intelligence they flashed during slow moments of political conventions was striking. The news show was like putting the New York *Times* on a postage stamp. An insiders' joke at CBS News was that if Moses handed down the Ten Commandments, the lead would be, "Moses today came down from the mountain with the Ten Commandments, the two most important of which were . . ."

In the spring of 1962 Cronkite became the CBS anchorman. He was rooted in a certain tradition and he was the best of that tradition. He set standards by which others were judged. In Sweden, anchormen came to be known as Cronkiters. He was not a distinctive writer himself, but he was a good editor, and when others wrote for him, his ear told

him what would work and what would not. He was not a great interviewer; he was too aware of the danger of seeming combative, and his questions were often easy (most memorably at the 1968 Democratic National Convention, when he pitched softballs to Mayor Daley of Chicago). But he was a good synthesizer and clarifier, working hard in the brief time allotted to his program to make the news understandable to millions of people. And his style and character seemed to come through. People set him apart from his office, as they did Eisenhower. When news was bad or upsetting, the audience might be angry with television reporters, but rarely with Walter Cronkite personally. He was exempt.

In 1970, a President who viewed television commentators as a major opposing power center was manipulating political pressure against them, and the networks were on the defensive. At a meeting that year between CBS executives and affiliate owners, the resentment and anger of the affiliates against the CBS news team was showing. Cambodia and Kent State had just taken place, and the Nixon–Agnew attacks on TV commentators were at their peak. The meeting had been bitter and there was a smell of blood in the air. That night CBS gave a banquet and the management trotted out all the stars, Jimmy Stewart and Doris Day and many others, and they all walked in and received polite applause. And then Cronkite came in and the house went wild, a magnificent standing ovation from the very people who had been echoing the Nixon–Agnew assault on CBS that morning. You *can* have it both ways.

4. The Jack Kennedy Show: Happy Medium, Happy Message

Charles de Gaulle, living in a democratic society that had one (state-controlled) television network, spoke for all chief executives: he used to say that all print reporters were against him, but television belonged to him. It was the classic statement of a politician about journalism: print can be too querulous, can do too much analyzing of motives, can spread too much doubt. But broadcasting is different; it accepts by and large what has been said and passes it on, often uncritically. A politician often has difficulty getting on the air, but a President can go on when he chooses in the setting he chooses.

If, as the choice of Cronkite to anchor the half-hour news show made plain, the limits on network journalism were becoming narrower and more sensitive to pressures from high public officials, then the converse was also true. Those in the highest offices were becoming more aware of television, more powerful because of television, and more skillful at exploiting it.

Eisenhower had used television well and had let the cameras into the White House on a regular basis, but he was a man of a passing era. Jack Kennedy, by contrast, was a modern man, the first television President. He performed with such charm and dispatch that much of the intellectual elite of the country, which might have reacted with distaste to the blending of politics and television because of the potential for demagoguery involved, enthusiastically applauded him. (The applause was generated in no small part because the alternative to him was Richard M. Nixon.) He and the camera were born for each other. He was its first great political superstar; as he made TV bigger, it made him bigger. Everyone using everyone. The President using the media, the media using the President.

Kennedy understood that television executives respect power and that television producers love film, and thus that the President and the executive branch could virtually go into the business of producing film, producing their own shows. The President's travels to other countries were events, special affairs that reporters and cameras would follow not just dutifully but enthusiastically, as they would never follow a Senate majority leader or a Supreme Court Justice or a lowly governor. He could in fact make his travels—often travels with a high degree of domestic political orientation—the nation's travels, and he could thus induce network journalists almost unconsciously to drop their normal critical roles and become a part of the pageantry, heralds of it, as it were, and little more. The farther the President was from Washington, the less he was seen as a domestic political figure and the more he was a kind of national symbol, President of all the people (Nixon's China trip was the ultimate example of this). Similarly, the less knowledgeable and secure the correspondent, the weaker his own sources of information and the greater his dependence upon the President's entourage for what he reported. The network reporter's ability to get on the air increased as his ability to understand what was going on decreased.

In countless ways John Kennedy wrote the book on television and the presidency, a book which Lyndon Johnson and Richard Nixon studied care-

fully, both of them feeling very much in his shadow. But however deep the shadow, each man developed his own shrewd sense of the weaknesses and vulnerabilities of the networks, and played upon them.

Thus, regardless of who was President, the decade saw a change in political and power balances: Fred Friendly, in 1960 a liberal CBS television executive anxious to help counsel a liberal President-elect on the use of television, went to Washington at the request of his superiors to help advise the new President on how to be more effective and more spontaneous. A little more than a decade later he was calling the office "an electronic presidency," and in the summer of 1974 he complained to his old associate Walter Cronkite that Cronkite's accompanying Nixon on the latter's dubious trip to the Middle East would escalate the importance of the trip.

Television not only changed the balance of power, but it became a vital part of the new balance of power. Presidents knew the advantage they had in gaining access to the air and the difficulties any competing politician or institution had. Presidents had used or suffered press conferences for a variety of reasons, including a chance to listen to the country. Kennedy seized on live television as an opportunity for political theater. He used reporters as pawns to help make him look better, smarter, shrewder, more capable, and in control. Indeed, mastery of the press conference became a kind of substitute for mastery of the political scene. The Bay of Pigs, for example, was a disaster and it was Kennedy's fault, *but it was not a televised disaster:* there were no cameras on the scene. The response to the Bay of Pigs, however, *was* televised, and Kennedy had the power, authority, and the cool to handle it. He put off serious questions about the origins of the disaster and the decision-making about it on the basis of national security; then he accepted responsibility for it. He seemed completely in control, yet explained nothing. No wonder his popularity soared upward. Similarly, a year later, during the Cuban missile crisis, he could use television and an external threat to bind the nation to him. Space shots were to be covered: space shots were national and space heroes were to be welcomed by the President and hailed, their success merged with his office. He was identified with the space program, which was successful and modern, and with the astronauts, who were young, handsome, virile, brave, and much admired. Astronauts showed that America was on the move; astronauts and Kennedy and Jackie showed that America *and* Jack Kennedy were on the move.

He also sensed the danger of overexposure; that was unique, since it was a time when the politicians who understood television tended to clamor for more and more time. Early in his administration, he asked Pierre Salinger to find out how many Fireside Chats Roosevelt had given. Why? Salinger asked. Because the public remembered them, Kennedy explained; in the public mind Roosevelt was credited with giving lots of them, and it was important to see why they were so memorable. One reason they were memorable, Salinger soon found, was that there had been so few—roughly two a year until the war. You see, Kennedy said, the public thought FDR had been on the air all the time, and yet he had carefully rationed his appearances. Besides, he added, television was far more powerful and dramatic than radio, and thus there was all the more need to be conservative: television could eat you up. When Salinger or other Kennedy aides would go to him and request that he make a particular appearance, he would hold back; he had been on, he would say, a week ago or two weeks ago, and he was wary of how carnivorous the electronic beast was. At one point he checked with Robert Kintner, president of NBC, to ask if perhaps Jackie was being over-exposed on television, and decided that in fact she was, and that it was time to hold down on her appearances.

Kennedy knew that television could widen the gap between him and his congressional opposition. The Republican party tried—almost pathetically—to answer him. The two Republican congressional leaders, Everett Dirksen and Charles Halleck, started holding a weekly press conference designed primarily for television. The problem was that Dirksen and Halleck were not designed for television: they had not risen to power by the route of open national exposure. Dirksen was like a huge and rich vegetable that had become slightly overripe; watching him, one had a sense that he was always winking at the audience, winking at the role that he had chosen to play, the stereotype of a slightly corrupt, old-fashioned senator. At best, "The Ev and Charlie Show," as it became known, was a disaster, as if two burned-out old Shakespearean actors had been hired to cavort around at Kennedy's request to play the part of a tired old opposition.

Kennedy also knew about the inner mechanics

and desires of television producers. The television people wanted the best show, and the best show had him at his best. He talked CBS into televising a tour of the White House with Jackie. When the show was filmed, he was allowed a last-minute appearance. He knew immediately, even before it was over and before anyone looked at the film, that his tone was wrong, that he had been perhaps too flip, and he asked CBS to redo it. When the producers looked at the film they found he was right, and of course accommodated him.

When he did a special with all three networks, there was an agreement to film ninety minutes and cut to an hour. Some people watching the filming noticed that George Herman of CBS seemed to ask the toughest questions, and that when he did the President became vague. When the editing took place it was the network producers' instinct, not the White House's suggestion, to cut the weak answers. They weren't sharp, *they did not make a good show.*

He was on occasion angry with television, but he usually overcame it. Once, after a network news broadcast on his handling of the steel crisis seemed more critical than he deemed appropriate, he called FCC director Newton Minow, demanding that he raise hell with network executives and threaten them about their licenses. Minow was alarmed by the nakedness of the threat and did not do it. Kennedy called him the next day and thanked him for preventing a President from making a fool of himself.

Nothing symbolized his sense of pleasure and ability with television better than a conversation he had with André Malraux. Malraux, Minister of Culture in that great democracy where the state controlled the one broadcast network, came to America and was surprised by the degree of independence of American news shows. He asked Kennedy why he put up with the Huntleys, Brinkleys, and Cronkites. Kennedy said that he didn't mind as long as he got equal time. Then he laughed. He laughed because he knew he always got far more than equal time.

In that sense, John Kennedy changed the presidency more than any recent predecessor with the exception of Franklin Roosevelt, who had slipped so naturally into the radio presidency. Kennedy's ascendancy, like Roosevelt's, was a confluence of a man and a technology, of a new political force and a politician with the skills and instincts to exploit it. The television audiences were acutely aware of style now. The President came not just into their towns but into their homes. He had attractive personal qualities, and occasionally dubious political qualities; he was therefore inclined to emphasize the personal side of the presidency. So it was not surprising that audiences judged him on a new scale of qualities, not necessarily the way they would have judged a politician in the past. Now what kind of man he was became paramount; what the feel of him was, what kind of family he had.

5. How the Lyndon Johnson Show Flopped

Once in 1971, two years after he had left the White House, Lyndon Johnson was appearing in a series of retrospective documentaries for television—for CBS, that is, the network of which Frank Stanton was president. CBS was the Johnson network, as Holt, Rinehart & Winston, the CBS book division, would become—to its financial loss—the Johnson publisher. He was in a relaxed mood one afternoon during the filming, and one of the senior CBS producers, John Sharnik, asked him what had changed in politics since his first years in Congress some thirty-four years earlier. Sharnik said it casually, and he was stunned by the vehement quality of Johnson's answer: "You guys," he had said without pausing to reflect. "All you guys in the media. All of politics changed because of you. You've broken all the machines and the ties between us in Congress and the city machines. You've given us a new kind of people"—a certain disdain passed across his face—"Teddy, Tunney. They're your creations, your puppets. No machine could ever create a Teddy Kennedy. Only you guys. They're all yours. Your product."

He was a man of the thirties, and he never really adapted to the new technology of his own times. Characteristically, he was one of the few people in Washington in the late sixties who was a devoted listener to *radio,* though his and his wife's private fortune centered around their Austin, Texas, radio-*television* station. He never really made it on television, though during the honeymoon that followed his accession to the presidency, he seemed to know his way around the medium. He reveled in it, President of all the people, anchorman for all the networks. He could do whatever he wanted, no one could catch up with him. These were great moments for him: his own impetuosity enhanced by being President, and a televised President at that; and his surprises being

orchestrated as surprises for the whole country.

There was the time he was settling a railroad strike and, looking at his watch, saw that it was nearly seven o'clock: he would announce the news himself at seven o'clock on the button. He decided to go to the CBS station (the White House was not yet set up for instant presidential specials; that would come in a few weeks—hot cameras ready for a hot Lyndon), and so suddenly the whole White House team was rushing into cars, sirens screaming, tires screeching, tearing through Washington evening traffic, and yes, at the very instant that Walter Cronkite came on the air in New York, he was put in the position not of giving the news, but of introducing the President of the United States, the only President we had, and Lyndon was there announcing that he had settled the railroad strike. He loved it, it was exhilarating. When he returned to the White House and a dismayed Lady Bird asked why he had done it, why he had risked his life tearing through traffic like that, he laughed and said, *Because I wanted to see the look on Walter Cronkite's face when I walked in the studio.*

In the beginning, simply being there was enough; he was the message, and the rest of the government was part of the stage set. Years later, when power began to slip away, and the Vietnam War was darkening everything, and critics like Bobby Kennedy began to make speeches against his policy, he tried on occasion to smother the trouble and upstage the critics by in effect moving the first rank of his Administration to the Pacific en masse for war planning conferences and consultations that dominated the news. Bill Moyers, then his press secretary, went before the National Press Club and gently mocked this tendency by answering to a planted question that he was not trying to take headlines away from Bobby, but yes, he was able to announce that he was sending Hubert Humphrey to the moon. Lyndon Johnson was not amused.

He never really came to terms with television. As he was a beneficiary of it, so he became a victim of it. He was an excessive man, and he did not know how to restrain his use of the medium; at the same time, he tended to be awkward and stiff on camera. The combination of his own style and the impact of television was deadly. In Lyndon Johnson there were many pluses and many minuses, but whatever else, he was not a man to ration himself; he wanted, as a politician and as a man, to give too much and to take too much. Where Jack Kennedy was aware of the danger of

Lyndon B. Johnson

overexposure, Johnson was almost maniacal about being on the screen; he wanted to be on all the time. When his aides, particularly the holdover aides from Kennedy, warned him that he was dealing with fire, that he had been on yesterday and the day before, he responded yes, but he wanted to be on today as well. On all three networks. And if Jack Kennedy was in a sense the first television President, or the first President made by television, then Lyndon Johnson was the first who was brought down by television, or at least in part by television. For it enhanced not only his hold on the presidency while he rode high, but ultimately the forces that came to be ranged against him. He was too volatile a man in too volatile a time using too volatile an instrument.

His farewell to politics that most people remember was his surprise announcement on March 31, 1968, that he would not seek re-election. But he uttered a much more interesting farewell the next day in Chicago, before the National Association of Broadcasters. There he very simply blamed them for his defeat, and for defeat in Vietnam. They had turned the country against him, he said. Winston Churchill was never very far from his mind, and he asked them what would have happened at Dunkirk if they had had their cameras there. They had beaten him, those cameras and all those punk kid reporters in Vietnam. They, the broadcasters, had beaten him, not Gene McCarthy and Bobby Kennedy and the kids in the streets. He was more than a little right, and he had learned the hard way that because of television, what goes up goes up quickly, but things can come down as quickly. He saw television as a gimmick and it brought out the worst in him: acting, preening, false piety. He

would try to play someone else. Kennedy. Roosevelt. Churchill. Almost anyone but Lyndon Johnson. He could not be himself. He fell prey to the worst habit a politician or a major television correspondent can form: he watched himself endlessly on the replay, and waited up for the late night shows to study himself, not liking what he saw, always looking for ways to change it. When he did a television special with three network reporters, he kept walking out, ostensibly to take phone calls, but really to check the videotape. After the show had been filmed, while he was flying to Australia, he called in corrections from Air Force One—always on grounds of national security—so many of them that CBS finally noted that the program had been edited with White House supervision.

If television was a gimmick, then he had to keep trying his own gimmicks with it. A better lighting man, a better makeup man, a better pair of glasses, a better TelePrompTer, a better television adviser. He was always unhappy with the way he came across, the big nose (what is politely called in the television trade "prominent features") forever casting unwanted shadows. Makeup men would come and makeup men would go, and the Rushmore of the features remained, casting shadows. When Johnson first became President, CBS had a young man named Mike Hunnicutt working in its Washington bureau, and one night he made Johnson up just as the President went on the air. Afterwards Johnson summoned Hunnicutt, and the young man was ushered into the Oval Office for a memorable meeting with the leader of the Free World.

"Boy, you trying to fuck me?" asked the President of the United States.

"Sir?" said the young man from CBS.

"Boy, you trying to fuck me?" Johnson repeated.

The young man looked puzzled.

"Get him out of here!" Johnson roared, and a Secret Service man rushed Hunnicutt out of the office, whereupon it was explained to him that the President had not liked the way he looked.

In 1964, still bothered by his image, he asked his friend Frank Stanton for help, and Stanton dispatched Fred Friendly to advise him. Friendly was clearly there to teach Johnson about television. The President surprised him by demanding that he join the White House staff: *Fred Friendly would become Johnson's chief intellectual, the domestic version of Mac Bundy;* the country needed Fred Friendly. Friendly, despite his own outsized ambitions, knew he was in dangerous waters. He called his old friend Ed Murrow, who warned him off: "It's the worst idea I ever heard—they'll cut your balls off in four weeks." So despite further presidential pleas—"Make up your mind, make up your mind, what are you going to do, sit around in New York at some fancy restaurant drinking old-fashioneds and making $100,000 a year, or are you going to help your country?"—Friendly remained in television. And Lyndon Johnson continued his search for someone to transform him on television. Someone who could make him less Texan, more eastern, shrink his nose, and gentle his accent. He could not hire Friendly from CBS, so he eventually hired Kintner from NBC, but his problems remained.

6. Lyndon, Meet Frank. Several Million Dollars Later...

His years saw the change in the unofficial network policy of giving the President air time. In the past the networks had asked whether the national interest was involved. Under Johnson that changed—he asked and they gave. He went to great pains to have his appearances filtered by the White House correspondents as little as possible. Where Kennedy thought of exchanges with reporters as part of the game, and knew that the process of give and take—or, more accurately, the semblance of give and take (he was taking more than he was giving)—worked to his benefit, Johnson was far more wary of journalism's sharks. In addition, Kennedy knew that the presidency did not endow him deep down inside with any qualities that he did not already possess; he was still a mortal working politician who had been given great new technological advantages. But Johnson, like Nixon after him, was less confident and secure, and he wanted the presidency to invest in him qualities that were not already there and did not necessarily belong to mortals. He was the President. He was special. He was above other human beings. He was above his fellow citizens, who were no longer citizens, but subjects; he was a democratic monarch, and he did not like that last vestige of democracy, working reporters who seemed to keep nibbling at him.

He tried to change the rules of presidential television, to expose himself to less questioning, and to use TV as much as possible as a forum for his (regal) announcements. But even under the best and most controlled of circumstances he felt miscast. The medium was theirs, not his. "I can't compete

with Walter Cronkite," he once said. "He knows television and he's a star. So when I'm with him I'm on his level and yet he knows what he's doing and so he does it better and so I lose." Press conferences, to his mind, elevated others to his level and thus lowered him to theirs.

Reporters in particular were a problem, still given to covering him as if he were a working politician instead of President of all the people. Even on CBS, his favorite network, there were reporters like Dan Rather who were a constant irritation to him. Johnson alternately cajoled, ignored, and threatened Rather. From time to time Johnson reminded Rather that he had friends at CBS, and suggested that perhaps the way to get ahead was to play ball.

Indeed he did have friends. Why, his very best friend in the world, he liked to tell young CBS reporters, was Frank Stanton, and anyone who worked for Frank Stanton could count himself lucky. Even at the very end, when he had been forced out of the presidency, he would point to a knoll on his ranch and say there, right there, was where Frank and Ruth Stanton were going to build a home.

The friendship had started in the 1940s when he was a young congressman looking for a network connection for Lady Bird's little radio station. Bill Paley sent him to see young Frank Stanton. Stanton knew what a congressman was. He decided that, by chance, just what CBS needed was a little affiliate station in Austin, right between those big stations in Dallas and San Antonio. Over the years Frank Stanton counseled the Johnsons on that station, made sure they got the best of advice, and certain benefits, such as the coaxial cable long before larger stations received it. Senior CBS executives could recall going into Stanton's office and hearing the president of CBS on the phone to a CBS affiliate in Texas saying that Senator Johnson was going to be on *Face the Nation* that Sunday, and Stanton hoped the station would carry it.

We all like a little help from our friends, and this relationship, so mutually beneficial, flowered. The station, first radio and then television, was the key to the expanding Johnson fortune. Johnson's own increasing political influence did not hurt the lobbying efforts of Stanton and CBS. Stanton was also there to help Johnson on trips to New York—theater, hotels, small help like that. And he advised him on how to deal with the elite of the eastern Establishment, big help like that. There were a variety of services. It was Stanton who sent Fred Friendly, then considered CBS's best producer, to help President Johnson with mastering the art of television performing in 1964. When Johnson had trouble with his White House desk because his legs were so long, Stanton, amateur carpenter, redid the desk legs for him. The LBJ–Stanton relationship was special: the Johnson White House was a relatively open place, and staffers on domestic affairs cut across lines easily. But not when a problem called for Dr. Stanton. Johnson might say to a staffer, "Call Frank Stanton and tell him . . ." Then he would stop in midsentence, check himself, and say, "No, I'll call Stanton myself."

Johnson appointed Stanton to serve on the USIA advisory board. As the Vietnam War heated up, Stanton was thus in a certain conflict between two roles. He was upset by CBS's coverage of opposition to Johnson's war policy. In 1966 he called up Fred Friendly, after a disaffected Senator J. William Fulbright had appeared on *Face the Nation,* to say that a rotten thing had been done to the President of the United States. That year too, Friendly arranged a lunch for Bill Paley and Walter Lippmann, which Paley had sought. It was difficult to arrange because both Paley and Lippmann were difficult to organize. Friendly expected Stanton to be a co-host for the occasion, but Stanton ate separately in the CBS dining room; he would not break bread with the dean of the Fourth Estate, who had become an outspoken critic of the President and the war.

Murray Fromson, CBS correspondent, reported that American bases in Thailand were being used as staging areas for the bombing of North Vietnam; Stanton was furious and complained to Friendly that this was a violation of embargoed information—a position neither true nor plausible, since the North Vietnamese, unlike the American people, knew precisely what was being done at the Thai bases; it was only the American people who had been kept ignorant. Friendly pointed this out to Stanton, who said yes, that's true, but it might be embarrassing to the government anyway.

And week after week, at the news executives' lunches with Paley and Stanton, Stanton would pass on what flak he had caught from Johnson that week, the litany of complaints, how angry Lyndon was about this piece of coverage, that bit of commentary. The news executives who watched this performance wondered what was behind it. Many saw that Stanton had placed himself in a somewhat twisted position: the star testifier before Congress, Statesman of Broadcasting, chief CBS lobbyist was trying to let CBS News know how much tension it was already causing (and thus, in a subtle way, suggesting that additional critical

coverage might be too much). At the same time he was trying to let them know that he, Stanton, was shielding them from the heat of the outraged, all-powerful President of the United States, his friend, CBS affiliate owner Lyndon B. Johnson. It did not sit well with the newsmen present.

7. The Gulf of Tonkin, 1964: LBJ Raises the Flag and the Networks March

Frank Stanton

The naval and air engagement in the Gulf of Tonkin in August of 1964, and its consequences, were probably the high-water mark in the rise of the unquestioned powers of the modern presidency. Indeed, the events of Tonkin raised questions which began to change the way many Americans regarded their President. At the heart of the relationship between the President and his fellow citizens was trust, and Tonkin damaged that trust. But the doubts were retrospective. No one could keep up with the President at the time. The hard questioning of the Senate Foreign Relations Committee came two years later; in the summer of 1964, it acquiesced totally, as did the rest of the country.

A CBS News documentary airing questions about the Tonkin Gulf incident came *seven* years later; in 1964 CBS, like other news organizations, endorsed the blank check LBJ wanted. Gradually the Tonkin affair came to symbolize not a model of a strong, activist presidency, but the abuse of presidential powers. At the time, the episode reflected the power of the presidency, in terms of political processes and political myth. The myth: it came after almost twenty years of Cold War, which had made the President the curator of the American national interest, the man who had all the information, to whom we gave all our trust, and who protected us from communist conspiracies. In terms of processes, the presidential reach had become longer and swifter than that of any competitor or challenger. Speed was vital to his new power: thrown into an instant international crisis, the country and the Congress had no time to inquire, no time to doubt, only time to accept. The American Air Force planes were already on their way back from the Tonkin Gulf; the President had already talked to the entire nation. He had the ability to put the Congress, and indeed the nation, in a position where they had to back him up. The President could in effect control events, or so it seemed; control the flow of information, and virtually control how the events were reported.

The television networks responded by presenting the government side, as Johnson knew they would. Even the choice of location for the incident was crucial: there was no New York *Times* or CBS correspondent in the Tonkin Gulf. There was no alternative source of information. The only film that was used was government film. The TV news showed the verities—or semiverities—of Johnson, McNamara, and Rusk. A case for caution in the Tonkin affair existed, but if the case could not be aired, then in the eye of the TV camera it did not exist. It was all a calculated exploitation of an event. Indeed, LBJ's standing in the popularity polls went up, convincing him that his "reality" was indeed reality. But there was a built-in danger. His control of the media, and the readiness of the networks to march to his tune, tempted him, and his successor as well, to reach too far. Beyond the belief that he could define issues and news was the notion that he might also define *events.*

Among those upset by what Johnson was doing with the country and with the networks was Ed Murrow. He was sick and dying, out of the government by then, out of CBS, full of misgivings, both about the Vietnam War and about Lyndon Johnson. The night the Tonkin Gulf news unfolded on the screen, Murrow did something he had never done before. He called up his onetime protégé Fred Friendly, by then the head of CBS News, and tore into him. In the past when Murrow had been angry with Friendly, he had handled him quietly, and sometimes his silence was the most eloquent form of his anger. But this time he was in

a rage. "By what God-given right did you treat it this way? What do we really know about what happened out there? Why did it happen? How could you not have Rather and the boys do some sort of special analysis?" Friendly was shocked by his anger, and felt a certain amount of it hit home, because that day he had been on the phone with the White House correspondent, Dan Rather, and Rather had said that it all seemed a bit tricky. Friendly had told Rather for God's sake not to say anything along that line on the air. Friendly was perplexed, but he simply did not know how to cover something as elusive as this, how to raise the questions. He was still, like the country, more hawk than dove, and he was apprehensive about dealing with the war. He was also in close contact with the Johnson Administration. There was some talk about coming back on the air later that night—perhaps a midnight special—but that idea was dropped.

At the same time that television was granting immense and almost unchallenged power to the President, it was granting less and less power to anyone else, particularly its own people. The role of reporter and commentator was diminishing. There was less time for serious analysis, and fewer explanations of complicated stories. As the role of the reporter diminished, the role of technology grew. Film was of the essence: a bad story with good film could beat out a good serious story without film almost any time. And film demanded action. So action there would be.

In the decade beginning with the mid-fifties television began to change, and change quite dramatically, the nature and pace of American life. It speeded the pace of social protest. Television had a great deal to do with the surge of the civil rights movement. It brought black people into white homes and white people into black homes. Television simplified events and conditions; at the same time, it was deeply dramatic. Often a news show had an effect like that of live grenades thrown into people's homes without anyone bothering to explain what had happened—and it reached a vast new national audience. If the news shows were in essence a good "page one," there was nonetheless little explanation of all these complicated dramas and changes in American life. There was what Daniel Schorr called a "greenhouse effect"—events, personalities, fads came (and went) at an accelerated rate because of television. A saturation point came more quickly too; people were bored with a subject before an issue was solved, finished, or determined. Television heightened interest in the war in Vietnam, heightened for a time the enthusiasm for it, probably hastened the demise of it, and left people exhausted and disheartened by it long before it was in fact over. That is, the war was over in people's minds while it was unfinished upon the battlefield.

Lyndon Johnson could manipulate the early escalation of the war in Vietnam and the news coverage of it. But he could not control what he had set loose in Vietnam, nor the news coverage that followed. For now, with the volatility of television, events had a power and force of their own. They could sweep past politicians, moving faster than the political system itself, past political scenarios and calculations. Fred Friendly, who was good with slogans and who had come up with the phrase "the electronic presidency," had another good phrase. He called Vietnam "Morley Safer's War."

8. "Morley Safer, CBS News": The Electronic War Short-Circuited

Morley Safer, a Canadian by birth, had worked for several years as a correspondent for the Canadian Broadcasting Company. In the summer of 1965 he had just gone to Saigon for CBS. He was thirty-five that year, and he was not, by journalistic standards (it is a young man's profession), a kid. He had covered combat and guerrilla warfare for the better part of a decade, first in the Middle East, then in Cyprus, and then again for several prolonged tours in Algeria. He was not naïve about the harshness and cruelty of political warfare, knowing that it was infinitely more personal and bitter than great global warfare. He had joined CBS in the spring of 1964, assigned to the London bureau and expecting to cover England and the Continent. But then Vietnam began to heat up and CBS asked him to go to Saigon for six months; he was, after all, experienced in covering warfare, he was new at CBS (and thus expendable), and he was single (and thus even more expendable). It was Safer's impression that he was chosen because no one really expected the war to last that long; that the idea of sending a young Canadian was attractive on the premise that no one else in the office was likely to be interested. In retrospect, what struck him most about the American military mission in Saigon when he first arrived was its innocence. The Amer-

Morley Safer

ican public information officers were helpful, little aware of the change in the nature of war and the complexity in press relations that this war would produce. They were graduates of previous wars, wars of survival, and they thought the rules were the same: our side, their side. Oh, yes, there had been dissident print reporters in the past, but there was an assumption that they were the exception, and that once the flag was truly planted, it would be the good old days again.

In August, 1965, shortly after Johnson's dispatch of American combat units to Vietnam, Safer had gone up to Da Nang, the Marine staging area. He had no precise idea why he had gone there; it was simply that he had not covered the Marines lately. In the trade Safer was known as having exceptional combat luck, two kinds of luck—the luck that wherever he went he found plenty of action, and the luck to live to narrate it. He was having coffee with some Marine officers, trying to get a feel for the area and the kind of action that was going on. A young Marine officer said he had an operation going the next day; would Safer like to go along? Safer would. So the next day they went on amphibious carriers to a place called Cam Ne, a complex of villages. On the way the young lieutenant confided to Safer that they were going to level it, really tear it up. Safer asked why, and the lieutenant said because they had been taking a lot of fire from the goddamn village, and the province chief wanted it leveled. (Years later another reporter who had studied that area told Safer that the reason Cam Ne was leveled had nothing to do with the Vietcong; rather, the Vietnamese province chief was furious that the locals had refused to pay their taxes, and he wanted the village punished; and the Americans, who were to do the punishing, were not aware of that.) The Americans walked toward the village in single file along a small tributary, everyone firing. One fact stuck in Safer's mind: it was all friendly fire, and though three Marines were wounded, all three, as often happened in this war, were wounded in the back by their own men. But this added to the American anger nonetheless, and when they finally took the village, with no hostile fire, the Marines did in fact tear the place apart, setting fire to the hutches and leveling the village. Safer, surprised by the destruction, remembered feeling how senseless it was.

Years later, he was not bothered by the impact of the story he filed; to the degree that he was worried at a professional level, it was about whether the story, explosive as it was, had been too soft, and whether he should have done a harsher story. For the facts were uglier than what he reported: the Americans were throwing grenades down into shelter holes and using flamethrowers on the deeper holes, where cowering civilians were either burned to death or asphyxiated. At one point Ha Thuc Can, a Vietnamese cameraman who worked for CBS and who was fluent in both French and English, saw a group of Americans about to fire a flame-thrower down a deep hole. The sounds of women and children could clearly be heard, and Can started arguing with the Marines, screaming at them not to do that; there were Vietnamese women and children in there, he cried. He argued with the Marines for several minutes, and since he was the only one present who spoke both Vietnamese and English (Safer asked the Marine officer why he had no one in his group who could speak Vietnamese, and the lieutenant said he didn't need anyone), Can began to talk the Vietnamese out of the hole. It took some time and risk on his part, but he finally did it, saving perhaps a dozen lives (for which heroism Arthur Sylvester, the Assistant Secretary of Defense for Public Affairs, tried to have him fired, complaining that one of the keys to this evil story was that CBS had used a *South Vietnamese* cameraman, a sure sign of alien influence).

For Safer, no innocent, this was something new: part of it was that it was Americans who were doing it. He had become accustomed to French cruelty in Algeria, but these were Americans, and like most people, including most Americans, he thought Americans were different. And part of it was the senselessness of it all, for even when the French had applied torture they had usually done it very deliberately; this seemed, in addition to everything else, haphazard, sloppy, and careless, and

therefore perhaps worse than French habits of war. He filed his story on the spot, a decision he later regretted, thinking that if he had taken more time he might have made it better and tougher.

When Safer's report came into CBS in New York there was an immediate awareness of the force and danger of it. Fred Friendly was called and awakened at home. At this point all CBS had was Safer's *radio* broadcast, which they were about to use on the *Morning News Roundup.* Friendly was groggy and not entirely enthusiastic about the prospect of the story, but he asked one question: Is Morley sure of his facts? The CBS desk man at the other end of the phone answered: "Not only is he sure of his facts but he's on the Q circuit [a kind of hold line] and they've just talked to him, and not only does he have it right—but wait until you see the film."

Friendly felt nervous and frightened. He was going to have to decide whether or not to put this film on the air, and he knew the implications. CBS had not assigned the story. CBS, God knows, did not want American boys to burn down Vietnamese hutches. And if the hutches were to be burned, most high CBS officials probably would have been pleased if Morley Safer had missed the helicopter that took him there.

Friendly called Stanton to warn him about the story, and then he called Arthur Sylvester of the Defense Department to tell him to listen to the CBS radio station in Washington. Sylvester did, denied the story, and called it inaccurate. At this point the CBS news executives decided to hire a line to Los Angeles so they could look at the film. In those days a line cost three or four thousand dollars, and they were usually reluctant to hire one, but in this case the money looked very small. Fred Friendly, now joined by associates including Walter Cronkite, sat in a small room in New York and watched on screen a film of American Marines setting fire to Vietnamese thatched huts, Americans leveling a village. They knew they had to go with it. It was not so much that they wanted to go as that *they simply could not fail to use it.* They looked and they were shocked. But once the film was in, they were the prisoners of it. The only talk was about whether Morley had gotten the context of the story right, and so they called back to Safer to be sure that they had the full explanation for why something so terrible had happened. And then they went with it. It was an eerie evening for Friendly. He stayed at his desk that night to answer the phone calls, and he noted that the evening news has an interesting effect. Response to it comes in ripples because it goes out at different times to different time zones, and so, each hour on the hour or the half-hour, a new time zone's worth of good Americans called in to scream their anger at CBS for doing something like this, portraying our boys as killers; American boys didn't do things like this. Many of the calls were obscene.

Among the obscene phone calls was one received the next day by Frank Stanton, president of CBS, member of President Johnson's Advisory Commission on the USIA, an agency whose mission is to promote the image of the United States to foreign countries. The call came from Stanton's great and good friend, the President of the United States. (Stanton, asked about the call years later, said he could not remember it, but the call and the reaction to it remained vivid in the memory of other CBS officials.)

"Frank," said the early morning caller, "are you trying to fuck me?"

"Who is this?" said the still sleepy Stanton.

"Frank, this is your President, and yesterday your boys shat on the American flag," said Lyndon Johnson. Then he administered a tongue-lashing to Stanton for letting CBS employ a communist like Safer and for being so unpatriotic as to put on enemy film like this. Johnson was sure that Safer was a communist; he sent out a search party to check his past; it was arranged that the Royal Canadian Mounted Police would check out everything about Safer. The conclusion was that he was above suspicion and law-abiding. Johnson was not happy about these findings, and he insisted that Safer was a communist. When aides said no, he was simply a Canadian, the President said, "Well, I knew he wasn't an American." He was also convinced that Safer had bribed the Marine officer in charge of the operation. "They got one of our boys," he told his staff. He immediately called through to the Joint Chiefs to launch an investigation of the officer in charge, to make sure that he had not been bribed by a communist reporter, that he had not taken money. Even after the investigation returned a report that there was no bribing, that it was just one of those things, that those tricky newspaper people had tricked a green young officer, the President of the United States believed there was a conspiracy involved. Some of his underlings in the Defense Department kept up a background noise claiming that Safer had staged the incident.

Safer's film helped legitimize pessimistic reporting for other television correspondents (and made sure that if they witnessed a comparable episode,

they filmed it). It illustrated the different dimensions of print and television journalism. A print report on a comparable story might have produced a brief flurry of reaction, but this was different. It marked the beginning of the end of a myth: that Americans were special, that American soldiers gave out chewing gum, and that American cowboys rescued women and children from the savagery of Indians. It also helped prepare the way for a different perception of the war. Now there was a greater receptivity to considering darker news about Vietnam, and to sensing that, despite all the fine words of all the public relations men that the Defense Department and the President employed, and all the fine posturings of high Administration officials on *Meet the Press*, there was something wrong going on out there. Sooner or later someone like Morley Safer was bound to stumble into something like Cam Ne, and when it happened it was electric. Overnight, one correspondent with one cameraman could have as much effect as ten or fifteen or twenty senators turned dissident.

CBS executives, talking to Stanton in the days following the incident, knew that he had it in for Safer. He would dearly have liked to dump him. For several days they thought that you could actually hear Lyndon Johnson's voice in Stanton's mouth. Then it became more subtle, reflecting Johnson's doubts as distinguished from his rage: What do we really know about Safer? How did he get with us? What's his real background? At CBS in the next couple of weeks there was an effort to get more positive stories on the air to balance the Safer report. But the Safer story had had an effect.

The problem for Frank Stanton was considerable. He was straddling dual roles: with the decline of Murrow, he had, ironically, been drawn more and more to the news department, and privately he believed it was the most important part of the giant corporation. But the other Frank Stanton was still the establishmentarian and lobbyist who worked at getting on with the big boys, knowing the inner corridors of power, and never revealing what was inside them. As the sixties passed, the conflict between the two roles became irreconcilable. It became impossible to stand for a good public service broadcasting network *and* be the closest friend of the liberal and well-intentioned President of the United States. The raw edge of power was too harsh to permit Frank Stanton the luxury of both roles. On the one hand Frank Stanton grew cold at the mention of Morley Safer's name, and he was not, to say the least, a champion of Safer's career. On the other hand, Safer himself never knew it. The other news executives at CBS protected him, and he remained in Vietnam, a respected figure among working correspondents.

A few days after the broadcast, Frank Stanton, he of the Establishment, whatever his complicated private feelings, went before a meeting of advertisers and defended the right of CBS News to cover stories as negative and as ugly as Safer's. It was, some of his colleagues thought, the making of Frank Stanton. He was a different man after it; he was more independent and had somehow cast himself more with the news department than with the presidency.

9. William Fulbright vs. Dean Rusk: The Better Late Than Never Show

The President went on television relentlessly in pursuit of his war policies, or his proxies went there for him, on the evening news shows or on the Sunday interview shows. J. William Fulbright, chairman of the Senate Foreign Relations Committee, watched his old comrade Lyndon Johnson and decided after several months that the country was being taken, that the President was waging war by means of television, using this vehicle almost unchallenged to whip up support for a war that Fulbright had come to suspect had very little basic support among the American people. Fulbright had steered the Administration's Tonkin Gulf Resolution through the Senate in August of 1964; now he was having an awakening. Later he gave a series of speeches demanding more broadcast time for the Congress and the opposition party; he had not previously noticed the degree to which the President could exploit and dominate television. You go along with him and it doesn't bother you, Fulbright thought, until you suddenly disagree with him on an issue, and then you realize your helplessness.

Senatorial helplessness was a subject upon which Bill Fulbright was increasingly becoming an expert. He could make a dissenting speech on Vietnam and he would be lucky to get a line or two in the New York *Times* or a minute on the evening news. Still, Bill Fulbright was not a man to throw himself into the breach. By nature he was an aristocrat, a man of rationality and decorum, uneasy with anything he thought might be demagogic. He

Dean Rusk (left) and J. William Fulbright

was not a man to take on a President, or to lead a crusade. He had broken with Johnson over the Dominican Republic in 1965. He was disturbed by the escalation in Vietnam, by the semicovert way Johnson had been expanding the war, and by the manner in which the President bypassed the Congress, holding consultations at the White House. There the only congressional function was to listen. It reminded Fulbright of the age of kings, with their divine right.

Fulbright searched for a way for Congress at the very least to ventilate the issues, to bring some outside reason to bear on the stealthy war policy. The occasion turned out to be annual hearings on foreign aid. It was mostly happenstance, like two armies not expecting to fight each other but stumbling onto the same battlefield. Fulbright had not really chosen to make these hearings a confrontation, and he had not expected television coverage, except perhaps for the usual banal two-minute summary ("Secretary Rusk claimed . . . Senator Fulbright charged . . ."). Indeed, when the confrontation took place, aspects of it offended his own sense of civility as much as they did that of Dean Rusk. The television lights bothered Fulbright and he wore flip-up sunglasses. But the time was right, if not late. He had particularly articulate allies now on the committee—Wayne Morse, Albert Gore, Eugene McCarthy—and his own staff had become critical of the conduct of the war.

It became clear as Rusk testified on the first day of the Foreign Aid Bill hearings that foreign aid had nothing to do with it. These would be the public hearings on the Vietnam War that should have been held two years earlier at the time of Tonkin; the congressional debate about the meaning of the Administration's policy that the nation had a right to expect. Ironically, what legitimized them in the public mind, and emboldened the timid television networks to cover them, was that the men who came to testify were by and large Administration witnesses, and the lead witness was not some antiwar critic, but Dean Rusk. What the Secretary of State said was news, and when he spoke it was all right for pencils to write and for cameras to run. It was legitimate, his title conferred legitimacy as Fulbright's did not. If the first witness had been James Gavin or George Kennan, there probably would have been no such legitimacy, no precedent for television coverage, and thus, in all likelihood, no coverage.

It was, in fact, the first time that the Administration, however involuntarily, had sent its warlords before a body of serious critics—men with titles—where the questions and doubts which the war was provoking would be raised. Like the Ervin committee hearings some seven years later, the Fulbright hearings were the beginning of a slow but effective educational process, a turning of the tide against the President's will and against his awesome propaganda machinery. It was a rare alliance of the media and another political institution against the presidency. It was the ventilation of serious opposition views (led not by the opposition party—most of the key members of the Fulbright committee were from the President's own party), and it helped legitimize dissent on the war.

10. The Better Late Than Never Show Is Abruptly Canceled, and Fred Friendly Takes a Walk

At CBS, the decisions about televising the hearings were a running struggle. There were the familiar cost factor and the familiar fear factor. CBS ran three minutes of Rusk's testimony the first day, which was long for the evening news show but not exactly extensive coverage of a historic high-noon confrontation between the Secretary of State and serious senatorial critics of a war that would come to be the most important issue of the decade. NBC had run five minutes. Fred Friendly, then president of CBS News, looking at the good Rusk–Morse, Rusk–Fulbright exchanges that CBS was not showing the American people, asked Bill Small, his Washington bureau chief, if the committee would let in cameras. Small said of

course they would, but there was no way CBS would cover live. Perhaps not so in this case, Friendly said; he was the legatee of Murrow, and he knew, whatever else, that as CBS had been judged in the past on how it covered great events, it was now going to be judged on how it covered Vietnam. The witness after Rusk was to be David Bell, the head of the AID program. Friendly called the television network executives and asked for permission to cover Bell live. The people there seemed agreeable; they had no real idea of what was coming. "Will you need a half-hour, or more?" asked one of them, John Reynolds, thinking it was easy come, easy go. Friendly said he didn't know, but that it would start at 8:30 in the morning. Reynolds was relieved; that meant they were losing only *Captain Kangaroo,* which was not worth very much advertising money. But the hearing dragged on. Bell became a proxy for Rusk who was a proxy for Johnson. On through the morning his testimony went, preempting CBS shows more lucrative than *Captain Kangaroo.* NBC stayed with it live, too, but NBC had a weaker daytime schedule than CBS, and therefore was losing less money. By the end of the day, the cost to CBS was an estimated $175,000. (As subsequent pressures mounted and CBS executives began to squeeze Friendly, he wondered, given the rocketing cost per minute of ad time in the mid-sixties, whether anyone in 1966 would have dared cover the Army–McCarthy hearings as they were aired in 1954. The cost of such coverage by 1966 standards would have been something like a half-million dollars a day, or roughly $15 million, a higher price for public service coverage than most network executives were willing to pay.) By the end of Bell's day of testimony, the CBS business executives were highly displeased. So was Frank Stanton's friend Lyndon Johnson, who announced a sudden decision to fly most of his Cabinet and personal staff to Honolulu to meet with South Vietnam's premier of the moment, Nguyen Cao Ky, and his entourage. His Administration was losing control of the media, and the President wanted it back.

When Bell was finished, Friendly pressured to cover the next witness, Lieutenant General James Gavin, a moderate critic of the war. Stanton seemed disinclined and aloof, and only reluctantly gave his permission. The next struggle was about whether to cover George Kennan, distinguished former diplomat, a principal author of the Truman Administration's containment policy, a strong critic of the Vietnam War. This time Stanton was unbending. Jack Schneider, on the business side, told Friendly that housewives didn't care about these hearings anyway. This time there was no give, and there was no televising of George Kennan over CBS.

Friendly now sensed that he had pushed and shoved too far. His superiors had grown tired of him and his arguments. Despite promises that as head of the news division he would have direct access to Paley and Stanton (crucial, because access to them meant access to broadcast time), Friendly faced a bureaucratic reorganization designed to keep the news department at a distance. There was a new filter between him and Paley–Stanton in the person of Jack Schneider, an executive who ran something called the broadcast group. Friendly had lost his access, his voice, and he was boxed in. In a few days he resigned. His superiors did not seem very surprised; indeed, they seemed more concerned with the nature of the resignation—that he not go public—than with the resignation itself. Image is always crucial. Nonetheless he went public.

NBC carried George Kennan and CBS did not, although CBS carried General Maxwell Taylor for the Administration and Dean Rusk again.

Fred Friendly—talented, volcanic, ambitious, egocentric, but a reminder of some of the best days of CBS—left the network wondering if his departure had been expedited by Lyndon Johnson through Frank Stanton.

11. And What Next? Walter Cronkite in Exile!

Walter Cronkite went to Vietnam in 1965, at the peak of his professional career. For most Americans it was hard to imagine national television without him. He was a fixture in American life, a point of solidity and comfort. Americans worried when he was ill and took comfort when he recovered. He was not controversial; it was a mark of his style and of the times passing that he could dominate television journalism for so long without becoming controversial. It was a mark of the raw, harsh decade to follow that even Walter Cronkite became controversial.

Before then, the one assault on Walter Cronkite had come from his own network superiors, and it had been deeply disturbing. The CBS *Evening News* ratings had slipped badly in 1964, and he had been made the scapegoat by CBS. He had been chosen to anchor the news in the first place

because he was comfortable rather than flashy; now it was as if CBS felt he wasn't flashy enough, or had become too stolid.

The occasion was the 1964 political convention season. NBC was riding high in the public affairs field. CBS, under network chief James Aubrey, had won an impressive lead in nighttime programming and was pulling in profits to show for it, but one price of that lead had been deliberate neglect of public affairs. (That summer Aubrey told a close friend, "The only thing that Paley and I agree on is that we're not going to blow all that fucking money on the conventions this year.") NBC's Robert Kintner, however, with less to lose at a time when NBC was number two in the ratings, was emphasizing public affairs. He believed that the key to a strong network was public affairs, that news generated excitement, that news could become the sinews of the entire organization. He had worked doggedly to build up NBC News, liked to put on instant specials, and had come up with Huntley–Brinkley. They made a finely tuned anchor team: Huntley, from Montana, Cronkitelike in his steadiness; Brinkley, the tart, slightly rebellious younger brother, who could by deft tonal inflection imply touches of irreverence and skepticism, qualities generally notable for their absence from the medium. Backing them at political convention time was a force of fine floor reporters.

In 1956 NBC had challenged CBS's news supremacy for the first time. It was the year of Huntley–Brinkley's emergence, and as the conventions had dragged on hour after hour (too much convention, too much coverage, journalistic overkill, the selection of the same two candidates who had run in 1952), they had become a fine showcase for Brinkley's dry humor. The surge in NBC's ratings scared CBS. Don Hewitt, the CBS producer, panicked and suggested to Sig Mickelson that they team Cronkite, who was then doing the anchor, with Murrow. The two big guns of CBS against the upstarts at NBC. A sure winner on paper. It was a disaster: they were the same man playing the same role. Two avunculars for the price of one. They did not play to each other or against each other as Huntley and Brinkley did. The chemistry was bad and Murrow was not a good ad-libber. This failed experiment propelled Huntley–Brinkley even higher. By 1960 the Huntley–Brinkley nightly news was number one in the ratings. Bill Paley loved to be number one; he was not happy. Kintner loved it. He ordered the NBC people to close the nightly news with a statement saying that this program had the largest audience in the world. Bill Paley was number two.

In 1964, as the national political conventions approached, NBC was keeping it up, putting major emphasis on public affairs and news coverage. CBS was trying to get through the conventions with minimal commitment. The NBC motto at the time under Kintner was "CBS Plus Thirty": however much CBS was putting on and thirty minutes more. The conventions were the payoff. NBC poured in immense amounts of logistical support and technical preparation. It was as if the two networks were out there, not covering the political story of the year, but rather defining themselves. In no way would CBS or NBC put comparable effort into trying to find out what made America work, or into covering important subsurface stories on a regular basis. Convention coverage was not so much journalism as a kind of show-biz preening, tied to ego and ratings and image.

On those scores, NBC's 1964 success was sweet. Kintner had a booth of his own with a special telephone to call his subordinates, and at one point the job of handling Kintner and his phone fell to a producer named Robert ("Shad") Northshield. The phone rang.

"Northshield," said Northshield.

"The new ratings we've got are 86," said Kintner in his gravelly voice.

"That's great," said Northshield.

Kintner hung up immediately. A second later the phone rang again. "Did you get that straight?—86," Kintner said, and hung up.

Seconds later the phone rang again.

"It seems to me that you could give me more of a reaction," Kintner said.

"Well, what do you want, 100 percent?" asked Northshield.

"Yes," said Kintner. Bang went the phone.

The difference between the NBC and the CBS coverage at the Republican convention that nominated Barry Goldwater and William Miller was not that great. NBC had a strong team; CBS had a young team, and a new, frenetic executive group under a very tense Fred Friendly. But there were not that many stories to miss. The big difference was in the ratings, and clearly, someone at CBS would have to pay. It would not be the people who had failed to support the news division—Paley and Aubrey—who would be blamed. It would be the news division and Walter Cronkite.

Cronkite had not had a good convention. There was a feeling among some of his colleagues that he had become a mike hog, a charge not without jus-

tification. It was also true that he had been a bit petulant when Friendly and Bill Leonard, who were running the show, put Eric Sevareid into *his* booth at a table next to him. Sevareid was ostensibly there to do commentary and only commentary, but to Cronkite it smacked suspiciously of an attempt to make him share the anchor, which in fact it was, and he accepted it badly. It had not helped anybody's temper that the Goldwater people had become enraged over a CBS story by Daniel Schorr linking the candidate with some right-wing Germans, a story which CBS had apologized for, and which had upset William S. Paley.

Paley now wanted drastic changes in the news team. He was not about to accept being number two. Friendly and Leonard argued that CBS had fielded a young team under Cronkite in San Francisco and there was no point in trying to change it now. Leonard and Friendly had weakened their position slightly in their talks with Paley by saying that Cronkite had talked too much during the convention. Paley immediately seized on that—Cronkite talking too much. A villain. Suddenly it was clear: Cronkite was going to be the fall guy, as far as Paley was concerned. Why was he on the air so much? Why did he talk too much? He had to go, and there would be a new anchor. Paley and Stanton (usually it was Stanton who brought the word down from the world of Olympus, but this time Paley was there as well) asked ominously what changes the news department was recommending. Friendly and Leonard said they were going to do nothing. Do you recommend, said Paley, that we get rid of Cronkite? Absolutely not, said Friendly. Paley told them to come back with specific recommendations in a few days. The corporation, it seemed, was about to meet the news department. So Friendly and Leonard met with Ernie Leiser, who was Cronkite's producer, and after much soul-searching, recommended that it was impractical to do anything about the convention team. NBC was going to dominate the upcoming Democratic convention at Atlantic City, and the best course was simply to take the lumps and plan for the future.

It was not what Paley wanted to hear. This time the suggestion was a little more like a command: Come back and bring with you the names of the correspondents that you intend to replace Walter with. They were meeting almost every day. At the next session Friendly and Leonard were still trying to hold the line, but Paley now had his own suggestion: Mudd. This terrific young correspondent, Roger Mudd. Mudd, he said, was a born anchorman, Mudd was a star. And now with Mudd, said Paley, how about Bob Trout? If Mudd was young and from television, Trout was a veteran from radio days, and a word man. Trout could indeed go on for hours with lingering descriptions of events in the old radio tradition. A Mudd–Trout anchor, that was Paley's idea. There was no talk of substance, or missed coverage, or bad reporting. It was all of image and ratings.

Robert Kintner

Friendly had coveted the job of head of CBS News, lobbied for it, and now he was caught between his ambition and his news department. What bothered friends, as he talked his dilemma out, was that at the time he seemed, or at least half seemed, to accept management's right to make non-news judgments on news questions. Friendly complained bitterly to one high-level colleague of the pressure from Paley, and added that he did not know what to do. The friend asked, Fred, is it just ratings, or is there a professional case against Cronkite? And Friendly's company-man response was the familiar one: it was their candy store; CBS belonged to Paley.

Friendly warned the Chairman that Walter would not stand for the change and might well quit; he was shocked by Paley's response—Good, I hope he does. There was one last meeting of Leonard and Friendly with Leiser, and Leiser thought he had held the line. But the next day Friendly gave in. Among CBS working reporters, Friendly's decision was not popular. Two years later, when he resigned over CBS's failure to maintain coverage of the Fulbright hearings, many colleagues thought he had chosen the wrong issue. They thought that the larger issue had been the yanking of Cronkite, that Friendly had then lost the power to protect

the rights of the newsroom, and had accepted the primacy of ratings.

Friendly and Leonard flew out to California to break the news to Cronkite, who was vacationing there. There was some talk of a Mudd–Cronkite anchor, but Cronkite, fiercely proud, wanted none of it; he did not want to share with Mudd, and he knew CBS did not want him in the booth. Cronkite was careful not to criticize the company. He held a news conference and he said yes, he thought CBS had a right to change anchormen. No, he was not going to worry about it. Nor did he agree to the suggestion of the company PR man who asked him to pose by a television set for an ad which was to say, "Even Walter Cronkite Listens to Mudd–Trout." His loyalty to CBS did not extend to fatuousness. At the Democratic convention in Atlantic City he did happen, by chance, to enter an elevator in which Bob Kintner of NBC was riding, and reporters who spotted them emerging together thereupon wrote that Cronkite was going to NBC, a rumor which helped sweeten his next contract. All in all, it could have been worse for him. He was fortified in his time of trial by a certain suspicion that a Mudd–Trout was likely to be an endangered species.

When Friendly returned from California and called Stanton to tell him that Walter Cronkite had been separated from his anchorman role (it made Friendly feel like a character in a Shakespeare play: "Yes, the deed has been done, sire"), Stanton said, "Good, the Chairman will be delighted." CBS put on Mudd–Trout, who were a failure. NBC routed CBS even more dramatically in Atlantic City than they had in San Francisco.

Friendly worked hard to keep Cronkite from quitting outright and to persuade him to stay with the *Evening News*. He did, and that fall CBS put together strong election coverage. CBS was far ahead of NBC in the ratings throughout election eve. Cronkite was immediately rehabilitated. The Huntley–Brinkley format had slipped a bit. It had been top for eight years, a long time by television standards.

There was a footnote to CBS's treatment of Walter Cronkite in 1964. The Cronkite who came back after his public humiliation was a proud man, and as the next few years passed and he became ever more dominant over his competition, the pride intensified and occasionally flashed. During the 1968 Democratic convention, the delegates were voting on the platform's peace plank. And suddenly, as sometimes happens at conventions, Cronkite and everyone else started using a single word to refer to a situation: the word this year was "erosion," which replaced "slippage," the previous convention's word. "Erosion" referred to the loss of votes for a leading candidate or position. Cronkite had just mentioned that there was an erosion of two votes in the Alabama delegation. He was broadcasting live from the booth, and suddenly a scribbled note was passed to him: "Tell Walter not to use the word 'erosion.' " Cronkite, without missing a beat in his commentary, scribbled his own note: "Who says?" Back came another note: "Stanton." Suddenly it was as if fire were coming out of Cronkite's nostrils, and even as he continued the delegate count, he scribbled one more note: "I quit." Someone scribbled a note to pass to the brass, saying: "Walter quits." This was passed on back, and even as it was being passed back, Cronkite was standing up and taking off his headset and reaching for his jacket. It was an electric moment. Suddenly someone was yelling: "For God's sake, tell him to get back down there, don't let him leave! They're not trying to censor him. They just don't like the word 'erosion.' " So he sat down and continued his broadcasting. They might mess with him once, but no one messed with Walter Cronkite a second time.

12. Cronkite Goes to Vietnam, 1965: If This Isn't World War II, What Is It?

When Walter Cronkite decided to go to Vietnam in the summer of 1965, he had successfully resisted an ill-advised attempt by his own company to displace him, and he was the senior journalist of the most important broadcast news medium in the world.

In those days Vietnam was a consensus war, and Cronkite was television's consensus newscaster. But in Saigon on that trip, his best qualities seemed to haunt him. He symbolized an American tradition of good faith and trust—and these characteristics were about to become casualties in Vietnam. He was inclined to take without question the word of men who had titles and positions. Often these were from World War II, men who had been his peers then and who were his peers now. It was a generational situation: he shared not just their perceptions but their seniority. They were four-star, he was four-star. They had to know what they were doing because he knew what he was doing. It was a danger of the journalist as superstar: instant ac-

Robert Trout (left) and Roger Mudd

cess to the top of the ladder before doing hard grounding in the field, finding out the difference between what was going on out there and what the top brass said was going on, and *why* there was such a difference.

When he went to Vietnam in 1965, Cronkite was not an objective man but a centrist man, and there is a difference. In his own mind he was objective, a middle-of-the-road containment man. The government's position, which he accepted, was not necessarily objective or legitimate, but it represented the center. He did not doubt the corruption and weakness of the South Vietnamese government, and he did not expect to see democracy flower in the Mekong Delta, but he had been conditioned to the rhetoric of a generation—indeed, he had helped push some of that rhetoric in long CBS documentaries on American air power, and in coverage of those great American space shots. He did not feel at ease with the people who were attacking the conventional wisdom, and when he arrived in Saigon in 1965, he did not like the cynicism and brashness of the younger correspondents. (From time to time he remembered, not entirely with pleasure, his own brashness during World War II.) Morley Safer, who was then CBS Saigon bureau chief, tried to put Cronkite in contact with younger officers, men who were in touch with the day-to-day reality of the war, but it was an uphill struggle. The Air Force, on which Cronkite had done those sympathetic documentaries in the 1950s, reached out to him and showed him all its finest toys and newest weapons, and he simply could not go against the past. He knew almost intuitively how hard to look, and how hard not to look. It was important that in his own mind he was not violating his objectivity by accepting unquestioningly the government position. Rather, at the time of the 1968 Tet offensive, he challenged the government position, and he was aware then of a departure from objectivity.

He was also, whatever his own sympathies, the man who, as managing editor of the CBS *Evening News,* ultimately passed on the reporting of the younger, critical reporters from Vietnam. And while the nightly CBS report from Saigon had faults—lack of air time, lack of cumulative meaningful texture, an emphasis on blood and bang-bang in film—it nonetheless stood out. Some of the American military people called CBS the Communist Broadcasting Station. But by journalistic consensus, the two best television reporters of the war were CBS's Safer and his younger colleague, Jack Laurence.

13. Consensus Newsman Turns Against the War

What television did slowly but surely with this particular war was to magnify its faults and brutalities, and to show, as the Safer film from Cam Ne proved, that you could not separate civilian from combatant. That was part of it. The other part was the way television had speeded the pace of life in America. Everything had to work faster—even war—and as bench mark after bench mark of victory predicted by the architects passed without victory, the war seemed to drag on. Everything now, because of television, was part theater, and the Vietnam War was becoming a drama with an unhappy ending which had played too long. Slowly the consensus began to change, and as it did television began to change, too, becoming more doubting, more mistrusting. And so Walter Cronkite, the man of consensus, changed as the nation changed. Walter Cronkite was always acutely aware of his audience and its moods; he was very good at leading and being led at the same time, at once a good reporter and a good politician.

At the time of the Tet offensive, early in 1968, Lyndon Johnson and his war policy were extremely vulnerable. Cronkite returned to Vietnam to do his own special broadcast; he was in effect covering a very different war. He was uneasy; he knew that he was stepping out of his natural role. He had carefully avoided revealing his real opin-

Cronkite today

ions and feelings on the *Evening News,* and there was no doubt that even people who agreed with what he was about to do would have a new kind of suspicion about him—Walter was somehow not quite so straight anymore, not so predictable. He was very good at anticipating the reaction; he knew that Huntley–Brinkley, particularly because of Brinkley, were already perceived as being more editorial than he was, and that serious implications rode on that perception. He talked it over with the various producers at CBS and with Dick Salant, head of CBS News, and they agreed that whatever misgivings they had, their shared sense was that if you were the signature figure of a serious news organization, your obligation was to cover a major story at a time when it was confusing and dividing the nation.

With that encouragement, but not without a good deal of reservation, Cronkite went to Saigon at the time of the Tet offensive. It was an Orwellian trip, for Orwell had written of a Ministry of Truth in charge of Lying and a Ministry of Peace in charge of War, and here was Cronkite flying to Saigon where the American military command was surrounded by failure and trying to sell it as victory. He and his producer, Ernie Leiser, traveled together, and they had trouble landing in the country. All the airports were closed. They finally reached Saigon, a city at war. Cronkite wanted the requisite briefing with General William Westmoreland, and that was truly Orwellian: pressed fatigues, eyes burning fiercely, the voice saying that little had happened, almost surprised that Walter was there, though of course it was fortunate that he had come, since Tet was such a great victory. Exactly what the Americans wanted.

Then Cronkite headed north with Leiser and Jeff Gralnick, his favorite young producer, who had just come to Saigon as a correspondent. They tried to get into the Khe Sanh, which was undergoing very heavy fighting, but no one would write the insurance policy; it was too dangerous. So he went instead to Hue. Just the day before, Westy had said that the battle was over. But it was clear that no one had bothered to tell the North Vietnamese; and the Marines were fighting desperately to retake Hue. The younger CBS men were impressed by the sight of Cronkite striding right into the center of the street fighting: The old war horse, they thought, takes all the risks. But it was a crucial moment for him, because for the first time he saw the credibility gap, face front.

He was shocked, not so much by the ferocity of fighting, but because to his mind the men in charge of the war were not to be trusted. Even his way of leaving Hue was suggestive. There were exceptional precautions, extra weapons aboard (having had the U.S. Embassy in Saigon overrun on the evening news was bad enough, but if the American mission lost the best-known newscaster of the day in a city which it had allegedly just pacified . . .), and the plane was carrying, along with the famous commentator, twelve dead GIs in body bags.

They stopped at Phu Bai on the way back to Saigon, and Cronkite met with his old friend General Creighton Abrams. Abrams was then the deputy commander, scheduled to replace Westmoreland eventually. He was candid with Cronkite about the dimension of the catastrophe, the degree to which the command had been taken by surprise, and the impact of it. Here was the number two man in the American command—close to, but free of responsibility for, the debacle—confirming Cronkite's own doubts and sounding like one of the much maligned American journalists in Saigon, and explaining how and why the mission had been so blind. From there Cronkite returned to Saigon to meet with his CBS colleagues. He was, thought those who worked with him, very different on this trip, introspective and disturbed, searching for answers. Usually Cronkite prided himself on his objectivity, on his detachment and his lack of involvement. An event was an event and nothing more.

The last night he had dinner with a group of correspondents on the roof of the Caravelle Hotel, and he kept asking, again and again, How could it have happened? How could it have happened? Peter Kalischer, the senior and most knowledgeable of the correspondents, spoke strongly: It has been

happening for years, there were lies from the start, we had been building on a false base, we were essentially intruders in Vietnamese lives. Later Cronkite went up to the roof of the Caravelle with Jack Laurence, the youngest and probably the most anguished of the CBS reporters. He was twenty-six when he arrived; his reporting had been distinguished by a human dimension, and he seemed to catch the feel of the young American GIs better than other television correspondents did. Cronkite and Laurence stood on the roof and watched the artillery in nearby Cholon, and Laurence felt a certain resentment. He didn't like the breed of older correspondent who observed the war from the Caravelle roof, armchair generals who watched the shells and did not know or care where they landed. He and his contemporaries preferred on their days off to sit in their rooms and get stoned on pot. He did not know if this was less or more moral, but it allowed him on occasion to forget the war and the bodies.

Cronkite, who was trying to measure the distance on some of the artillery rounds, must have sensed this resentment, because he talked to Laurence, not so much as a senior correspondent to a junior one, but almost as a father to a son. He said he was grateful to Laurence and the other reporters who had risked so much day after day for the news show, and he understood how frustrated a younger man could become with the bureaucracy of journalism and what seemed like the insensitivity of editors. He had undergone similar frustrations in World War II, the difficulty of communicating with older men thousands of miles away who were not witnessing what he was witnessing. Laurence was touched, and felt that Cronkite had been changed by what he had seen.

Cronkite did a half-hour news special, which he insisted on writing himself—which was by itself unusual. This was the period when the Johnson Administration was seriously considering a commitment to Vietnam of 200,000 more troops. He said that the war didn't work, that more troops would not turn it around, and that we had to start thinking of getting out. These were alien and hard words for him, but he did not feel he could do otherwise. He was ready for it and the country was ready for it; he moved in part because the consensus was moving, helping to shift the grain by his very act. Other forces were at work: Eugene McCarthy and Robert Kennedy challenging Johnson out front; Defense Secretary Clark Clifford leading a reassessment from within the Administration. But Cronkite's reporting did help change the balance. It was the first time in American history that a war had been declared over by a commentator. In Washington Lyndon Johnson watched and told his press secretary, George Christian, that it was a turning point; that if he had lost Walter Cronkite he had lost Mr. Average Citizen. It solidified his decision not to run for re-election. He had lost his consensus. Cronkite, hearing of what Johnson said, tried on future occasions to bring the subject up when he was with Johnson; but Johnson knew the game, and, when the question was raised, took off on long tirades against the press in general and the press' sinister betrayal of the national interest in particular.

14. The Dick Nixon Show: The Message Is That the Medium Stinks

The Nixon Administration was even more preoccupied with television than its predecessors. Richard Nixon himself was obsessed by television, perhaps because he scored an early coup (the Checkers speech) on it, and was later a victim of it (the debates with Kennedy); perhaps because he sensed that if he controlled it he could make it show the Nixon he wanted to be and not the Nixon he was. In the Nixon years, television was not just a means but an end. Those who opposed him on it became his real opposition. He struggled to control his exposure. Unsure of who he was, Nixon was obsessed by exterior definitions of himself. His was a television White House; it was dominated by Bob Haldeman and his people. Haldeman came from the world of the manipulative arts, not from the world of politics. Haldeman paid close attention to television. He knew after which prime-time shows it was advantageous to schedule a presidential broadcast, and which ones never to break in on. In 1968 Haldeman devised the campaign tactic of scheduling only *one* appearance a day that could be filmed, on the theory that if the network producers had a choice of film for two or more Nixon campaign appearances, they would always pick the least flattering one. Therefore, schedule Nixon tightly, control the environment, and give the networks the film *you* want, not what they want. It was Haldeman, too, who, during the chaos of the 1968 Democratic convention in Chicago (kids, cops, pols, blood, all in the street, and all on television), made

sure that Nixon was on a boat and out of reach of a camera so that there could be no connection, not even subliminal, in the public mind between Nixon and that kind of politics. Once they were in the White House, more time and energy of more key White House people was spent deciding when and how to get the President on television—and how to keep potential adversaries off—than in dealing with the Congress or the Democratic opposition.

By comparison with Nixon and his aides, previous Presidents had pressured the networks with kid gloves. Now there was an orchestrated assault upon the integrity of the network news divisions, an attempt to put them on the defensive and to reduce public respect for them.

CBS News was the strongest of the three networks, and the theory was that if CBS was bent, the other two would follow. Early in the conflict between the Nixon Administration and the media, Walter Cronkite called it a conspiracy. At the time, Joe Wershba, an old Murrow hand, had congratulated Cronkite on his response to Agnew, but said that he was bothered by the word "conspiracy"; wasn't that too harsh a word? A few years later, as more evidence began to come out from Watergate, including a memo on NBC by Larry Higby of Haldeman's staff which said that the aim was to destroy the institution, Wershba apologized to Cronkite.

Nixon dispatched Vice President Spiro Agnew to attack the press in general and the networks in particular ten days after he announced his policy of Peace with Honor. He intended to sell his policy with as little negative or pessimistic analysis as possible. Americans would think they were getting both peace and honor in Vietnam, even if neither was in fact, under the conditions set by Nixon, attainable. But the selling of the policy was more important than the policy. He had, in singling out the networks and unleashing Agnew upon them, picked up the scent of the networks' vulnerability. For a decade they had been, if not the cause, at least the bearers, of bad and jarring news: racial conflict, a terrible war, and protest against a terrible war. Kill the messenger.

To many Americans, the old verities about America still lived: America was good, and the less said about the bad, the better. The Nixon–Agnew onslaught against the media was more successful than most television executives like to admit. Nixon drew blood, and people in television were newly sensitive to the issues raised. Yes, the networks would carry bad and unsettling news when it was warranted, but there was a subtle drop-off in their aggressiveness in seeking it out, and a new defensiveness about their reporting. At CBS in the early 1970s, for example, Charles Kuralt's reports on roving around America became easier to include in the news show. Kuralt had been doing his charming bits of Americana for some time; now there was an intensified effort to find Kuraltlike human interest stories—good stories, but stories that did not jar people's nerves. There was even a word for them at CBS—"HI," Human Interest—and the word was, *get more HI.* At the height of the Nixon–Agnew pressure, Bill Paley decided to drop instant analysis after presidential speeches. Later it was reinstated. CBS did not back down on really important issues under the attack (or remove Dan Rather from the White House beat, which was a prime Nixon priority). But it made sure that with the bad news, the abrasive or critical reporting, there was a certain amount of sugar coating. TV correspondents as good guys. If not lovable, at least likable.

The Nixon Administration's war on the networks had a second front. That was a subtle but deliberate attempt by the Administration to turn the outlying affiliate stations against the network news divisions in New York. The Nixon men saw their strongest, most centralized rival for power and political opposition in network television. They set out to do something that Kennedy and Johnson had never tried—to decentralize the networks, provoke regional pressure from the affiliates on home-office news questions. They had discovered that the affiliates were the soft underbelly of the networks. The affiliate station owners tended to be Republicans, but there was more than party politics to this effort. There were social and cultural aspects of it: the local station owners were businessmen; they were closer to the local chamber of commerce outlook than to any notion of a journalistic tradition; and they were not from New York. They did not like the contemporary counterculture in its various manifestations, especially not when the networks covered it and, by covering it, encouraged it. In any showdown between the traditionalist values, or the allegedly traditionalist values, of the Nixon Administration and those of the CBS newsroom, the affiliate owners were by inclination and instinct on the side of the Administration.

In 1970, CBS planned to put on a small, frail show called *The Loyal Opposition,* designed to compete with presidential use of television—four half-hour shows in an election year. The Nixon people roused the affiliates against it; they brought so much pressure that the show was canceled abruptly after only one viewing. Herb Klein, the nice guy of the Nixon Administration press operation, quietly worked the

boondocks, taking the "good cop" approach. He was not, like Agnew, looking for headlines, but rather stirring up the natives against network news, encouraging the affiliate owners to protest the kind of coverage that alien forces in New York were subverting them with—the impudence of Dan Schorr and Dan Rather, the lack of patriotism in the Saigon bureau. (Dick Salant, head of CBS News, spent two days arguing a committee of affiliate representatives out of the idea that they should visit the Saigon bureau, shape it up, and express their displeasure with its reporting. The suggestion originated in the White House.)

There was no doubt that the Nixon Administration found a receptive response among affiliate owners: the things that Nixon disliked, *they* disliked. They began to put a constant pressure on the news show, particularly against Dan Schorr, and most of all against Dan Rather. The Administration hit a sensitive nerve. The affiliates had a powerful lever against the less than mighty news department: the power not to take CBS programs. Indeed, right after the 1974 tangle between Rather and Nixon at the Houston meeting of the National Association of Broadcasters, CBS officials went to their affiliates' meeting and had to defuse a major recall move against Rather.

In 1972, Richard Nixon campaigned for the presidency by being President, as incumbents usually do. He had learned the lessons of the 1970 off-year election when he made a number of hard-sell campaign appearances as if he were running for sheriff. His ultimate 1972 campaign weapon was his trip to China. Whatever history was made, he played it as political theater, hour on hour of picture postcards of China, Nixon with Mao and Chou and a cast of 800 million exotic extras. Campaigning. The networks had bitten all the way for that one, covering it exactly as Nixon had planned, perhaps a little more so. Senior network news executives smuggled themselves on planes as sound technicians. One Nixon aide thought it was as if there were two Republican conventions that year, the first in China, the second in Miami.

Even so, the Nixon people took few chances with the second, and real, Republican convention. They studied how the networks had covered previous national conventions, and they broke the code and wrote their own scenario. They knew when the networks took breaks, and how long the breaks lasted, so that if there was something they wanted to slip by quietly, they were ready to use the network commercial breaks as a cover. They had the convention timed to the second. They doled out a roster of young attractive Republican comers and stars to the networks as the convention wound on. All of it went according to script, according to schedule—balloons to be let off at exactly the right moment. Then someone got hold of the schedule, but even that didn't really cause any bother. All of it was perhaps boring, but better boredom than the chaos of earlier conventions. Control was of the essence.

15. CBS Covers Watergate... Reluctantly

At one point during the 1972 campaign, Gordon Manning at CBS News suggested to Walter Cronkite that he call the President personally to see if he could set up some kind of exchange or interview: Cronkite Meets the President, Nixon Faces Walter. "And," said Manning, "don't take Ziegler on the phone. Go directly to The Man." So Cronkite called the White House and twice Ziegler called back, but Cronkite refused to take the calls. Finally Nixon himself came on the phone, and Cronkite said, "You know, there are all these issues, and you yourself have said that the choice has never been so clear, and I wonder if you could come on the show so we could talk about the differences." The implicit understanding was that McGovern would get an equal shot. Nixon's immediate reaction (both Manning and Cronkite were impressed by how acutely he was attuned to the media, and knew how to deflect something he didn't want to do) was, "I'd love to, but what will I tell Howard Smith and Jack Chancellor?"

But there was that fall, always in the background, hovering like a dark shadow, Watergate: the issue that would not go away. A third-rate burglary, the Administration said. It was dismissed, put aside, ignored, overlooked, but it would not go away. That was partly because reporters Bob Woodward and Carl Bernstein of the Washington *Post* kept finding connections between the Watergate burglary and successively higher levels of the Administration. It was also because among aficionados of American politics there was a sense that Richard Nixon was a man who trusted no one in politics and who accordingly ran his own campaigns, handled all details himself. But it was a story that was extremely difficult to get a handle on. Watergate exposed a great deal about politics and the presidency; it also exposed the weaknesses of the news

media: the news media, and television particularly, were reactive, they did not initiate things. They liked things to happen right smack out there in front—a debate in the Congress, a courtroom trial—so that they could describe them. Less risk. Less initiative. They did not like to investigate, and in particular they did not like the idea of pursuing a journalistic investigation of someone as powerful as the President of the United States.

CBS was not alone in this. NBC, which also had a strong news staff, was ambivalent about Watergate, unsure of how hard to ride it, and wary that it might blow up in everyone's face. NBC's Washington reporters complained about troubles they had with their superiors in New York, and a lack of enthusiasm for Watergate stories. In the spring of 1973, Carl Stern of NBC, a lawyer as well as a first-rank reporter, learned that E. Howard Hunt, one of the Watergate plotters, was blackmailing the White House and threatening to tell all. It was an important story; Stern immediately went on NBC radio with it. (Radio now is virtually unedited; a reporter calls the radio desk, tells what he has, and gives a rough estimate of time to be saved: none of the corporate filters that reach into television these days inhibit radio.) The story went out quickly over NBC radio, and it turned out to be the most important news story that day. Stern thereupon called the television news desk and explained what he had for the *Nightly News* broadcast, and that he had already used it on radio. But the executives of the *Nightly News* wanted no part of Hunt's blackmail; NBC television was afraid to broadcast what NBC radio was doing.

Watergate was a bottled-up story, covert instead of overt. It was a very easy story not to see, not to cover, and not to film. During the campaign, when Woodward and Bernstein were writing some of their most important stories—the middle of September to Election Day—NBC devoted a total of only 41 minutes and 21 seconds to covering Watergate, and ABC gave it 42 minutes and 26 seconds. Even that coverage was more often than not perfunctory. The Democrats and Larry O'Brien Charged; the Republicans Answered. Of the three networks, only one covered Watergate with any enterprise or effort, and that was CBS.

The decision at CBS to do two major Watergate reports in the fall of 1972 began with a decision to do a long study on the wheat deal. From the start, the Soviet wheat deal had offended Walter Cronkite's old-fashioned values. He told his associates late in the summer that there was something wrong with the wheat deal, and that this was going to be the Teapot Dome of the Nixon Administration. Cronkite's strength on the *Evening News* is that he wears two hats, that of anchorman and that of managing editor, and he can, within the limits and as long as he doesn't push too hard too often, get what he wants on the show. In this case he wanted the wheat deal. It was not a story which television could do easily. There were few opportunities for film, and CBS, like the other networks, lacked the inclination to do serious investigative reporting. Television liked what was on the surface, and was made uneasy by what was beneath the surface.

Cronkite assigned Stanhope Gould, a talented young CBS producer. His graphics and his illustration of the story were exceptional. The wheat story in fact was infinitely complicated. Even in the best newspapers it was the kind of story that sent puzzled readers back to reread the preceding paragraphs before it all came together. For television it posed comparable problems, but the CBS team was able to put it all together. The strength of the report was that it broke out of the language of networkese—that short, hard, semi-wire-service exposition—and tried to do something intricate in a short time by nuance and implication. The normal television way would have been to show lots of film of wheat fields, the wind rippling through them, as background for a few bland narrative sentences. But this time CBS concentrated on explaining about exports and commodities and apparent conflicts of interest, returning to Cronkite to explain the story once, twice, and then three times. At one point Cronkite came out of his chair to point to some graphics, and the audience had to know it was important. *Walter would not have come out of his chair for just anything.* It was a triumph for CBS News, a reversal of the normal order whereby print leads and television follows.

The CBS executives and Cronkite were encouraged to take a try at some Watergate special reports. In the summer of 1972, the word to members of the Washington bureau who had wanted to go all out on Watergate had been no, it was not a television story, they would wait on events. Now, suddenly, with the election approaching, CBS tried to parachute into Watergate. Gordon Manning of CBS had worked in years past at *Newsweek* with Ben Bradlee, now the Washington *Post*'s editor. Manning (as Agnew might have suspected) called Bradlee to ask for the *Post*'s help on the story: to turn over sources, or, even better, its documents. Bradlee had answered in a way that would have surprised Agnew: Manning could bleep off, there would be no help, there would be no documents, indeed, there *were* no documents. And when Stan

Gould of CBS went by to see Bradlee, he came away with the very strong impression that Ben Bradlee, very much like Agnew, did not like network newsmen. In fact, Bradlee knew that he and his two *Wunderkind* reporters were skating on thin ice, and he was supersensitive to the charge of collusion and conspiracy. So the CBS team came down from New York, and, though reporters like Schorr and Rather were energetic, the story was derivative, putting together what had been in the *Post*, and crediting other sources, mostly the *Post*'s. It was a very difficult journalistic decision to make: it was all there, and yet very little was there. Gould was telling his superiors that it was an important story, and that though they did not have sources of their own to confirm it, it all smelled very bad. The Washington *Post* and *Time* and the Los Angeles *Times* were pushing it hard, and the White House denials were very odd, very carefully phrased. But if CBS went with it, like it or not, they were going to be in bed with the *Post*. That is not unusual—it is accepted journalistic practice for the networks to run stories that have appeared only in the *Times* or some other publication, giving the proper credit—but this would be dicier. In effect, the decision was to do the Washington *Post* story or do nothing.

They decided to go. Part one was the espionage itself, the break-ins plus Segretti and the spying operation. It ran slightly more than fourteen minutes. Fourteen minutes was the real breakthrough, more, even, than the content. An entire news show, less commercials and pauses, consumes only twenty-two minutes. The effect is that all news items are equal, and equality is enforced by brevity—everything runs two minutes or less. Three minutes for the apocalypse. Four minutes if it's an American apocalypse. Now here were *fourteen* of twenty-two precious minutes going to Watergate. It was as if the *Times* had played only one story in an entire daily edition. It was very strong reporting.

When he screened the show in New York, Cronkite was immediately enthusiastic, although not everyone else was pleased. Sandy Socolow, the producer of the show, was furious at Gould: first, because of the length (Gould had pulled off a Walter-Mitty-like triumph against the New York producer system; he had usurped virtually the entire news show); second, for being so late. It came in on Friday, ten days before the election. Gould, Socolow realized, had presented him with a virtual fait accompli.

Richard Nixon (left) and Dan Rather

There was another unhappy CBS executive: Dick Salant, president of CBS News, who had attained his job not because he was a creative, original newsman, but because he was a lawyer and a corporate figure. He was expert in the *implications* of news—what it might mean legally and politically. He stood between the forces coming down from the executive levels of Black Rock (the new 36-story CBS building) and the forces pushing up from the newsroom. Salant, during the Nixon years, had come through to the newsroom as a man of considerable integrity. He had understood what was important about CBS News, and shepherded it through a difficult time; he loved the news business, for which he was not trained, and despised the law, for which he was. As he had gotten closer to retirement he had seemed to those around him an increasingly liberated man. When John Ehrlichman demanded the head of Dan Rather—that Rather be transferred away from his White House assignment—Salant not only laughed Ehrlichman off, but deliberately leaked the information to print reporters as a means of securing Rather's job and zinging the Nixon White House. But now, reading Gould's script, Salant was clearly upset: "—do we really have to go with this? . . . isn't this quite long? . . ." He could sense the problems ahead, and that they would not be pleasant ones. But Gordon Manning was ready to go, and Socolow, still privately irritated with Gould, was backing his man (it was now news against corporate pressure). Besides, they had the most important of all CBS News forces going for them, Walter Cronkite. Fourteen minutes it was, and fourteen minutes it would be. There would be a part two, to be scheduled.

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16. Chuck Colson Finds the Chairman's Number

The show was aired on Friday night, October 27, 1972. It had television's impact and authority. Though CBS was extremely careful to credit the Washington *Post* as a source, and equally careful to carry White House denials, there was no doubt about the special force of the report: this much time on a national news show, Walter Cronkite's stamp of approval on it—if that's what Walter said, that's the way it was:

> CRONKITE: At first it was called the Watergate caper—five men apparently caught in the act of burglarizing and bugging Democratic headquarters in Washington. But the episode grew steadily more sinister—no longer a caper, but the Watergate affair escalating finally into charges of a high-level campaign of political sabotage and espionage apparently unparalleled in American history. Most of what is known of the Watergate affair has emerged in puzzling bits and pieces, through digging by the nation's press and television newsmen. Some of the material made public so far is factual, without dispute—those men caught in the act at Watergate, for instance. Some is still allegation, uncovered by the press but as yet legally unsubstantiated. We shall label our sources carefully as we go along. But with the facts and the allegations, we shall try tonight to pull together the threads of this amazing story, quite unlike any in our modern American history . . .

Among those who watched the show that Friday night was Charles Colson, the White House's chief television monitor, generally felt to be the cobra of the operation. He was deputized by Nixon to deal with the networks, the bad cop to Herb Klein's good cop. Colson was a man, in those days before he found Jesus, full of swagger and a touch of the bully; he was often described in newspapers as being a tough ex-Marine. Colson's reports back to the White House starred Chuck Colson: Colson telling off people, network executives cringing as Colson laid down the law. Nixon delighted in all this. It was nice work if you could get it, for Nixon was obsessed by what the networks were doing, and there was no way Colson could lose. If he described network officials showing great timidity as he handed down the line, Nixon loved it. And if he reported flashes of network courage, vague life signs, then there was all the more need for a Colson at the White House. Heads he wins, tails you lose.

Chuck Colson watched that Friday night, and he was quick to the phone. The Nixon White House was not going to stand for reporting like this. He had visited the network officials earlier that year. Frank Stanton, who had grown accustomed to dealing with the big boys himself, encouraged calls from Colson; if there was something wrong with CBS News, just call Dr. Stanton, and they would talk. Stanton's position, oft expressed to the newsroom, was that he was simply protecting its interest, taking the heat. But some CBS newsmen were not so sure that this was his sole intention. They wondered whether this was a wise way to deal with people in power, particularly the Nixon people; they would have preferred that protests about their reporting come directly to them. Stanton's way of operating meant that the news division never knew what the White House was saying and doing, or whether the CBS corporate structure was bending and trading off. There was irony here: in the last few years of his tenure at CBS, Frank Stanton was regarded as being, willy-nilly, the inheritor of the Murrow-era credo; CBS news people regarded him, variously, as being shrewd, intelligent, protective, and devious, and they were uneasy about the dualities of his role.

As it happened, Colson, seeing the long CBS Watergate report, made his first call to Stanton, who was out. Mrs. Stanton was on a long-distance call to a friend. The White House operator cut in to announce that the White House was calling, and would Mrs. Stanton get off the phone. She did, with a feeling that there were crude people in power these days. She tried to reach her husband and missed him a couple of times; by the time she got him, it was too late. Colson had already gone to Bill Paley, who had *also* encouraged White House calls. When Stanton realized that Colson had called Paley, he became a little nervous. He had a sense of what was in store, and that Paley was not ready for it; that he, Stanton, had shielded Paley too long, and that Paley might be particularly vulnerable to such calls. It was just before the 1972 election; Nixon seemed a sure winner, and a landslide winner to boot. Charles Colson found in William S. Paley a very willing listener.

Colson told Paley, in language they taught in the Marine Corps, that this was the most irresponsible journalism he had ever seen, that it was pure McGovern work. The CBS people, he said, were pretending to be journalists but were in effect working for George McGovern. He said it was much too long, that it was too close to the election, that it was all old stuff, and old stuff which had been lies to start with; CBS was just using Wash-

Richard S. Salant

ington *Post* stuff, and CBS would live to regret it.

Shortly thereafter, William S. Paley summoned Richard S. Salant. By Saturday Paley had made almost exactly the same charges to Salant, with one exception. He did not say where they came from, and he did not mention the White House or Colson. In the gossipy world of television news, the word got around that the White House had complained, that Paley was furious, that he had ripped Salant apart, and that part two of the Watergate show was in jeopardy. The next Monday morning Paley and Salant went back and forth again and again. They had had sessions like that before, but never so long. The position of each had a certain fragility. Paley liked to have it both ways with the news department. He liked to keep it reasonably contained and minimize how obstreperous it was, yet he liked to be able to say to outsiders that he never told the news department what to do, and that he left it to its own devices. Salant, in turn, was not Paley's man. Salant had come first from the law firm which handled the CBS account. In the complicated corporate structure of CBS, he was Frank Stanton's man, and he admired and esteemed Stanton, which meant that he did not necessarily like or esteem Paley, since he picked up some of Stanton's prejudices and attitudes, and Stanton and Paley had fallen out over the question of Stanton's succeeding Paley as CBS's chief operating officer.

Stanton was not at these sessions, which was odd, although at the meetings Paley again and again associated Stanton with his position. Stanton never talked with Salant in those days, didn't tip off his own feelings about the first show, nor let Salant know the crucial missing ingredient: that all these meetings with Paley had been precipitated by one call from the White House. This of course placed Salant in an ambivalent position—he was dealing with his own organization, which was reacting to pressure, but he did not know that there was pressure, or what its nature was. He could not tell whether these remarkable long sessions with Paley reflected Paley's genuine feelings, or whether Paley was responding to someone else. He was at the center of it, but he was in the dark.

Salant, good lawyer that he was, ordered a list of the *other* long news segments CBS had run on the *Evening News,* to prove that this report was not unique. He was buttressed there. But at base he was puzzled by Paley's insistence and firmness: this was unlike the Chairman; the attention span and the effort that he was putting into these two shows were different from any other confrontation they had ever had. Gradually, as Paley began to ask more and more about the second segment, Salant found the key. Paley had almost certainly made a promise to somebody that there would be no part two, and he was trying in as genteel a way as he could manage to order the news department not to run it, without actually giving the order. That was what all this confusing bullying and repetition in their long sessions was about.

Those who were working with Salant at the time thought that he had left Paley's office on Monday morning visibly shaken. This was just before the screening of part two. It was one of those moments when everyone in the room was aware that he was no longer just a newsman, that outside considerations were playing a role, and that the corporate presence was breathing heavily. The decisions were no longer entirely those of the news division. The second report was scheduled for the same length as the first one, about fourteen minutes. It wound up at eight minutes. This one had a sequence on laundering money in Mexico—again, a subject that was difficult enough to explain in print, let alone on television. But Gould had come up with illustrative graphics, and Rather was there explaining the importance of Haldeman and Chapin and Mitchell, somehow bringing it all very close to Richard Nixon. The report ended with Cronkite saying that the story was important, and that the White House denials were not very convincing.

The meeting on the second segment included Salant, Socolow, Manning, Paul Greenberg (Cronkite's executive producer), and Gould, who had produced the two segments. Cronkite did not at-

Frank Stanton (left) and William Paley

tend. The smell of trouble was in the air, and Gordon Manning had decided to hold Cronkite out of battle, as a one-man reserve battalion. Salant was strong for cutting back. It was too long, he said; besides, a great deal of it was repetitious. Then Salant said a very odd thing: "I hope I feel this way because I'm a fair and honest newsman." It was an oblique remark, but he was suggesting that he did not even know his own feelings, and that there was now so much pressure on him that he hoped the reasons he was stating were his own, not Paley's, and not, dear God, those of Richard Nixon or Chuck Colson. Then he brought up a report that Dan Schorr had done during Labor Day weekend. The Schorr report had been on laundering money, and Salant wanted to know how this new story was different from Schorr's. (One difference was that a weekend news report, particularly on a Labor Day weekend, when no one is presumed to be paying attention to the news, is different from the Cronkite news. A weekend report is hit or miss, and the audience accepts it or rejects it; but the *Evening News* is CBS, it has the imprimatur of Walter Cronkite, it means that what comes over the air is true and real and semiguaranteed. Take it seriously.)

Salant had the text of the old Schorr story, and they began to compare them. Other executives in the room had forgotten about the earlier report, or, like most CBS listeners, had never heard it; they shook their heads, thinking that Salant was one smart lawyer son of a bitch, how did he ever remember that one, what a great argument to take to the news department. Gould argued strenuously on behalf of the second report, pleading that it not be cut, that it was new, that Watergate needed above all to be summed up, not nickel-and-dimed, that the *time,* and indeed, the repetition, were crucial. Everyone at CBS, Gould argued, was hearing the same thing from Middle America, that Watergate was too complicated to understand. This was a journalistic failure, he said, and in particular it was a failure of network news departments who were charged with reaching the great mass audience and helping it understand such things. Manning and Socolow also argued for the story. Manning emphasized that this report had been promised to the CBS audience on the air, and he said that it would ruin morale in the newsroom if it was dropped or severely cut. But there was also a sense in the room that limits were once again being set, and the corporation was re-entering the game.

Socolow was charged with taking the old Schorr script and removing overlap and repetition, and then cutting the second report down to size. Socolow told his wife that night that he and his colleagues might be out of jobs the next day. But he managed to cut the story from fourteen minutes; he showed it to Cronkite, who bought it.

Gould was furious. As far as he was concerned, the script had been gutted. As far as he was concerned, they had backed down to pressure. Even if the words were similar, the graphics were much weaker.

Cronkite took the script to Salant, who approved it—Well, let's go, but this may be it.

Paley was furious, in a special rage after it was broadcast. He and Salant went around one more time, and he made clear what he felt: this must never happen again. But it was done, or almost done.

17. Epilogue: A Few Character Studies

A few days after the 1972 election, when the Nixon Administration was riding its highest, when the President was talking to his aides about how they were really going to get their enemies this time, Chuck Colson called Frank Stanton. This Administration was not going to play gentle games anymore. No more Mister Nice Guy. The Nixon Administration knew who its friends were and who its enemies were, and it was going to bring CBS to its knees on Madison Avenue and Wall Street. The CBS stock was going to

collapse. When Richard Nixon got through with CBS, there was going to be damn well nothing left. They were going to take away CBS's five owned and operated stations (a major source of CBS's wealth). "We'll break your network," Stanton heard him say. On he went, with a litany of what the Administration was going to do to CBS. Stanton was not surprised, but he was upset. There was a dimension of fury and arrogance to Colson's harangue that, even from this Administration, was chilling. If a CBS reporter had found a top Nixon aide making similar threats to the head of U.S. Steel or General Motors, it would have become the lead story that night. But Frank Stanton, who had come to love the news department but also loved to lobby, said nothing: he was not about to challenge the Administration. Later, long after the Nixon Administration was on the defensive and coming apart, he put his account of these confrontations in an affidavit.

There were several other footnotes to CBS's two Watergate shows. A few days after they ran, Katharine Graham of the Washington *Post* happened to see Bill Paley at a party. Until then she had felt that the *Post* was covering Watergate pretty much alone, and that no one else was joining the fight. But now, in her view, CBS was with the *Post,* and to her mind that meant that Bill Paley and she were together. CBS had enlarged the story, given it a national constituency, and more muscle. So she ran over and kissed him. "You saved us," she said. He seemed to freeze just a little bit. It was precisely what he did not want to hear.

The day that Frank Stanton retired, in the spring of 1973, a small party was given for him. It was not an occasion he looked forward to. He was privately very bitter about how his career at CBS had wound up, and about the trouble between him and Paley. He did not, in fact, want to retire. So the party was kept small, just a few old friends who had fought some of the same battles at CBS. It happened by chance to be the day that all the Nixon people fell out of the tree: Mitchell, Haldeman, Ehrlichman, Dean. And Stanton, usually so correct, proper, and reserved, turned to a friend. The ferocity of his words, and the language, shocked his old friends: "I hope they get that little son of a bitch Colson, too."

At the time that Watergate broke open, William S. Paley was in China, far from the flood of news that the top ranks of the Nixon Administration were either resigning or being indicted. Paley, traveling with Gordon Manning, got back to Hong Kong, where a huge stack of the New York *Times* was waiting for them. On the way back to America Paley read them, one after another. He said very little as he read, just occasionally sucking in his breath. A light gasp or two. After several hours he turned to Manning and asked how it could happen. These were all educated men. They had all been to law school. How could it have happened? Manning said it was simple.

"Why?" asked Paley.

"Because they lacked character," said Manning.

There was a long pause. "I guess you're right," Paley said.

But he evinced no regrets for having taken the Administration's side against the news division's on Watergate. Indeed, those who knew Paley well were sure that by the time he got back to America he was already congratulating himself for having had the courage to stand up to all that pressure from those terrible people. The Murrow–Paley tradition, he must have thought, still lived. He was the one who had made sure that they ran those two fine reports right before the election. Sure enough, when this reporter went to interview him about other matters, Paley got the subject over to Watergate and he seemed to expand with pride: CBS had done what no one else had done on Watergate; it had stood alone, had taken the Washington *Post*'s local story and made it a national story, and he, Bill Paley, was very proud of it. □

ANGEL'S LAUNDROMAT

A story by Lucia Berlin

I don't know why Indians get so drunk. A tall old Indian in faded Levis and a fine Zuni belt. His hair was white and long, knotted with raspberry yarn at his neck.

The strange thing was that for a year or so we were always at Angel's at the same time. But not at the same times. I mean some days I'd go at seven on a Monday or maybe at six-thirty on a Friday evening and he would be there.

Mrs. Armitage had been different, although she was old too. That was in New York at the San Juan Laundry on Fifteenth Street. Puerto Ricans. Suds overflowing onto the floor. I was a young mother then and washed diapers on Thursday mornings. She lived above me, in 4-C. One morning at the laundry she gave me a key and I took it. She said that if I didn't see her on Thursdays it meant she was dead and would I please go find her body. That was a terrible thing to ask of someone; also then I had to do my laundry on Thursdays.

She died on a Monday and I never went back to the San Juan. The super found her. I don't know how.

For months, at Angel's, the Indian and I did not speak to each other, but we sat next to each other in connected yellow plastic chairs, like at airports. They skidded in the ripped linoleum and the sound hurt your teeth.

He used to sit there looking at my hands. Not directly, but into the mirror across from us, above the Speed Queen washers. At first it didn't bother me. An old Indian staring at my hands through the dirty mirror,. between yellowed IRONING $1.50 A DUZ. and orange Day-Glo Serenity prayers. GOD GRANT ME THE SERENITY TO ACCEPT THE THINGS I CANNOT CHANGE. But then I began to wonder if he had something about hands. It made me nervous, him watching me smoke and blow my nose, leaf through *VEND* magazines and *Newsweeks* years old. Lady Bird going down the rapids.

Finally he got me staring at my hands. I saw him almost grin because he caught me staring at my own hands. For the first time our eyes met in the mirror, beneath DON'T OVERLOAD THE MACHINES.

There was panic in my eyes. I looked into my own eyes and back down at my hands. Horrid age spots, two scars. Un-Indian, nervous, lonely hands. I could see children and men and gardens in my hands.

His hands that day (the day I noticed mine) were one on each taut blue thigh. Most of the time his hands shook badly and he just let them shake in his lap, but that day he was holding them still.

women have taken the Saxena blood test for

marketed throughout the country within the next few months.

AMERICAN TV INFLUENCE

American television is world-pervasive. We not only export hundreds of TV series each year, everything from "I Love Lucy" to "Kojak," but our influence in foreign TV networks is historic and technical.

In 1961, for example, CBS helped put together RAI, Italy's television network. In 1966, CBS helped build the TV system for Israel.

In the past two decades, NBC has provided great assistance in establishing TV systems in Egypt, Argentina, Portugal, Sweden, Kenya, Nigeria, Yugoslavia, Hong Kong, and other countries.

As for our third network, ABC, it has interests in five Central American stations, three Japanese, one in Australia, one in the Philippines, as well as small financial interests in 54 other TV stations in 16 countries.

IMPRO

Women's Ye
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garet Thatch
first woman
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party, the yea
Junko Tabei of J
came the first wo
climb the peak of
Everest, and the y
which Julie Mannin
came the first fem
cabinet minister in
Tanzania.

So much for the a
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How did women in gen
fare in 1975?

In Hong Kong concu

y of room for sandwiches, favorite foods, plus a vacuum up or beverage.

lesk in the photograph is a sand- a new and delicious filling (recipe olives and gherkins on the side, plus wedge of process Gruyere cheese and offee.

SANDWICH

1 teaspoon prepared mustard
1 tablespoon mayonnaise

Combine all ingredients; mix well. Makes about one cup filling. Especially good with rye bread (without seeds).

TEST KITCHEN

IT'S TO BE EATEN

Don't turn up your nose at parsley! And don't leave it on your plate. Consider it as a food, not a garnish, because it is rich in vitamin A.

VEGETABLE PUREE

Don't throw away vegetable tops and parings (except potato peelings and rhubarb leaves). Wash them well—carrot and beet tops, radish tops, celery leaves, and so on. Toss them in a heavy kettle or Dutch oven, add water to cover, and simmer for two or three hours. Now taste, and if they are slightly bitter, add a dash of sugar.

Search the refrigerator for little dabs of leftover vegetables and add them all. Now whirl the mixture in an electric blender until a smooth puree results. Store it in a covered jar in the refrigerator and add it to soup, hot or cold, for a delicious base.

JOHN LEONARD

Public Television Versus Private Rights

It is interesting to watch a piety at work, to see it grow. The closest analogy I can think of in the biological sciences is metastasis—"the transference of disease-producing organisms or of malignant or cancerous cells to other parts of the body by way of the blood vessels, lymphatics or membranous surfaces." In the case of a piety, the disease takes two forms: high-minded rhetoric and bad legislation. It swells, it inflates, it fills the room and the spaces in our heads, and suddenly we are inside of it, looking out at the ribwork; we become piety's children, in the belly of a blimp.

The piety for this morning started up, as so many pieties do, at that theological seminary for remedial seriousness, the Public Broadcasting Service. It spread by blood vessel to the attention of Senator Charles Mathias, Republican of Maryland; by lymph to the approval of the Senate as a whole, and now attacks by membrane the House of Representatives.

PBS has this problem getting clearances for permission to use "nondramatic" literary materials (poems, for instance, or books on social problems) as well as musical, pictorial, graphic and sculptural work in its programs. These materials are theoretically protected by copyright. But clearing every little thing with the appropriate author, artist or composer is tedious, cumbersome and time-consuming. Hartford Gunn, Jr., the vice chairman of PBS, estimates that "ast year, for example, 29,000 clearances would have been required."

"Would have been" is nicely phrased. In fact, PBS has been rather casual about obtaining clearances. Generally speaking, almost no fees have been paid for nondramatic works; for instance, Igor Stravinsky's estate was paid nothing for the recent use of the late composer's works that were exploited so elegantly during the Feb. 29 broadcast of "Leonard Bernstein at Harvard." PBS professes distress over this state of affairs. Why not set up some machinery whereby clearing permissions would be simplified and artists would automatically get paid? And what better way of establishing such machinery than by writing it into the general copyright revision bill just passed by the Senate?

Senator Mathias introduced the appropriate amendment, Section 118. Section 118 specifies a compulsory licensing system. PBS can use whatever nondramatic work it chooses, but the artist must be paid a royalty fee. The size of that fee would be determind by a newly created Federal Copyright Royalty Tribunal. Thus is the piety of good-guyism served. PBS, a worthy enterprise, after all, won't have to go to the inconvenience of processing 29,000 clearances. Artists will be paid accordingly. And so, is everybody happy?

Bernstein conducting Stravinsky on PBS—the composer's estate got nothing

No. The 6,500-member Authors League of America objected that "compulsory licensing of literary works creates, for the first time, a dangerous precedent in the Copyright Act for other forms of government compulsion and control over the use of copyrighted literary works." What if an author wanted to decline a license for fear that "broadcasts of works would diminish sales, injure motion picture or recording rights, or damage a work's integrity?" What if he just wanted more money? What if he hated television? Too bad.

The National Council on the Arts, high poohbah of government spending on culture, also objected: "To permit a major communications medium to use literary, musical, pictorial, graphic and sculptural works without the prior approval or consent of the author or copyright holder would abridge freedom of expression and introduce an unacceptable element of government control over artistic and literary works." The Association of American Publishers, the Associated Councils of the Arts, ASCAP and other performing rights societies had similar objections.

These protests—why a special break for PBS, rather than, say, CBS?—were unavailing. PBS responded with rhetoric ("the only special break we support is for the creators") and lobbying muscle on Capitol Hill. On February 19 the Senate passed the copyright bill, with Section 118, by a vote of 97 to zero. A substitute amendment, which would have obliged PBS to let copyright owners know in advance that it wanted to use their work and give them a chance to say no, was defeated, tabled, 61 to 22. The bill is now before the House.

Nobody seems willing to explore alternatives, such as a voluntary licensing system. Nobody appears seriously interested in how ASCAP, BMI and SESAC manage to take care of clearances for every radio station and saloon jukebox in the country without the help of a Federal Copyright Royalty Tribunal. When the Soviet Union insisted a couple of years ago that foreign copyrights for Soviet works could only be granted by an official Soviet agency, not by the author himself, we were angry. But isn't Section 118 a little sister, or big brother, to the same state psychology?

For those of us who don't work for PBS, and are therefore insufficiently pious, these metastatic goings-on look unhealthy for the First Amendment. It happens, alas, that I've written a lot of "nondramatic" literary materials. If PBS can put them on the air without my permission, I feel distinctly less a free man.

...Haslam, Schwartz, ... Victoria. Through ... Closed Mo...

PLEIADES, 152 Wooster St.—Five art... Through March 28. Closed Mons; Open Suns., 11-6.

VORPAL, 465 W. Bway—Sculptures by Agnese Udinotti, plus a group show. Through March 31. Closed Mons.; open Suns., 1-6.

WARD-NASSE, 131 Prince St.—Paintings of people by Jeri Drucker, lyrical abstract landscapes by Ada Kera Friedman, realistic paintings by J. William Hunt, ceramic sculptures by Janet Tierney. Through April 1. Closed Mons.

WOMEN IN THE ARTS FOUNDATION, 325 Broome St.—Paintings and etchings by Ellen Baum, Elissa Dortman, Gail Edelman, Grace Sambura. Through March 27. Tues.-Fris., 2-5; Sats., 12-5:30.

Other

CUNY GRAD CENTER, 33 W. 42d St.—Paintings and sculptures of nature forms and household objects by Marjorie Strider. Through April 3. Mons.-Fris., 9-6; Sats., 11-3.

DORSKY, 111 Fourth Ave., at 11th St.—A retrospective of Henry Moore's sculptures. Opens Sat. Through April 17.

NATIONAL ACADEMY OF DESIGN, 1083 Fifth Ave., at 89th St.—Annual exhibit of oils, sculptures, watercolors, graphics. Through March 21. Daily, 1-5.

NOHO, 542 LaGuardia Pl.—Paintings and sculptures by Steve Palermo and hard-edge abstract paintings by Joe Woods. Through March 24. Tues.-Suns., 1-6.

POSTER AMERICA, 174 Ninth Ave.—Oriental American movie posters from the twenties to the present. Through April 17. Closed Mons.

PRATT GRAPHICS CENTER, 831 Bway at 13th St.—Over 100 prints by members of the Society of American Graphic Artists. Through April 5. Mons.-Fris., 10-6; Sats., 1-5.

ROKO, 90 E. 10th St.—Paintings with photographic imagery by Don Nelson. Through March 27. Tues.-Sats. 12-6.

TRIBAL ARTS, 37 W. 53d St.—"African Bestiary." Opens Mon. Through April 30.

VISUAL ARTS, 209 E. 23d St.—Wall drawings by Sol LeWitt. Through Fri. Mons.-Thurs., 12-9; Fris., 11-4:30.

WALKER STREET GALLERY, 46 Walker St.—Sculptures by Stephen Bundy, Photo-Realist works by E. Michael Burrows, Surrealist paintings by John Fudge. Through Sat. Tues.-Sats., 1-5.

Museums

AFRICAN-AMERICAN INSTITUTE, First Ave. at 47th St.—Household objects, implements and body ornaments from 14 countries of East and southern Africa. Through May 15. Mons.-Fris., 9-5; Sats., 11-5.

AMERICAN MUSEUM OF NATURAL HISTORY, Central Park W. at 79th St.—Permanent exhibits. Mons.-Sats., 10-4:45; Suns. and holidays, 11-5.

Television

"Whatever happened to network programs designed specifically for children?" (John Leonard)

TV VIEW

JOHN LEONARD

Old Sitcoms And Young Minds

According to Proverbs (26:14): "As the door turneth upon its hinges, so doth the slothful upon his bed." Actually, it was a chaise longue, connived at by some plastics manufacturer to look like the corpse of a zebra. I was turning upon it the other Monday afternoon when the children came home from school, as if from the scene of an accident, threw their coats and notebooks at me, and switched on the TV set so that it might warm up while they pulled watermelons, potato sticks, Gatorade and leftover mucilage out of the icebox.

I stayed put, because I was thinking about Jimmy Carter's teeth: Had he borrowed them from Mary Tyler Moore? A charming scuffle—elbows and oaths—ensued. Would they watch "Mickey Mouse Club" or "Lassie," followed by "Batman" and "Superman" or "Lost in Space," followed by "The Brady Bunch" or "Gilligan's Island"? Before long, unhinged, I found I was looking at Florence Henderson's teeth. What office was she running for? She was running for the office of wife.

Afternoon reruns of series like "The Brady Bunch" are "TV's home movies."

This turned out to be the episode of "The Brady Bunch" in which Miss Henderson (and her three daughters and a cat) married Robert Reed (and his three sons and a dog and Alice, the housekeeper)—in short, the Big Bang that created the Bunch. After which, entropy. I was pleased. I collect such moments. The nation's wounds are annealed in the heat of an eternal verity like marriage or childbirth. I had been there when Lucille Ball gave birth on "I Love Lucy" in 1954, and when Valerie Harper got married on "Rhoda" in 1974. In between, Mary Tyler Moore and Elizabeth Montgomery had children on "The Dick Van Dyke Show" and "Bewitched," while Don Adams took Barbara Feldon to be his bride on "Get Smart." Just recently, "Marcus Welby, M.D." married off the good doctor's hulking young associate, James Brolin. (No matter that Mr. Brolin now wants to leave the show to pursue a movie career. Considering his performance in "Gable and Lombard," he should leave the country instead.) How nice for the children that they are permitted to witness these moments from the past, TV's home movies.

In fact, there are very few moments from the TV past that our children will not witness, over and over again. Daytime television is a revolving door of the past or, turned on its side, a wheel of images in the cage of the afternoon, within which kids scamper like pet gerbils. As each old program reruns its course on one independent channel, it simply moves over to the next. A child of ten has memorized every episode of "I Love Lucy," "I Dream of Jeannie," "Gilligan's Island," "Superman," "Bewitched," "Leave It to Beaver," "The Partridge Family" and "The Flintstones," not to mention "Star Trek" and "The Mod Squad."

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This is obvious and extraordinary at the same time. By and large, our children not only watch the same *new* programs that we watch, but they are scholars of everything that went before, everything we have forgotten or never knew. Twenty-five years of situation comedies and adventure programs are picked up between kindergarten and the fourth grade, in the archives of the afternoon. If, as the historian Daniel Boorstin has suggested, TV is in the business of manufacturing experience as well as entertainment, our children are as experienced as we are. They consume the banquet of our lives, little cannibals, as though it were a snack. With apologies to André Malraux, there is a "museum without walls" in every American livingroom. Two ruminations:

(1) While we work, sleep, drink or think about Jimmy Carter's teeth, our children, tethered to the TV hitching post, absorb the situation comedies of the 1950's and 1960's. The sitcom is a socializing agency, like the family and the public school system. It instructs us on how the culture expects us to behave. It seeks to internalize norms of virtue, standards of decency, codes of etiquette. Are we so sanguine about the values and perceptions of these programs—their portrayal, for instance, of women and fathers—that we let them mess up unformed minds?

(2) Whatever happened to network programs designed specifically for children? In the 1950's, we had "Howdy Doody," "Kukla, Fran & Ollie," "Time for Beany," "Zoo Parade," "Super Circus," "Pinky Lee," "Watch Mr. Wizard," "Rin Tin Tin," "Mickey Mouse Club," "Huckleberry Hound," "Big Top," "Lucky Pup," "Captain Video," "Juvenile Jury," "Leave It to Beaver" and Paul Winchell and his puppets, as well as the perennials ("Captain Kangaroo," "Lassie," "The World of Disney") and the unspeakables ("Bozo the Clown" and "Romper Room"). The quality ranged from all right to rotten, but at least there was a commitment. In the 1970's, we have the monthly afternoon special, the seasonal rerun of a Snoopy, a Rudolph or a Grinch, crude week-end cartoons and the snakepit of "Wonderama." The networks have apparently opted for allowing public television to do it all: If children are hungry, let them eat "Sesame Street."

DiCenzo as Bugliosi in "Helter Skelter"—blacked out in home town

Notes: CBS Juggles a Hot Potato

TV viewers in Los Angeles will not be seeing "Helter Skelter," the two-part "docu-drama" about the Manson "family's" murder of the actress Sharon Tate and six other persons in Los Angeles in the summer of 1969, which will be shown on the CBS network this coming Thursday and Friday at 9 P.M. The story behind the decision of KNXT, the CBS-owned station in Los Angeles, not to run this special raises significant questions about the relationship between television entertainment and electoral politics.

The made-for-TV film is a dramatization of Vincent Bugliosi's best-selling book "Helter Skelter," in which the former Los Angeles County assistant district attorney told of his devised and successful investigation and prosecution of the band of youthful murderers whom scriptwriter J. P. Miller terms "Les Miserables with acid."

The fact that the Bugliosi character, as portrayed by actor George DiCenzo, comes across as heroic led to an intracorporate battle at CBS, for Mr. Bugliosi had filed as a candidate in the June 8 election for the post of Los Angeles County district attorney.

If "Helter Skelter" had been shown in Los Angeles before the June primary, the other candidates for district attorney could have asked for equal time. According to staff attorneys of the Federal Communications Commission, however, the equal time law does not apply to entertainment programming of this kind. The law, they explain, applies only to personal appearances by candidates (such as the episodes of "Death Valley Days" in which Ronald Reagan performs as an actor) and not to dramatizations in which a candidate is portrayed by an actor (as in "Helter Skelter").

It was at least partly in order to avoid such challenges that CBS recently decided not to buy President Ford's book about the Warren Commission's investigation of the assassination of President Kennedy. For similar reasons, the 1974 TV documentary "The Missiles of October," which presented a highly favorable picture of the handling of the Cuban missile crisis by John and Robert Kennedy, might never have been telecast if Robert Kennedy had lived to be an active candidate. An amusing exception occurred recently when KCET, the Los Angeles public television station, broadcast the BBC dramatization of the trial of the Chicago Seven in which one of the defendants was Tom Hayden, who is now opposing Senator John Tunney for the Democratic Party's nomination for the U.S. Senate. Senator Tunney might well have asked for equal time, but presumably did not feel that his position had been unduly damaged by the portrayal of his opponent as a criminal defendant.

The corporate infighting reached a high point on March 3 when CBS fired W. Russell Barry, general manager of KNXT, who had earlier flatly refused to carry "Helter Skelter" before the election. "It would not be fair to the electoral process," Barry had said. The prospect that a program which promised to win high ratings would be blacked out in the major Los Angeles market had inspired no cheer among top CBS executives. But the network was seemingly powerless to overrule Barry: both corporate and F.C.C. policies give a station manager almost unfettered power to decide what should and should not be shown in his community.

The network appeared to have only two options, neither of which was very appealing. First, CBS could have held the program until next fall, when KNXT would presumably have been delighted to air it—but such a delay would have been costly. The network has a large investment in "Helter Skelter" (a $1.5-million license fee for two broadcasts). The program's potential ratings had become especially important by the first week in March when ABC got higher ratings than CBS for the seventh consecutive week, and CBS executives wanted to end the year with a strong finish and decisive lead in the ratings. "Helter Skelter" is being counted on to make a major contribution toward achieving that goal.

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The second alternative in this complex game of corporate strategy would have produced similarly discouraging economic results. The network could have allowed the program to be carried by an independent station in Los Angeles. Indeed, at least one Los Angeles station made such a request. But the show's ratings would undoubtedly suffer on an independent station, which lacks the advantages of network promotional announcements, viewer loyalty and a strong "lead-in" program. The economic consequences for KNXT (which, after all, is part of the CBS corporate earnings structure) would also be disastrous. As one KNXT executive pointed out, "For two consecutive nights whatever we put on would be murdered by 'Helter Skelter.'"

During the weeks following Barry's dismissal, it appeared that KNXT would air the program. Barry's replacement announced that he was inclined to air "Helter Skelter" and he even listed the program in KNXT's advance program log. But then early this week, considerations of political prudence finally won out over commercial temptation when KNXT's new manager announced that the show would be shown in Los Angeles — but only after the June primary.

GEOFFREY COWAN

Marshall's Turn

Some years ago, Westinghouse Broadcasting created two 90 minute talk-variety programs that became staples of television syndication: "The Mike Douglas Show" and "The Merv Griffin Show." Griffin jumped ship for CBS and now is with another syndicator; Douglas stayed on and has proved so popular that his current pay is $2-million a year.

Westinghouse hopes to score again next fall with "The Peter Marshall Show" as a 90-minute weekly series. Marshall has made his mark as one of those ever-smiling game-show hosts, but Westinghouse believes that what the viewer sees of him on "Hollywood Squares" is just the "tip of the iceberg." Marshall is also a singer, actor and comedy monologist; for the past two years he has performed a successful night-club act with a singing-dancing supporting group known as The Chapter 5, under the musical direction of Alan Copeland.

Marshall's nightclub package, with guest stars, is to be the basis for the new syndicated series; it is being pitched for the 11 or 11:30 slot on Saturday nights, only because that is the time period most available at stations for a weekly show of that length.

LES BROWN

TV VIEW

JOHN J. O'CONNOR

Adaptations of Novels—Right On Or Rip-Offs?

This season's television object of most intense attention has undoubtedly been "Rich Man, Poor Man," the 12-hour dramatization of Irwin Shaw's novel. An interesting story was given a good production and a first-rate cast of several very impressive new faces surrounded by veterans doing "guest star" turns. The result, while falling somewhat short of great art, was generally far better than average television fare. And, just to complicate matters, it was extremely successful for ABC-TV in the audience ratings.

That kind of success in television inevitably breeds imitations, but it remains to be seen if the self-contained "mini-series" will become an established form. The making of "Rich Man, Poor Man" consumed a great deal of time and money. Harve Bennett, the executive producer, had been planning the project for five years. The filming required five months of shooting. The budget was in the "multimillion-dollar" bracket. Beyond these heavy costs, there is still the question of a resale market for such projects. Producers of some successful weekly series can venture "deficit financing" on the first runs of their programs, anticipating later profits in the "secondary markets." But the size of the profit is governed by the quantity of product available. A limited mini-series could not compete in a similar framework.

These are some of the economic questions ultimately to be answered in the marketplace. But what of the form itself, the curious phenomenon of TV adaptations? How faithful can, or will, TV be to the original material? Will the audience be getting a reasonably accurate reflection of some best-selling book, or will it be confronted by some mindless rip-off exploiting the familiarity of an established title? In broad outline, the television version of "Rich Man, Poor Man" did follow the master plotting of Mr. Shaw's novel. The lives of the two Jordache brothers (played by Peter Strauss and Nick Nolte) were traced from a small Hudson Valley town at the end of World War II through years of bitter separation to eventual reconciliation in the setting of a French Riviera village. In specific details, however, the TV screenplay was riddled with changes, some substantial, others so inconsequential as to seem pointless.

In the book, for instance, Tom, the rebel brother, lends Rudy $5,000, which Rudy then invests. Years later, Rudy turns over $60,000 to Tom, who is broke. In the dramatization, the initial sum is reduced to $3,000, the accumulated return to $48,000. The mysterious ways of television are infinite and awesome.

Other changes were decidedly more significant. The most notable involved the character of Julie Prescott, with the TV version (played by Susan Blakely) incorporating

Blakely in "Rich Man . . ."—"bits and pieces of several of the novel's females"

several of the novel's major females into a single figure. Gretchen, the sister of the two brothers, and Julie, Rudy's first love, and Jean, Rudy's alcoholic wife, were canceled as distinct personalities, their remains rolled into Julie Prescott, who retained bits and pieces of all three characters. The result was perhaps more tidy for home consumption, but it also was distorting in terms of motivation. Young Tom's crucial fire incident, for instance, was related to finding a young girl in bed with the town's wealthiest resident. In the screenplay, that girl was Julie, Rudy's girlfriend. In the novel, it was the brothers' sister. A logical motive of revenge was simply lost.

But most of the more interesting changes, the type that lend some insight into basic TV policies, involve matters of degree. And these tended to fall into two separate categories. In the first, any legitimate opportunities for sentiment were almost invariably developed into displays of sentimentality. In the other, several instances of violence in the book were made more violent for television.

In the area of sentimentality, the death of the brothers' mother is neatly representative. The TV version had Rudy rushing to the hospital after finding the prodigal Tom. In the hospital room, Tom presented his dying mother with a scarf from Europe. She asked forgiveness for neglecting him as a child. While she gasped for breath, he embraced her with tears streaming down his cheeks. America was being comforted by the moving reunion of mother and son. But Mr. Shaw's novel was hardly that comforting. The brothers arrived at the hospital only to find that their mother was already dead. Their reactions to the news were clinical, almost objectionably cold. TV, evidently, is not about to be clinical when an opportunity for emotional manipulation presents itself.

On the violence side of the ledger, most of the examples are perhaps minor but, once again, representative. In an early confrontation scene, Tom hits his father in the face. The novel has the father barely moving from the blow and then punching Tom in return. In the TV version, the father is sent sprawling across the room, where he lands on a glass bakery display case, which is noisily shattered into a thousand fragments, leaving the father with serious cuts. The matter of degree has been escalated sharply.

In another scene, Tom is working on a ship and becomes friendly with another sailor, a black man (in the novel, he is white and somewhat effeminate). The shipboard villain, a bully named Falconetti, makes insulting comments about their friendship and, for purposes of TV, goes so far as to sodomize Tom's new friend. Interestingly, the book did not go that far; Falconetti tried, but was caught by Tom and thoroughly thrashed.

Considered singly, these changes are not especially overwhelming. However, taken cumulatively, they quite accurately reflect the mentality that governs much of the typical TV product, up to and including the news. The camera that searches for the tear on some victim of a disaster and for good "action footage" that might get a story more prominence than it deserves are simply extensions of the medium's endless exploitations of sentimentality and violence.

Arts and Leisure Guide

Continued from Page 26

CONCERT SOCIALS—With Jim Gold, guitar. Classical to folk. Music Room, Hotel Biltmore, Mad. Ave. and 43d St. At 8:30.

GUARNERI STRING QUARTET—All-Beethoven. Rogers Aud., Metropolitan Museum, Fifth Ave. at 82d St. At 8.

CALVIN HAMPTON—Organ. 20th-century music. Calvary Episcopal Church, Park Ave. and 21st St. At midnight.

JUILLIARD SCHOOL STUDENT CONCERT—Alice Tully Hall, Lincoln Center. At 8:30.

BRANKO KRSMANOVICH CHORUS—Carnegie Hall. At 8.

BOB MAMARY—Guitar. Carnegie Recital Hall. At 8.

NEW YORK PHILHARMONIC—Same as Thur., but at 2.

PHILHARMONIA VIRTUOSI OF NEW YORK—Richard Kapp, conductor. Great Hall, Cooper Union, Third Ave. and 7th St. At 8.

SYMPHONIC BAND CONCERT — From High School of Performing Arts. Vittorio Giannini, Haydn Wood, Vaclav Nelhybel, Gustav Holst, Morton Gould, others. Jonathan Strasser, conductor. N.Y. School of Printing, 439 W. 49th St. At 7:30.

MESCAL WILSON—Piano. Bach, Richard White, Rachmaninoff, Prokofiev. Greenwich House Music School, 46 Barrow St. At 8. Free.

Saturday

BERGSON TRIO—Bernstein (Trio, Op. 2), Heinrich (The Yankee Doodleiad, A National Divertimento), Beach (Trio, Op. 150 in A minor), Foote (Trio, Op. 65 in B-flat), other American composers. Alice Tully Hall, Lincoln Center. At 8.

CANBY SINGERS—Carnegie Recital Hall. At 8:30.

EVENSONG RECITAL—Organ. Cathedral of St. John the Divine, Amsterdam Ave. at 112th St. At 4. Free.

GALIMIR QUARTET—With guest artists. Janacek, Ravel, Haydn. Washington Irving H.S., Irving Pl. at 16th St. At 8.

LEONA HIGGS—Soprano. Carnegie Recital Hall. At 2:30.

I MUSICI DI ROMA—Chamber ensemble. Brooklyn College, Whitman Hall, Flatbush and Nostrand Aves. At 8.

NEW YORK PHILHARMONIC—Same as Thur.

QUEENS SYMPHONY CHAMBER ORCHESTRA — Vivaldi, Marcello, Respighi, Mozart. Queens Theater in the Park, Queens. At 8:30.

VIENNA PHILHARMONIC ORCHESTRA—Mozart (Symph. No. 39), Bruckner (Symph. No. 7). Claudio Abbado, conductor. Carnegie Hall. At 8.

Tristate

GREENWICH PHILHARMONIA ORCHESTRA — Griffes, Chopin, Beethoven. Greenwich H.S., Hillside Rd., Greenwich, Conn. Today, 4.

HUDSON VALLEY SYMPHONY—Children's concert. Tchaikovsky, Saint-Saens, Rozsa. Louis F. Simon, conductor. Mercy College, Dobbs Ferry, N.Y. Today, 2 and 3.

LONG ISLAND SINGERS SOCIETY—Bach's "St. Matthew Passion." Holy Trinity Diocesan H.S., Stewart Ave., Hicksville, L.I. Today, 3.

ORCHESTRA DA CAMERA — American composers, including Copland. Kings Park H.S., Kings Park, L.I. Sat., 8:30.

PHILHARMONIC SYMPHONY OF WESTCHESTER—Gries, Shapiro (premiere), Beethoven. Martin Rich, conductor; Van Cliburn, piano; Jose Ferrer, narrator. Westchester County Center, White Plains, N.Y. Sat., 8:30.

PRO ARTE OF CONNECTICUT—Britten, Purcell, Tallis, Krenek, others. Noroton Presbyterian Church, 2011 Post Rd., Darien, Conn. Sat., 8:30.

SEA CLIFF CHAMBER PLAYERS—Handel, Bartok, Schubert, Milhaud. Nassau County Center for the Fine Arts, Northern Blvd., Roslyn, L.I. Today, 3.

SINGERS THEATER—Verdi's "Il Trovatore." Lakeland H.S., Shrub Oak, N.Y. Sat., 8.

WAVERLY CONSORT—Michael Jaffee, director. Memorial Aud., Montclair State College, Upper Montclair, N.J. Mon., 8.

Jazz

In Concert

COLUMBIA UNIVERSITY JAZZ BAND—Elliot Semel, director. McMillin Theater, Bway and 116th St. Wed., 8:30.

LIVE LOFT JAZZ—Thur.: Billy Lyles. Fri.: Ronnie Boykins and the Sound Scientists. Sat.: Royal Blue and the Funky Army. Ladies Fort, 2 Bond St. At 8.

SOUNDS OF LIFE—With Ellen and Tom. William Parker, bass. Ward Nasse, 131 Prince St. Today, 3.

JIMMY VASS—Live Loft Jazz, Ladies Fort, 2 Bond St. Today, 4.

In the Clubs

BALABAN AND CATS—A club named for the late guitarist, with Rod Balaban in charge of both club and band, which includes: Jim Andrews, Vic Dickinson, Herb Hall, Ed Polcer, Connie Kay. Tues. guest: Peewee Erwin, trumpet. Eddie Condon's, 144 W. 54th St. Mon.-Sat.

BARBARA CARROLL—A swinging, singing pianist. Bemelmans Bar, Hotel Carlyle, 35 E. 76th St. Today.

BRAD CATRON—Sweet Basils, 88 Seventh Ave. S. Mon.-Thur.

WARREN CHIASSON TRIO—Chiasson on vibes and Wilbur Little on bass, with a guest appearance today by Al Dailey, piano. Gregory's, 1149 Frist Ave. Suns.

BOB CUNNINGHAM DUO—Dizzy Gillespie's onetime bassist is teamed with Danny Mixon, a pianist who sometimes accompanies Betty Carter. Harley Street, 547 Second Ave. Today, Fri.-next Sun.

TED CURSON AND COMPANY—A tremendously vital jazz group led by Curson's sparkling trumpet and brightened by Nick Brignola's saxophone. Tin Palace, 325 Bowery. Fri.-Sat.

FRANKIE DASH AND HIS ALL STARS—The all-Stars include Clarence Hutchenrider, the clarinet star of the Casa Loma Orchestra; Gene Roland, once a Stan Kenton trumpeter and arranger; and Jimmy Wormworth, a drummer who has not been heard much in recent years. Jilly's, 256 W. 52d St. Suns.

ROY ELDRIDGE SEXTET—One of the great trumpeters, the lineal link between Louis Armstrong and Dizzy Gillespie, with a band that includes Bobby Pratt, trombone; Joe Muranyi, clarinet. Jimmy Ryans, 154 W. 54th St. Tues.-Sat.

FLOATING JAM SESSION—First New York night-club venture by George Wein, producer of the Newport Jazz Festival, with different faces on the bandstand every night. Storyville, Frank's Place, 41 E. 58th St. Mon.-Sat.

CHUCK FOLDS—A pianist who starts in ragtime, moves to Harlem stride and then to swing and manages to make it all sound both indigenous and contemporary Cookery, 21 University Pl. Sat.-Sun. afternoons.

AL HAIG TRIO—The pianist in the Charlie Parker quintet of the late forties now going his own way with Attila Zoller, guitar, and Wilbur Little, bass. Gregory's, 1149 First Ave. Mon.-Tues.

BARRY HARRIS DUO—A quietly elegant pianist who stirs up some deeply swinging performances without even ruffling his feathers. Bradley's 70 Univ. Pl. Suns.

LANCE HAYWARD—Piano. Jim Smith's Village Corner, 142 Bleecker St. Nightly, except Weds., when Jim Roberts fills in. Jane Valentine, vocalist. Suns.

HELLMAN'S ANGELS—Daphne Hellman's harp ranges from classics to jazz, with Mike Garl on guitar and Jack Gress on bass. Village Gate, Thompson at Bleecker St. Tues.

AL HIBBLER—The onetime Duke Ellington singer still reaches for those low notes and decorates them with a pseudo-English accent. New Barrister Room, 161st St. and Grand Concourse, Bx. Mon.-next Sun.

DICK HYMAN—Virtuosic piano playing from Bach to boogie. Cookery, 21 Univ. Pl. Suns.

PAUL JEFFREY OCTET—A well-integrated musical group led by Thelonious Monk's most recent saxophonist, Tin Palace, 325 Bowery. Today and Thur.

HANK JONES—The elder brother of Thad and Elvin Jones playing piano with a polished touch. Le Petit Cafe, Sherry Netherland Hotel, Fifth Ave. and 59th St. Mon.-Fri.

KAT JONES—Piano. With Clint Huston, bass. West Boondock, Tenth Ave. at 17th St. Thur.-Sun.

SAM JONES TRIO—A veteran bassist leads a trio with Hugh Lawson, a pianist long associated with Yusef Lateef, and Al Harewood on drums. Angry Squire, 216 Seventh Ave. Thur.-Sat.

THAD JONES AND MEL LEWIS 17-PIECE BAND—Back from a trip to Germany just in time to celebrate their tenth anniversary here. Village Vanguard, 178 Seventh Ave. S. Mons.

SHEILA JORDAN—Tin Palace, 325 Bowery. Tues.-Wed.

MAX KAMINSKY SEXTET—A veteran of the Dixieland wars still blowing authoritative, traditional trumpet. With his Dixieland Jazz Band, of course. Jimmy Ryans, 154 W. 54th St. Suns.

BROOKS KERR TRIO—Kerr, a 24-year-old pianist and the leading authority on the compositions of Duke Ellington, plays with dyed-in-the-wool Ellington veterans Sonny Greer and Russell Procope. Gregory's, 1149 First Ave. Wed.-Sun.

BERNIE LEIGHTON QUARTET—Polished jazz piano by a veteran of numerous Benny Goodman groups. Jimmy Weston's, 131 E. 54th St. Sun.-Mon.

JAY MCSHANN—With Panama Francis, Milton Hinton and Claude Williams, Michael's Pub, 211 E. 55th St. Tues.-Sat.

MARIAN MCPARTLAND—A pianist who has been through all the jazz styles and seems to find out more about them every year. Bemelmans Bar, Hotel Carlyle, 35 E. 76th St. Mon.-Sat.

BARRY MILES QUARTET—A young, adventurous pianist leading a quartet that features his younger brother, Terry Silverlight, on drums. Village Vanguard, 178 Seventh Ave. S. Tues.-next Sun.

ANNE MARIE MOSS AND JACKIE PARIS—Two voices that sometimes blend as one in scat passages, but can also take off on their own. Eddie Condon's, 144 W. 54th St. Today.

NEW ORLEANS FUNERAL AND RAGTIME BAND—One of the liveliest and most polished traditional jazz bands in town, concentrating on a New Orleans repertory when Woody Allen happens to be playing with them, on a Chicago repertory when he isn't. Michael's Pub. 211 E. 55th St. Mon.

SY OLIVER AND HIS ORCHESTRA—Rainbow Room, Rockefeller Center. Nightly, except Mon.

THE ORIGINAL TRADITIONAL JAZZ BAND—Choice musicians drawn from several traditional jazz bands, led by Stan Levine, a drummer, and notable for Jacques Kerrian, whose soprano sax echoes Sidney Bechet. Patch's Inn, 314 E. 70th St. Wed.

JOE PASS—A guitarist of unusual grace. Hopper's, 452 Sixth Ave. Mon.-Sat.

BUCKY PIZZARELLI—Guitarist. Mon., Thurs.-Sat., P.S. 77 Restaurant, 355 Amsterdam Ave. Today: Sweet Basil's 88 Seventh Ave. S.

RED RICHARDS—A pianist who is used in the wood, in the music, in the atmosphere and anything else available. Eddie Condon's, 144 W. 54th St. Mon.-Sat.

GENE ROLAND TRIO—A trumpeter and arranger who developed in the Stan Kenton band, with Peter Donald as MC and pianist, and Lynn Crane, vocals. Gregory's, 1149 First Ave. Mon.-Sat.

STAN RUBIN QUINTET—The clarinetist who once led Princeton's Tigertown Five, keeping the Swing Era alive. Patch's Inn, 314 E. 70th St. Suns.

HAZEL SCOTT TRIO—Looking lusciously pixie-faced and still swinging classics and non-classics. Jimmy Weston's, 131 E. 54th St. Mon.-Sat.

TONY SHEPPARD — Singer/pianist. With Ron Coleman, bass. Patch's Inn, 314 E. 70th St. Thur.-Sat.

GRAHAM STEWART & HIS GAS HOUSE GANG—Lusty New Orleans-flavored jazz from trombonist Stewart, an essence of vaudeville from drummer Freddie Moore and echoes of the Eddie Condon crowd from whomever else shows up. Fugue, 275 First Ave., at 16th St. Thur.

SWING-TO-BOP QUINTET—With Ed Lewis, trumpet; Harold Comberbatch, baritone sax; backed by piano, drums and bass. West End Cafe, Bway at 114th St. Thur-Fri.

JOHN TANK QUARTET—Tin Palace, 325 Bowery. Thur.

JOHN TROPEA—Sweet Basils, 88 Seventh Ave. S. Fri.-Sat.

TWO TENOR BOOGIE—Veteran saxophonists Paul Quinichette and Buddy Tate, with Sammy Price, piano. West End Cafe, Bway at 114th St. Sat.-Sun.

MCCOY TYNER—Village Vanguard, 178 Seventh Ave. S. Today.

WARREN COURT—Earle Warren, the alto saxophonist in the original Count Basie band, leading a quartet that includes Taft Jordan, trumpet; Dill Jones, piano; Skip White, drums. West End Cafe, Bway at 114th St. Wed.

THEM FARGO BROTHERS—O'Linney's Country Music City, 915 Second Ave. Mon.-Sat.

ELEANOR FELL and KATHERINE KARLSRUD—Harp. King Cole Grill, St. Regis Hotel, 55th St. at Fifth Ave. Nightly.

GEORGE FEYER—Popular piano by an entertainer who has been on the night-club scene for more than 25 years. Stanhope Hotel, Fifth Ave. at 81st St. Tues.-Sat.

WAYLAND FLOWERS—Grand Finale, 210 W. 70th St. Today.

TOMMY FURTADO TRIO—Jimmy Weston's, 131 E. 54th St. Mon.-Fri.

STEVEN GOLDGRAM—Piano. La Cabana, 146 E. 57th St. Mon.-Sat.

MURRAY GRAND—A living repository of show tunes and well-aged pop songs. Daly's Daffodil, First Ave. and 59th St. Wed.-Sun. With Rill Pollard, bass, Fri.-Sun.

STUART HART—Piano. Daly's Daffodil, First Ave. and 59th St. Mon.-Tues.

DICKSON HUGHES—Singer/pianist. Cafe Pierre, Pierre Hotel, Fifth Ave. and 61st St. Tues.-Sat.

JIMMY JORDAN—Singer and pianist. Pub Theatrical, Bway at 51st St. Tues.-Sat.

NILS LOFGREN—A rock performer who's never quite made it to the stardom some think should be his. With Cate Brothers. Bottom Line, 15 W. 4th St. Mon.-Wed.

LYNN MULLINAX/ALAN LOGAN—Piano. Sign of the Dove, Third Ave. and 65th St. Tues.-Sat.

NOVELLA NELSON—A leading light on the cabaret circuit. Reno Sweeney, 126 W. 13th St. Today.

NOSTALGIA—Joe Carter, one-man band, with Dorothy Arms, soprano; Hal Willard, baritone; Bill Dern, banjo; Sal TeraCina, piano. Bill's Gay 90's, 57 E. 54th St. Mon.-Sat.

LOUISE OGILVIE AND ED LINDERMAN—Singers. Camelot, Third Ave at 72d St. Tues.-Sat.

HUBBELL PIERCE — Choice selections from the hands of Cole Porter, Noel Coward and other pre-World War II sophisticates. Bird Cage, Michael's Pub, 211 E. 55th St. Tues.-Sat.

LYNN RICHARDS—Piano. Jacques', 210 E. 58th St. Tues.-Sat.

RICARDO RODA—Singer-guitarist, Iberbole, 137 E. 55th St. Mon.-Sat.

BIFF ROSE and ARTIE TRAUM—Blues, bluegrass and good-time music. Other End, 149 Bleecker St. Today.

EARL ROSE—Pianist-composer. Mon.-Fri.: Les Mareveurs, 998 Mad. Ave. Sat.-Sun.: Le Petit Restaurant, Sherry Netherlands, Fifth Ave., and 59th St.

BILL RUSSELL — A pianist and singer with a jaunty air that makes even the most unfortunate request sound attractive. Onde's, 50th St. at Second Ave. Nightly.

SHAKTI//JOHN MCLAUGHLIN/BOB SHAW—McLaughlin, no longer Mahavishnu, has broken with Sri Chinmoy and formed a new band. Bottom Line, 15 W. 4th St. Today.

NORMA SHEPERD—Singer-pianist. Recovery Room, 417 E. 70th St. Thur.-Sat.

BOBBY SHORT—The exuberant singer and pianist is back at his accustomed stand with his accustomed repertoire of show tunes and titillating miscellany. Cafe Carlyle, Carlyle Hotel, 35 E. 76th St. Tues.-Sat.

MARILYN SOKOL—Cabaret singer. Ballroom, 458 West Bway. Mon.-Sat.

JUD STRUNK/CHRIS RUSH—Folksingers. Other End, 149 Bleecker St. Tues.-Sat.

RICHARD SHADROUI AND JOHN STANDISH—Playing piano and singing, both separately and together, with material from Noel Coward to Joni Mitchell. Grenadier, 863 First Ave. Wed.-Sat.

DON. TABOR—Singer-pianist. Jacques', 210 E. 58th St. Thur.-Mon.

TINY TIM & ROSIE ROSS—Tiny Tim??? Returns??? Upstairs, Max's Kansas City, 213 Park Ave. S. Wed.-Thur.

TRAPEZOID—Southern band. O'Lunney's Country Music City, 915 Second Ave. Thur.

BEN VEREEN—Theatricalized but vibrant supper-club entertainment. Persian Room, Plaza Hotel, Fifth Ave. and 59th St. Mon.-Sat.

RUTH WARRICK—The actress takes a swing at cabaret to show that she talks better than she sings. Top of the "U", 137 E. 55th St. Tues.-Sat.

MICHAEL WHITE—Piano. Prive, 1078 First Ave. Nightly.

PETER YARROW//RAUN MACKINNON—Yarrow is the Peter of Peter, Paul and Mary; Mackinnon is a promising younger folksinger. Reno Sweeney, 126 W. 13th St. Tues.-next Sun.

Tristate

GLEN CAMPBELL—The Rhinestone Cowboy himself. Westbury Music Fair, Brush Hollow Rd., Westbury, L. I. Today, 3 and 7:30.

FOUR OUNCES OF BLUEGRASS—Englishtown Music Hall, 24 Water St., Englishtown, N.J. Sat., 8:30.

BETTE MIDLER —Westchester Premier Theater, White Plains Rd., Tarrytown, N.Y. Today, 7:30.

MUSKRAT DUO—Dixieland jazz. Ground Round: Tarrytown Rd., White Plains, N.Y. Fri.-Sat., 9.

NO-GAP GENERATION JAZZ BAND—Artie Miller, who derives from Benny Goodman on clarinet and Lester Young on tenor saxophone, leading a group whose young hearts beat fondly for the Swing Era. Blue Water Inn, Ocean Ave., Seabright, N.J. Wed.-Sat.

TONY ORLANDO AND DAWN—Middle-of-the-road adult-pop and soft-rock stylings, the quintessence of L.A. hip. Nassau Coliseum, Uniondale, L.I. Tues., 8.

SMITH STREET SOCIETY—Dixieland jazz. Binghampton's, 725 River Rd., Edgewater, N.J. Suns., 3. Also Nathan's, Long Beach Rd., Oceanside, N.Y. Wed., 7.

Horn virtuoso Ted Curson plays at the Tin Palace

EDDIE PALMIERI & FRIENDS—The recognized leader of Latin salsa music, a Latin-jazz-pop performer and bandleader of rare distinction, along with his brother, a fine pianist, and other top Latin bands. Beacon Theater, Bway and 74th St. Fri., 8 and 12.

ANNA RUSSELL—Carnegie Hall. Teddibly British, if hardly subtle, musical humor. Carnegie Hall. Today, 8.

PETE SEEGER—The king of the post-Woody Guthrie leftist folksingers. Barnard College Gym, Bway and 116th St., Sat., 8.

JOHNNY WINTER—The elder of the two blues-rocking Winter brothers. With Thee Image. Felt Forum, Madison Square Garden Center. Sat., 8.

In The Clubs

ERIC CARMEN//RON DOUGLAS—The former head Raspberry, now out on his own. Bottom Line, 15 W. 4th St. Fri.-next Sun.

THE CRYSTALS—Rock oldies. Riverboat, Fifth Ave. and 34th St. Tues.-Sat.

DARDANELLE—A pianist who has touches of Tatum and who sings with echoes of Lee Wiley—a hard combination to beat. Bar None, 167 E. 33d St. Tues.-Sat.

TONY DARROW—Singer. Rainbow Grill, Rockefeller Center. Mon.-Sat.

DOLLY DAWN—Once a familiar voice on the air waves, with George Hall's orchestra and with her own Dawn Patrol, coming out of retirement with her lusty voice still intact. With Marty Napoleon, piano, Bucky Calabrese, bass. Cookery, 21 Univ. Pl. Mon.-Sat.

BLOSSOM DEARIE—A darling of the cocktail-hour crowd. Reno Sweeney, 126 W. 13th St. Wed.-Sat.

TED DIAMOND—Piano. With Chet Amsterdam, bass. Peacock Alley, Waldorf Astoria, Park Ave. and 49th St. Tues.-Sat.

RITA DIMITRI and STANLEY BRILLIANT—Oo-la-la in their own boite by a husband (piano, guitar) and wife (oo-la-la) team. La Chansonette, 890 Second Ave. Tues.-Sat.

HAROLD DUMONT—Singer. Cleo's, Bway at 63d St. Tues.-Sat.

THE DUPREES — Riverboat, Fifth Ave. and 34th St. Today.

PHOEBE SNOW—The distinctive young jazz-folksinger. McCarter Theater, Princeton U., Princeton, N.J. Sat., 7:30 and 11.

JOE STUART AND TRACY SCHWARTZ—Bluegrass. Englishtown Music Hall, 24 Water St., Englishtown, N.J. Fri., 8:30.

JERRY VALE—With Caterina Valente. Westbury Music Fair, Brush Hollow Rd., Westbury, L.I. Mon.-Fri., 8:30; Sat., 7 and 10:30.

Revues

MARYIN BRASCH—"An Evening of Kurt Weill." With Paul Trueblood, piano. Mama Gallis, 24 Wooster St. Tues.-Sat., 7:30.

DEJA VU—Comedy skits, song and dance, starring George Dart and friends. Upstairs Cafe, Second Ave. and 64th St. Nightly, except Mon., 9:30 and 11:30.

Art

(Air galleries, unless otherwise noted, are closed Sundays.

Galleries Uptown

PIERRE ALECHINSKY—A series called "The Color of Time," combining watercolor and etching with, often, a witty effect. Lefebre, 47 E. 77th St. Through April 10. Closed Mons.

LENNART ANDERSON—Selected works, 1951-76. Davis & Long, 746 Mad. Ave., at 65th St. Through April 17. Closed Mons.

MILET ANDREJEVIC—The greensward and lakeside of today's Central Park given an allegorical existence of the sort found in the paintings of Puvis de Chavannes. Goldowsky, 1078 Mad. Ave., at 81st St. Through Sat. Tues.-Sats., 12-5.

RUTH ZINN BECKER—Aerial views of the United States in mixed-medium works. Gallery 84, 1046 Mad. Ave., at 80th St. Opens Tues. Through April 17. Tues.-Sats., 12-5.

WILLARD BOEPPLE—Abstract sculptures. Acquavella, 18 E. 79th St. Through April 7.

EMANUELE CAPPELLO—Expressionistic paintings. Galerie Internationale, 1095 Mad. Ave., at 83d St. Opens Tues. Through April 10. Closed Mons.

FRED CHANCE—Paintings. Avanti, 745 E. 72d St. Opens Tues. Through April 16. Tues.-Sats., 12:30-6.

BRUNO CIVITICO—Nudes and other figure groups, plus landscapes, in the manner of classical realism. Schoelkopf, 825 Mad. Ave., at 69th St. Through April 17. Closed Mons.

ANN COLE PHILLIPS—Paintings. Bodley, 1063 Mad. Ave., at 80th St. Through Sat. Closed Mons.

ROSEMARY COVE—Reclining female figures in terra cotta, plaster and papier-mache. Ingber, 3 E. 78th St. Opens Tues. Through April 17. Closed Mons.

KEN DANBY—Realist paintings. Zierler, 955 Mad. Ave., at 75th St. Opens Sat. Through April 29. Closed Mons.

FRIEDEL DZUBAS—Paintings. Knoedler, 19 E. 70th St. Opens Sat. Through April 21. Closed Mons.

RONALDO DE JAUN—Works on paper. Lerner-Heller, 789 Mad. Ave., at 67th St. Through April 10. Closed Mons.

JIMMY ERNST—Paintings. Borgenicht, 1018 Mad. Ave., at 79th St. Through April 21. Closed Mons.

BARKER FAIRLEY—Landscapes and portraits in oil and watercolor by a Canadian. Touchstone, 118 E. 64th St. Through Wed. Closed Mons.

ANDRE FAUTEUX—Welded-steel sculptures by a Canadian. Deitcher, 35 E. 67th St. Through March 31. Closed Mons.

EMIL GANSO (1877-1941)—Prints, drawings and watercolors. Weyhe, 794 Lex. Ave., at 81st St. Through Sat. Closed Mons.

ESTHER GENTLE—Painted steel sculptures. Larcada, 23 E. 67th St. Opens Tues. Through April 17.

JOHN GRIEFEN — Abstract paintings. Daitcher, 35 E. 67th St. Through Wed. Closed Mons.

ALAN GUSSOW—Abstract patterning of landscapes. Washburn, 820 Mad. Ave., at 68th St. Through Sat. Closed Mons.

PHILIP GUSTON—Paintings from 1975. McKee, 140 E. 63d St. Through April 10. Closed Mons.

JEAN HIGGINSON HARDEN—Paintings, many of Italian scenes. Kottler, 3 E. 65th St. Through April 17. Mons.-Fris., 12-6; Sats., 12-4.

ROGER HILTON (1911-75)—Late paintings and drawings, many of women, by an English artist. Gruenebaum, 25 E. 77th St. Through Sat. Closed Mons.

MARGARET ISRAEL—Paintings and sculptures. Cordier & Ekstrom, 980 Mad. Ave., at 76th St. Through April 24. Closed Mons.

CRAIG KAUFFMAN—A form of painting and construction, of canvas and wood, in pieces which resemble the back sides of paintings. Elkon, 1063 Mad. Ave., at 80th St. Through Wed. Closed Mons.

CARLA LAVATELLI—Abstract sculptures in black marbles and granite. Gimpel, 1040 Mad. Ave., at 79th St. Through April 17. Closed Mons.

FERNAND LEGER (1881-1955)—Seventeen oils spanning the French master's career. Perls, 1016 Mad. Ave., at 78th St. Through April 10. Closed Mons.

DAVID LEVINE—Watercolors and drawings of political, literary and art figures, plus interiors. Forum, 1018 Mad. Ave., at 79th St. Through April 16. Closed Mons.

HARRY MCCORMICK—Realistic paintings. ACA, 25 E. 73d St. Through Sat. Closed Mons.

ARMANDO MORALES—Paintings of volumetric female torsos and magnified images of fruit. Ault, 25 E. 77th St. Through April 17. Closed Mons.

YOSHIKAZU OGINO—Paper cutouts dealing with astronomy and science fiction. Phoenix, 939 Mad. Ave., at 74th St. Through April 16.

JULES OLITSKI—Paintings. Knoedler, 19 E. 70th St. Through Wed. Closed Mons.

SAUL OSTROW—Chansing Installations. Bykert, 24 E. 81st St. Through April 8. Closed Mons.

MAX PAPART—Abstract paintings derived from Cubism, by a 65-year-old French artist. Zarre, 20 E. 69th St. Through Thur. Closed Mons.

DAVID PEASE—Mixed-medium works on paper. Dintenfass, 18 E. 67th St. Through April 10. Closed Mons.

MATT PHILLIPS—Monotypes. Zierler, 956 Mad. Ave., at 75th St. Through Wed. Closed Mons.

LIA PICARD—Conceptual work involving Watergate personalities. Feldman, 33 E. 74th St. Through Sat.

HENRY VARNUM POOR (1887-1970)—Paintings and drawings, including a self-portrait, by an artist whose larger accomplishment was in ceramics. Reno, 655 Mad. Ave., at 60th St. Through April 10.

HELEN QUAT—Paintings, etchings and silverpoint drawings of organic forms. Alonzo, 26 E. 63d St. Through Sat. Closed Mons.

CHARLES REID—Still lifes. FAR, 746 Mad. Ave., at 65th St. Through Wed.

PAUL RESIKA—Paintings. Graham, 1014 Mad. Ave., at 78th St. Opens Tues. Through April 24.

SALLY WINSTON ROBINSON—Photochemical works on paper. Rina, 23 E. 74th St. Through Sat. Closed Mons.

MEL ROMAN—Wall reliefs, sculptures and photo-collages, done between 1963 and the present. Automation House, 49 E. 68th St. Opens Sat. Through April 30. Closed Sats.

WILLIAM SCOTT—Small still lifes in gouache, by one of Britain's major painters. Jackson, 32 E. 69th St. Through Sat. Closed Mons.

RONALD SEARLE—Humorous drawings and watercolors of Hawaii, Florida, Alaska, Nicholls, 1014 Mad. Ave., at 78th St. Through April 10. Tues.-Sats., 12-5:30.

LEON SHTAINMETS—Paintings on 18th-century themes, by a graduate of the Moscow Academy. Poinpexter, 24 E. 84th St. Through April 11. Closed Mons.

DAVID SMITH—Small sculptures. Knoedler, 21 E. 70th St. Through April 7. Closed Mons.

TONY SMITH—Castings of models in bronze and five small pieces in steel. Fourcade, Droll, 36 E. 75th St. Through April 17. Closed Mons.

BOB THOMPSON and WILLIAM SCOTT—Paintings and works on paper (1961-66) by the former and gouaches by the latter. Jackson, 32 E. 69th St. Through Sat. Closed Mons.

JAMES TWITTY—Paintings with overlapping geometric color planes combined with landscape details. Findlay, 984 Mad. Ave., at 77th St. Through April 17. Closed Mons.

ELISABETH VINCENT—Painted drawings. Selected Artists, 655 Mad. Ave., at 60th St. Through April 10.

WILLIAM T. WILLIAMS—Paintings on paper. Carlton, 127 E. 69th St. Through Sat. Closed Mons.

Group Shows

BABCOCK, 805 Mad. Ave., at 68th St.—Landscapes by Americans, including Hassam, Maurer, Hartley. Through Wed. Closed Mons.

LA BOETIE, 9 E. 82d St.—German and Austrian Expressionist paintings and drawings by Dix, Kirchner, Schiele, others. Through April 10. Closed Mons.

DEUTSCH, 43 E. 80th St.—Artists associated with Stieglitz' 291 Gallery, among them Dove, Hartley, O'Keeffe. Through Sat. Closed Mons.

FABIAN, 760 Mad. Ave., at 65th St.—Artists from 10 European countries, working in the naive style. Through Sat.

GALLERY OF FINE ARTS, 58 E. 79th St.—Paintings by Elemer Polony, drawings by William G. Paszternac, sculptures by Lucette Darby White. Through April 20.

HIRSCHL & ADLER, 21 E. 67th St.—Paintings, sculptures and drawings, including major works by Picasso, Magritte, Sheeler, Hopper, Nevelson. Opens Thur. Through April 24. Closed Mons.

JANKOVSKY, 33 E. 74th St.—Salvador Bru, Knox Martin, Shirley West, Guy Williams in a show of paintings and sculptures. Opens Tues. Through April 30. Closed Mons.

KERR, 49 E. 82d St.—"Masters of American Impressionism," principally Cassatt, Hassam, Theodore Robinson, Sargent, Twachtman, Weir. Through Sat. Admission is $2.

RONIN, 45 E. 70th St.—"Images of a Floating World," a show tracing the evolution of Japanese woodblock prints from 1680 to the 20th century. Through April 10. Closes Sats. at 2.

SABARSKY, 987 Mad. Ave., at 77th St.—Klee, Nolde, Schiele and other Expressionists. Through May 1. Closed Mons.

SOLOMON, 959 Mad. Ave., at 75th St.—Paintings and sculptures by Lars, Dubuffet, Stella, others. Through Wed.

WEINTRAUB, 992 Mad. Ave., at 77th St.—Post-Impressionist paintings and sculptures. Through April 15. Closed Mons.

Galleries 57th St.

PETER AGOSTINI—Sculptures. Zabriskie, 29 W. 57th St. Opens Tues. Through April 17. Closed Mons.

ENRICO BAI—Witty portraits in collage on canvas. Arras, 29 W. 57th St. Through April 17. Closed Mons.

EDWARD BETTS—Acrylic paintings. Midtown, 11 E. 57th St. Through April 10. Closed Mons.

BLANCHE BRODY—Figure paintings by a West Coast artist. Humboldt, 37 W. 57th St. Through April 10. Closed Mons.

DAN CHRISTENSEN—Paintings. Emmerich, 41 E. 57th St. Through Thur. Closed Mons.

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bring the nation's central bank into the arena of intense political scrutiny and pressure. . . ." During an appearance before the Senate Banking Committee, the Fed chairman predicted that if the bill becomes law, it could have international repercussions. He contended that "runaway worldwide inflation" has resulted when other governments eliminated the independence of their central banks. The bill was proposed by Banking Committee Chairman William Proxmire (D.-Wisc.), who argued yesterday that it would strengthen congressional oversight but would "not affect the Federal Reserve's monetary function."

FORD ADMINISTRATION

President Ford yesterday nominated Air Force Secretary John L. McLucas to become head of the Federal Aviation Administration. If confirmed by the Senate, McLucas, who has been in his present post since 1973, would succeed Alexander Butterfield who resigned last March. The White House did not indicate who would be named to the Air Force position.

POLITICS

A survey of industry executives has found that businessmen overwhelmingly favor President Ford's election in 1976 to a full term in the White House. *Dun's Review* reported yesterday that 70 percent of its poll of the 300 executives on its presidents' panel said they would vote for Ford if the election were held today. The magazine added, however, that many of the businessmen were worried about the President's chances next year because "no incumbent president since World War II has been re-elected with an unemployment rate in excess of seven percent."

REGULATORY REFORM

'DE-REGULATION' PUSH ASSESSED

Irving Kristol (WALL ST. JRNL., 10/20/75):

"Everyone suddenly seems to be in favor of 'de-regulation': President Ford, conservative economists, liberal Congressmen, the media, Ralph Nader, Common Cause, populist academics, The Wall Street Journal, etc. Such an odd consensus ought to be enough to cause one to have second thoughts about the whole business. And, indeed, there are very good grounds for such second thoughts. For upon examination there is far less to 'de-regulation' than meets the eye. And what substance there is, is of dubious merit.

"The movement for 'de-regulation' may seem to be a healthy reaction against what Walter Lippmann called 'the sickness of an overgoverned society.' But in actuality it is not really anything of the sort. It is a movement directed almost exclusively against *some* of the activities of the *older* regulatory agencies—e.g., the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Power Commission, the Securities and Exchange Commission, et al. Not *all* such agencies, it is interesting to note. There seems to be little urge to dismantle the Food and Drug Administration or the Federal Trade Commission. And there appears to be no impulse whatsoever to apply 'de-regulation' to the activities of the *newer* regulatory bodies—the Environmental Protection Agency, the Occupational Safety and Health Administration, or the Consumer Products Safety Commission. On the contrary: the bureaucracy and red tape of these other agencies calmly and inexorably multiply, attracting little controversy, even as the movement for 'de-regulation' grows more popular.

"So, while 'de-regulation' sounds as if it means de-bureaucratization, it turns out not to have that meaning at all. Or, more precisely: it is a very selective kind of de-bureaucratization. And there is reason to believe that it is the wrong kind—one whose ultimate consequences will be more government control over the economy rather than less.

"The history of the current fervor for 'de-regulation' is an interesting one. The idea itself was born a couple of decades ago at the University of Chicago, specifically in its department of economics, and is associated with such distinguished names as George Stigler and Milton Friedman. Since the economics department at Chicago is famous for its orientation toward a free market economy, there is nothing surprising in its producing studies critical of government regulation. What is surprising is the direction this criticism took. Not only did it expose, with great cogency, the inefficiencies associated with government regulation. It further argued, and tried to prove, that all such regulatory agencies eventually became the captives of their business constituencies, so that 'regulation' really became a kind of governmental-business conspiracy against the commonweal.

"It is this last thesis which, in more recent years, has enthusiastically been taken up by the left, for fairly obvious reasons. Articles and books have been pouring forth from the academy, all purporting to reveal the workings of this conspiracy; and the idea that, when government regulates business, business ends up running government, has now became a commonplace of radical-populist thought. Indeed, some younger historians are now arguing that such agencies as the ICC came into existence at business' behest, and for the clear purpose or maximizing corporate profits. This explains why 'de-regulation' has become so popular among people who have never had a kind word to say for capitalism.

"Now, there are two issues posed here, one involving historical fact, the other involving economic theory.

"Whether the older regulatory agencies were from the beginning conceived as allies of 'big business' (as the radicals say) or merely became such allies in the course of time (as the free-market economic historians assert) can be left to these parties to debate. This is especially easy to do since some recent scholarship (which I find more persuasive) argues that they are both wrong—that what seems obvious is not always false, that the more traditional view of such regulation as being a political reaction *against* 'big business,' and on the whole operating as a genuine restraint on it, is probably the correct one. In any case, I have yet to meet an executive in a regulated industry—railroads, say or airlines—who had the impression that those regulators in Washington were really on his side.

"The issue of economic theory is both more important and more troublesome, since it involves a conception of the 'natural tendencies' of a capitalist economy. The Chicago school insists that oligopoly and monopoly are (a) either created by governmental policies, or (b) would dissolve under the corrosive effects of competition were it not for governmental policies. But there are other economists—the great Joseph Schumpeter was one—who believe (without animus toward capitalism) that free competition among firms can lead to the 'survival of the fittest,' and that these in the end will number a relatively few of the largest and most efficient firms. In other words, there is a question as to whether the free market, at least in certain areas, has a tendency to create a situation where only a handful of large corporations compete with one another, and where such competition is mitigated and internally moderated (especially as regards pricing) by the desire to protect the profitability of the industry as a whole.

"It would be presumptuous of me to have too strong an opinion on this matter. I have the greatest respect for George Stigler and Milton Friedman. Still, I'll go so far as to say that there does seem to be *some* validity in the Schumpeter analysis. Conditions of entry into *some* capital-intensive industries are so difficult as to be, in effect, impossible, and though competition does exist within them, it is highly imperfect competition. If and where this is the case, enforcement of antitrust laws, and-or some kind or degree of government regulation, and-or legally sanctioned self-regulation by the industry in question, may turn out to be the only way to preserve what competition exists. In the longer run, it may be the only realistic alternative to some form of nationalization. And we are already witnessing in such an area as stock-brokerage, how 'de-regulation' might end by creating a capital-intensive industry where one does not now exist.

"It seems reasonable, therefore, to worry about the consequences of unthinking 'de-regulation.' The SEC may sincerely believe that its recent actions have opened the financial markets to greater competition, but what is visible is only a movement toward greater concentration. 'De-regulation' of the airlines would probably have the same consequences—and a more concentrated airline industry would surely lead to a nationalized airline industry. There really does seem to be substance in the traditional belief that the older regulatory agencies have both the purpose and the effect of

preserving some competition where competition might otherwise diminish or disappear under the pressure of 'natural' market forces. And it is well to recall that the original arguments for such regulation, in decades past, were that it would help save capitalism and 'free enterprise' from 'big business.' This is not such an incredible notion. Indeed, if one thing is certain, it is that the more 'big business' we have, the more 'big government' we shall get.

"To be sure, there is an excellent case for the *reform* of these older regulatory agencies. They have, over time, become encrusted to a scandalous degree with bureaucratic inefficiency. They do need an infusion of new blood and new thinking—especially economic thinking, to correct the traditional legalistic habits of mind which take more satisfaction in complicating problems than in resolving them.

"And there is an even better case for turning our 'de-regulating' and 'de-bureaucratizing' energies to the newer regulatory agencies. These did not come into existence, or do they operate, in order to preserve capitalism. On the contrary, they overflow with unfriendly feelings against *all* business —not just 'big business.' Their aim is to substitute, wherever possible, their decision-making powers for those of the marketplace, so as to improve the 'quality of life.' This is why they are so utterly indifferent to the burdensome costs of their interventions—most of which, inevitably, make the very existence of a small business almost an economic impossibility.

"I am sure that President Ford and the Chicago economists would be delighted to apply 'de-regulation' to these new agencies, and to the 'new class' which created them and populates them. But were they to try to do so, I suspect that we would all suddenly discover that 'de-regulation' had gone out of fashion."

[Mr. Kristol is Henry Luce Professor of Urban Values at New York University and co-editor of the quarterly The Public Interest.]

TAXES

GOP HAILS FORD PLAN

Godfrey Sperling Jr. (CHR. SCI. MON., 10/20/75, Washington):

"Republican leaders across the nation see President Ford's tax-cut, spending-cut proposal as a sound political move that bears promise of giving a decided lift to GOP hopes next year.

"Again and again, from every geographic region, comes this assessment from Republican state chieftains:

"—The $28 billion tax reduction proposal is viewed as one that, as one leader put it, 'is taking the wind out of the Democrats' sails.'

"'The Democrats,' another leader said, 'were just waiting to urge a tax cut of this size, thinking the President would merely ask that the present tax deduction be continued. They know there is good politics in promising the people a big tax bite. But they simply don't know how they can outpromise the President now without looking irresponsible.'

"'What makes the Democrats so angry,' another Republican said, 'is that he has taken what they regard as a Democratic issue — taxation relief — away from them.

"'That's why they are hollering 'irresponsibility' at the President. They don't know what else to say.'

"—The coupling of a request for an equal, $28 billion spending cut with the taxation proposal is seen by many GOP leaders as a 'brilliant' move—as a necessary and responsible way of dealing with cutting taxes.

"'It is the only way to keep the tax-cut stimulus from overheating the economy again,' is the way several leaders expressed it.

"But — further — the leaders see the move as a very effective political maneuver — one that is calculated to please the conservatives in both parties who would have otherwise been appalled by the immense tax-cut concept.

. . .

"—Republican leaders generally believe that the President has made a good start toward 'selling' his program."

Opponents of right-to-reply contend that such laws would have a "chilling effect" on vigorous newspaper coverage of electoral issues. Instead of permitting the public to hear both sides of a debate, as the Florida Supreme Court intended, the laws could have the opposite effect. Editors, fearing costly demands for free space, might stop covering election campaigns altogether.

Press spokesmen see right-to-access laws as the first step toward total government control over newspaper editorial content. Daniel Paul, attorney for The Miami Herald, told the Supreme Court that: "Forced publication is a form of regulation as pernicious as direct censorship."

Although most newspapers oppose any government attempt to regulate accuracy or fairness, they are taking steps to be more accountable to their readers. One essential factor in restoring credibility is the willingness to admit and correct errors. In response to calls for more diversity of opinion, many newspapers are printing more letters to the editor and are actively encouraging people to write. In addition, many papers have added an "Op-Ed page" of opinion and commentary opposite the paper's own editorials.

Another way to strengthen press credibility is assigning an "ombudsman" to see that public complaints get acted on. Most newspapers use an easier-to-pronounce and more descriptive title such as "Mr. Go-Between," "Reader Contact Editor" or "Public Access Editor." At several papers the ombudsman writes a column informing the public how the paper operates, telling how errors occur or assessing news media performance.

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The creation of the National News Council in August 1973 was another attempt to bridge the gap between the public and the press. The council, proposed and partially funded by the Twentieth Century Fund, reports on complaints about the accuracy and fairness of news reporting. It also studies issues involving freedom of the press.

However, the National News Council has no legal or coercive powers to force compliance with its findings. The council's "only power," Executive Director William B. Arthur has said, is "derived from publicity given its proceedings, and even this power is totally dependent on the judgment of editors to publish or not publish the council's findings."

Some major news organizations, including The New York Times and ABC-TV, have withheld their cooperation. Times Publisher Arthur Ochs Sulzberger expressed fear that the council might "encourage an atmosphere of regulation" that could lead to government intervention.

The press council is not a panacea for all the shortcomings of the media. But its establishment, together with the other experiments for making the news media more responsive to the public, shows that "consumerism" has caught up with the press. The public clearly wants a stronger voice in setting standards for the communications media, and the media cannot afford to ignore this demand.

(Brief of Report issued June 21, 1974: E.R.R., 1974 Vol. I, No. 23)