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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT, NATIONAL BROADCASTING COMPANY, INC.

In order to avoid unnecessary repetition, National Broadcasting Company (hereinafter "NBC") adopts the following portions of the Brief filed by Respondent, Radio Television News Directors' Association (hereinafter "RTNDA Brief"): Opinions Below, Jurisdiction, Statutes and Regulations Involved, and Statement. NBC also adopts those portions of the argument contained in Points II and III of the RTNDA Brief relating, respectively, to the lack of statutory foundation for the Commission's rules and the inadequacy of the findings made by the Commission.

NBC is in general agreement with the constitutional argument as it is presented in the RTNDA Brief. As a

party however, which is one of those most directly affected by the Commission's policies in this area, both as a station owner and as the owner of a nationwide radio and television network, NBC believes it important to make its views known to the Court. Moreover, NBC believes it important that the Court, in determining the validity of the Commission's personal attack and political editorializing rules, consider the scope and implications of the "fairness" doctrine, of which the rules are merely one implementation.

Questions Presented

1. Whether the freedom of speech and of the press guaranteed by the First Amendment are abridged by the FCC's regulation of "fairness" in programming through rules which impose burdens on broadcasters who carry "personal attacks" or political editorials.

2. Whether the challenged regulations are authorized by the Communications Act.

3. Whether the challenged regulations are invalid because not supported by an adequate FCC investigation and specific findings upon the necessity of the restrictions in order to make available to the public a diversity of opinion.

Summary of Argument

The imposition by an arm of government of its standard of "fairness" on the press and the enforcement of that obligation by governmentally imposed sanctions is contrary to the constitutional guarantee of freedom of the press. The First Amendment specified the free press, along with the right of assembly, the right of petition and the right of free speech, as instruments of political action and debate which were guaranteed against suppression so that our process of self government could function effectively. The government's argument that the time has come when the press, or a part of it, must be regulated as to "fairness" by a Governmental agency is directly contrary to our tradition of a free press, as it has consistently been interpreted by this Court.

Governmental regulation, however well intentioned, which has the tendency or effect of muzzling the press, discouraging or inhibiting the robust expression of views, or compelling the expression of one idea rather than another is precisely what the constitutional guarantee was intended to prevent. The nature of the press is such that no single member of it can publish every view on every issue or everything that every individual wishes to say; a selection must therefore be made. The First Amendment requires that the members of the press, rather than the government, will, in the exercise of their editorial judgment, do the choosing, without the supervision, control or regulatory influence of the government or a governmental official. The crucial guarantee is that the publisher or broadcaster be "unfettered in his own selection of what to publish." *United States* v. *Associated Press,* 52 F. Supp.

362, 374 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd,* 326 U.S. 1 (1945).

Broadcasting is an important part of the press to which this constitutional guarantee extends. *United States* v. *Paramount Pictures,* 334 U.S. 131, 166 (1948); *St. Amant* v. *Thompson,* 390 U.S. 727 (1968). Broadcasting must, of course, for reasons of technology, be regulated by a licensing system in order to prevent electronic interference. It does not follow, however, that the FCC may also regulate the "content" of what is broadcast by each licensee on controversial questions relevant to the process of self government. Such regulation is no more necessary or desirable for broadcasting than it is for other media; government regulation is not necessary to expose the public to a diversity of information and opinions, and, indeed would not serve that end; and it raises an impermissible threat of governmental censorship of the press.

There is an enormous multiplicity and diversity in broadcasting today. Radio and television voices are several times as numerous as newspaper voices. According to the Commission's latest figures, there are 7,411 broadcasting stations in the country. In 1965 there were only 1,751 daily newspapers, and the number was declining. In virtually every state and locality there are far more broadcasting voices than there are newspapers. There are many additional radio and television frequencies allocated to communities across the country which are not currently being used. The situation is radically different from what it was when the Communications Act was first adopted; the number of broadcasting voices has proliferated enormously. Other developing technologies are supplying the opportunity for even greater diversity.

Broadcasting voices are additive to those already being heard in the daily press, national magazines, and books and periodicals of all kinds. Network news organizations, in accumulating and presenting national and international news, provide news sources in addition to the wire services and the reporting staffs of the larger newspapers and magazines. Other means of expression have been found and used to bring particular points of view to the attention of the public—the demonstration, the political rally, and the parade. A greater range and variety of opinion is heard by the public today than has ever been heard in our history. The process of opinion formation is a complex one in which broadcasters and the other national media play only a part.

Against this background a reversal of the policy which has kept the press free of governmental restraint or compulsion has not been shown to be necessary or desirable—either for broadcasting or for the media in general.

The Commission's "fairness" doctrine and personal attack and political editorializing rules impose burdens on free expression far heavier than burdens which this Court has repeatedly struck down. The risk of prosecution for libel, *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); the requirement of verifying material before it is published, *St. Amant* v. *Thompson,* 390 U.S. 727 (1968); the requirement of filling out and returning a card in order to receive particular communications, *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); and the prohibition of publishing editorials on election day, *Mills* v. *Alabama,* 384 U.S. 214 (1966) have all been held to impose too heavy a burden. A requirement that a station broadcast a point of view only on the condition that time in the limited broad-

cast day also be allotted to other points of view specified by the Commission imposes at least as heavy a burden. A requirement that in a great number of indefinable situations a particular view can be expressed only if transcripts are sent to particular persons or groups and free broadcasting time be given them goes even further.

Moreover, the Commission's policy and regulations are unconstitutionally vague. The Commission has recognized that its rules do not adequately define the situations to which they apply. Phrases like "attack" and "like personal qualities" will hold whatever content the Commission wishes to pour into them. The "fairness" doctrine in its broad contours is even vaguer. Application of these policies by the Commission necessarily involves it in value judgments as to the merit and importance of particular viewpoints.

The Commission's rules and policy provide an uncertain guide to the broadcaster and give the Commission an enormous censorial power. The capacity to exercise such power in a context in which the Commission's lifted eyebrow carries with it the threat of fines or forfeitures, or the ultimate death penalty of license denial, is an unconstitutional infringement on the freedom of the broadcast press.

Argument

THE FAIRNESS DOCTRINE AND THE COMMISSION'S PERSONAL ATTACK AND POLITICAL EDITORIALIZING RULES, WHICH PURPORT TO IMPLEMENT IT, VIOLATE THE FIRST AMENDMENT.

In this case and the *Red Lion* case[1] this Court is called on for the first time to deal directly and specifically with the question whether and to what extent Congress and the Federal Communications Commission can regulate the content of radio and television programming.

The Court has previously concluded that broadcasting is a part of the press to which First Amendment protection extends. *United States* v. *Paramount Pictures,* 334 U.S. 131, 166 (1948); *St. Amant* v. *Thompson,* 390 U.S. 727 (1968). It could hardly have decided otherwise since broadcasting is an important vehicle for the dissemination of information and opinion, on which many people rely for information and views on matters of public concern. An important part of the role traditionally performed by the press is now performed by broadcasters.

This Court has also previously indicated that, whatever other powers the FCC may have, they do not extend to the regulation of the content of radio and television programming. As the Court said in *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940):

> "The Commission is given *no supervisory control of the programs,* of business management or of policy" (emphasis added).

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[1] *Red Lion Broadcasting Co.* v. *F.C.C.,* 381 F.2d 908 (D.C. Cir.), *cert. granted,* 389 U.S. 968 (1967).

The Court of Appeals for the District of Columbia Circuit, which had been generally hospitable to FCC regulation in this area, in a recent case involving an application of the "fairness" doctrine cautioned that:

> ". . . it may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." (*Banzhaf* v. *Federal Communications Commission,* —— F.2d —— (D.C. Cir. 1968)).

As raised here, the issue is a particularly crucial one since the programming which the Commission has sought to regulate by its "fairness" doctrine is programming which deals with "controversial issues of public importance." The personal attack rule applies to personal attacks "during the presentation of views on a controversial issue of public importance" and the political editorial rule applies to programs endorsing or opposing candidates for public office. Thus, the expression at which the Commission's policy and rules are directed is, without exception, expression lying at the very heart of the process of self government where the importance of free expression and the danger of governmental intervention are clearest.

The Court of Appeals, in invalidating the regulations under the First Amendment, held only that these regulations are unconstitutional upon this record. Two constitutional issues are, however, posed, either of which might warrant invalidation of the Commission's rules. The first question is whether it is consistent with the concept of a free press, which is embodied in the First Amendment, for the Commission to regulate the "fairness" of what is broadcast. The second question is, whatever the constitutionality of the "fairness" doctrine, do the Com-

mission's personal attack and editorializing rules so burden and inhibit freedom of the press and free expression as to be unconstitutional?

A. *Broadcasting Is Entitled to the Protection Given the Rest of the Press Against Regulation of the Content of What It Publishes on Public Issues, Persons, and Events*

The Government's argument that the free press guarantee against government control of what is published may be cast aside for broadcasting rests on two alternative propositions: First, that this inevitably follows from the fact that the "available channels of expression [must] be restricted, by governmental licensing, to a limited number of persons"; second, that there are so few sources of broadcast information that such regulation is necessary to secure a diversity of expression. We shall demonstrate that both of these propositions are false.

1. The Regulation of "Fairness" in Broadcasting Is Not a Necessary Consequence of the Need for Licensing

In part, the Government's argument is divorced from any consideration of the absolute number of broadcast voices available or the comparative number of broadcast voices as against the number of voices in other media. In this branch of the argument the Government asserts that the mere fact that broadcasting must be licensed and that, at least in some areas, there are more applicants than there are frequencies, justifies the regulation of "fairness" in the programming of individual broadcasters. Thus, the Government argues that the propriety of such regulation follows from the fact that the available channels are "restricted, by governmental licensing, to a limited number

of persons" (Government Brief, p. 42) and that the crucial fact is that "there are not enough . . . [available outlets] to satisfy the demand of those who would be broadcasters" (Government Brief, p. 47). Elsewhere the Government frames the argument somewhat differently, suggesting that, because there is a regulatory apparatus, it must be used for this purpose. Thus, the Brief suggests that regulation of "fairness" in broadcasting is appropriate because this is "a field already subject to substantial governmental regulation to further the public interest" (p. 57) and because "the predicates and machinery for effectuating . . . a right of access exist" (p. 58).

It obviously does not follow from the fact that there is regulation of one sort that there can or should be regulation of another sort. As the Court said in *Rumely* v. *United States,* 197 F.2d 166 (D.C. Cir. 1952) [per Prettyman, J.], *aff'd,* 345 U.S. 41 (1953):

> "*It is clear that authority over a subject matter does not import authority over all activities of persons concerned in that subject matter.* Especially is it true that power over a subject matter involving speech, press, religion, assembly and petition does not go beyond the power to do that which is essential to be done in protection against a public danger." (197 F.2d at 176) (emphasis added).

There is also an unbridgeable logical gap between the premise that licenses must in some instances be denied to those who want them and the conclusion that "fairness" on the part of individual broadcasters should be regulated.

We note at the outset that the essential need for broadcasting regulation does not flow, as the Government suggests, from the fact that there are more persons who wish to broadcast than there are places in the frequency spec-

trum. Even if there were room for all, regulation would be necessary in order that two broadcasters not occupy the same space. It is true that, whenever the number of applicants exceeds the number of frequencies available, the Commission may be required, in addition to assigning frequencies, to select among the applicants. The Government concedes, however, that this second step is not universally or inevitably necessary when it says:

> ". . . economic conditions in some communities will not now support the new stations for which frequencies have been allocated . . ." (Government Brief, p. 48).[2]

In such communities, the only need for regulation which inevitably flows from the nature of broadcasting is the

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[2] One commentator has said that:

> "In almost all radio and television markets, economic barriers to entry will come into play before the technical barriers. The economic limitations have already become the dispositive factor in the growth of radio and television stations in many, if not most, small and medium-sized markets. The barrier to entry to further stations in those areas is not the technical unavailability of frequencies, but rather the economic inability of the area to support an additional station and the unavailability of sources of programming different from that which is already being provided by the existing stations. This situation then is identical to the situation in all large mass communications media." Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation,* 52 MINN. L. REV. 67, 158-59 (1967).

To the same effect is SIEPMANN, RADIO TELEVISION AND SOCIETY at 225 (1950):

> "More men can get into radio's domain today, and at far cheaper cost, than into the newspaper world."

See also THAYER, LEGAL CONTROL OF THE PRESS 126 (1956); Sullivan, *Editorials and Broadcasting: The Broadcasters Dilemma,* 32 GEO. WASH. L. REV. 719, 756-61 (1964); *Note, Regulation of Program Content by the FCC,* 77 HARV. L. REV. 701, 705-06 (1964); *Note, The Federal Communications Commission and Program Regulation—Violation of the First Amendment?* 41 NEB. L. REV. 826, 838-39 (1962).

need that each broadcaster be assigned a specific frequency on which to operate.

The question then becomes whether, in those communities in which a selection must be made among applicants, there is anything in the nature of broadcasting which requires that the selection be based, in part, on an evaluation of the "fairness" of what the licensee has broadcast.

We submit that this conclusion does not follow from the mere fact of regulation or the necessity to choose among applicants. Faced with the necessity of granting and denying licenses the Commission could have adopted any of the following courses, among others:

1. The selection among applicants on a first-come first-served or other arbitrary basis.

2. The selection among applicants on the basis of financial ability, character, independence from outside control, or other criteria which are neutral with respect to program content.[3]

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[3] It was essentially regulations of this nature which were upheld in *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943) ("Chain Broadcasting" regulations designed to preserve independence of licensees from contractual arrangements limiting their freedom in program selection), *Regents of the University System of Georgia* v. *Carroll,* 338 U.S. 586 (1950) (regulation against "management contracts" by which licensee surrenders control of station to third party not subject to Commission's licensing powers), and *Henry* v. *F.C.C.,* 302 F.2d 191 (D.C. Cir. 1962) (regulations designed to insure that applicant had studied needs and interests of locality for which license is sought). Similarly, *Lafayette Radio Electronics Corp.* v. *United States,* 345 F.2d 278 (2d Cir. 1965), involved a power which is neutral toward content, *i.e.,* the power to allocate frequencies to one *use* or another, and to enforce that allocation. 47 U.S.C. 303(b) and (c). The Commission action upheld in *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956) (rules against multiple-ownership, designed

3. The selection among applicants on a basis which, while involving some examination of program content, confines that examination to whether the programming is designed to serve some "public" interest, as opposed to serving exclusively the licensee's own private interest.[4]

4. The selection among applicants on the basis of criteria which include criteria relating to overall balance among program categories.[5]

5. The selection among applicants on the basis of criteria which include program "quality".

6. The selection among applicants on the basis of criteria which include "fairness" in programming.

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to avoid excessive concentration of ownership of broadcasting facilities) and *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266 (1933) (power of Commission to delete existing station to attain equitable distribution of radio facilities among various states) were similarly neutral toward the program content of applicants' broadcasts.

[4] It was upon this basis, rather than any criteria related to the "fairness" of the applicant's overall programming, that several of the cases relied on by the Government were decided: *e.g.*, *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dism.*, 281 U.S. 706 (1930); *Chicago Federation of Labor*, 3 F.R.C. Ann. Rep. 36 (1929), *aff'd*, 41 F.2d 422 (D.C. Cir. 1930); *Young People's Ass'n for Propagation of the Gospel*, 6 F.C.C. 178 (1938); and *KFKB Broadcasting Ass'n* v. *F.R.C.*, 47 F.2d 670 (D.C. Cir. 1931).

[5] It was the Commission's power to consider, in a general way, the *types* or *categories* of programs of applicants, which was sustained in *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F.2d 351 (D.C. Cir. 1949) and in *Bay State Beacon, Inc.* v. *F.C.C.*, 171 F.2d 826 (D.C. Cir. 1948). No consideration of the specific content of the licensee's programming, such as that required under the "fairness" doctrine, was involved in those cases.

7. The enforcement of a requirement of "fairness" by the adoption of the personal attack and political editorializing rules and the imposition of sanctions for failure to comply.

Each of these degrees and kinds of regulation places a burden of a different degree and kind on free expression. Going down the list they increasingly raise the risk of governmental censorship of the press. They increasingly threaten the sensitive area of political discussion and debate. The fact that regulation is necessary does not tell us which course the Commission should follow nor does it tell us that the burdens on, and dangers to, a free press, which alternatives 6 and 7 involve, are consistent with the First Amendment.

Nor is the Commission helped by anything said or decided in *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), or *Associated Press* v. *United States,* 326 U.S. 1 (1945). In the *NBC* case this Court held only that the Commission could act against certain economic arrangements which might have deprived the individual licensee of the power to choose the programming for his station. On the free speech point the Court said only that the fact of licensing, and economic regulation of this sort, were not unconstitutional. Similarly, in the *Associated Press* case, the Court held only that newspapers were not exempt from the antitrust laws and could not, by anticompetitive arrangements, drive others of their number out of business. Despite its extensive quotation from Judge Learned Hand's opinion in the lower court, the Government has missed the nub of it:

> ". . . the mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, *so long as he remains unfettered in his own selec-*

> *tion of what to publish"* (52 F. Supp. at 374) (emphasis added).

This Court's recent decision in *Shuttlesworth* v. *City of Birmingham,* 37 U.S. Law Week 4203 (March 10, 1969) is very much in point. The Court there held unconstitutional a municipal ordinance which allowed licensing officials to grant or deny licenses for parades or demonstrations in public places under broadly worded language which would have allowed them to affect or regulate the content of what was expressed. The regulation of parades in public places is something which the government may clearly do. This Court held, however, that it did not follow from the fact of licensing that the licensing could be based on criteria which might have an impact on the content of the ideas communicated.

We submit that pointing to the fact of regulation and licensing does not solve the problem. It does not demonstrate that the regulation which the Commission has undertaken here is either necessary, desirable or constitutional.

2. Broadcasting Cannot Be Distinguished From Other Media on the Ground That Diversity Is Lacking

One of the striking features of the Government's Brief is the paucity of evidence cited in support of the vital factual premises on which its argument is based. No evidence is cited for the proposition that the public is not now receiving, or would not receive without the "fairness" doctrine and the personal attack and political editorializing rules, a sufficiently diverse diet of information and opinion. No evidence is cited for the Government's assurance that today's marketplace of ideas is "increasingly one for the affluent and powerful." No evidence is cited for the propo-

sition that there is less diversity of information and opinion available now than there was thirty, or one hundred, years ago. No evidence is cited for the proposition that our system of self government is threatened by a spate of personal attacks, political editorials, and unfair treatment of issues whereby the media, or some of them, have molded the public to their view on vital issues. The Government takes all of these propositions as given, *a priori.*

All of the available evidence suggests that the facts are contrary to the picture which the Government paints of them.

The Government's argument ignores, first, the facts as to the existing and growing diversity and multiplicity in broadcasting. Second, it ignores the facts as to the interaction of broadcasting with other media and its place in the process of opinion development.

The Government relies heavily on the factual assertion that frequency limitation impels the imposition of the controls at issue here and indeed concludes at pages 48-49 of its brief that:

> ". . . The basis for congressional regulation of radio remains essentially the same as was the case when this Court examined the matter in *National Broadcasting Co.* v. *United States* . . . ."

We point out elsewhere (p. 14) that the *NBC* case was not at all concerned with the "matter" before the Court now.

For present purposes, however, it is significant that the conclusions reached by the Court in the *NBC* case in 1943 were in part based upon a 1938 Commission study which

revealed that at that time some 660 commercial broadcasting stations were in operation in the United States (319 U.S. at 197). The Commission's Report showed that there were then only 475 unlimited time broadcasting stations.[6] It is instructive to compare that figure with the statistics today.

As of January 31, 1969 there were some 6,560 AM and FM radio stations operating in the United States.[7] In addition to the radio stations there were a total of 851 television stations in operation.[8] Thus, there are now some 7,411 operational broadcast outlets in the United States as against the 660 outlets in 1943.[9] In addition, more than 1,000 UHF and VHF television channels, and another 1,000 FM radio frequencies have been allocated to communities, but are not being utilized.[10] It is true that unused TV channels are more prevalent outside the great metropolitan

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[6] Report on Chain Broadcasting, FCC Dkt. No. 5060, May 1941, p. 31.

[7] FCC News Release, Feb. 20, 1969.

[8] *Ibid.* The FCC's Annual Report for the Fiscal Year ending June 30, 1967 showed the following comparisons between stations on the air in 1949 and stations on the air in 1967:

	1949	*1967*
Commercial TV	69	626
Educational TV	0	127
Commercial AM	2006	4135
Commercial FM	737	1708
Educational FM	34	318

[9] Far from the Government's conclusion that the factual basis for regulation remains essentially the same as it was in 1943 we find that the commercial outlets viewed by this Court in 1943 comprise only 9% of the broadcast outlets operating now.

[10] These allocated but unused frequencies are scattered all across the country. A comparison of the number of television frequencies

centers. It is also true, however, that the metropolitan centers are best supplied with diverse sources of information, so that any technological limit on the number of channels in such areas is unlikely to result in a deficiency of sources.[11]

Compared with this multiplicity in broadcasting there were in 1965 only 1,751 daily newspapers in this country, and the number has been declining for the last several decades.[12]

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allocated with the number authorized in some representative states is as follows:

	Allocated	*Authorized*
California	102	72
Illinois	53	35
Kentucky	33	26
Massachusetts	23	16
New Jersey	13	10
Virginia	41	23

FCC Current Table of Assignments.
Many of the frequencies which are authorized to applicants are not yet operational, so that the number of stations presently operating is, in most cases, less than the number authorized.

[11] It is worth noting that scarcity, if it is relevant, was much more of a factor when our Constitution was adopted than it is today. Printing presses were few in number and expensive, and metal type, inks, and paper usually had to be imported from Europe. It is estimated that in 1776 there were only 41 newspapers in all the colonies. In 1775 there were only 4 newspapers in New York and 2 in Virginia, all of them weeklies. NORTH, THE HISTORY AND PRESENT CONDITION OF THE NEWSPAPER AND PERIODICAL PRESS OF THE UNITED STATES (TENTH CENSUS OF THE UNITED STATES, VOL. 8 (1884)); CHENERY, FREEDOM OF THE PRESS 142 (1955). Moreover, during this early period the few best newspapers were grouped around the seaports and "the inland papers were only copies of those of the seaports. . . ." FAY, NOTES ON THE AMERICAN PRESS AT THE END OF THE EIGHTEENTH CENTURY 21 (1927).

[12] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966, 519, 523 (87th ed.).

This diversity in broadcasting also exists in particular communities, as shown by the two tables below covering a number of representative States and metropolitan areas.[13]

There is, in fact, an even greater diversity and multiplicity of broadcasting sources, both absolutely and in comparison with the number of newspapers, than is revealed by the bare figures as to the numbers of stations located in any

[13] It should be noted that the following figures are based on sources published several years ago; the present number of broadcasters is significantly larger.

	Daily Newspapers	*Broadcasting Stations*	*AM*	*FM*	*TV*
California	128	373	223	116	34
Florida	47	239	181	41	17
Illinois	83	197	118	59	20
Maine	9	43	32	5	6
Nebraska	19	64	41	10	13
New York	85	240	149	66	25
South Dakota	12	38	26	2	10

U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966, 519, 523 (87th ed.).

A similar situation is found to exist when comparable figures for the five largest metropolitan areas in the United States are examined:

	1960 Population	*Daily Newspapers*	*Broadcasting Stations*	*AM*	*FM*	*TV*
New York	10,694,632	21	79	35	35	9
Chicago	6,220,913	13	79	32	39	8
Los Angeles-Long Beach	6,038,771	21	76	32	35	9
Philadelphia	4,342,897	17	52	23	22	7
Detroit	3,762,360	5	41	12	23	6

In each instance the area referred to is the appropriate Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Census. The figures are compiled from U.S. BUREAU OF THE CENSUS, COUNTY AND CITY YEARBOOK: 1967, Table 3; EDITOR AND PUBLISHER YEARBOOK, 1966; BROADCASTING YEARBOOK, 1966; and TELEVISION FACTBOOK, 1966.

particular community. An analysis of the situation in the New York metropolitan area is instructive.[14] In that area there are 21 English-language daily newspapers,[15] compared to 9 television stations and 70 AM and FM radio stations. All of the television stations, and a great many of the radio stations, can be received throughout the area; but many of the 21 daily newspapers have only a small or very local circulation. Of the nine dailies which are published in the five counties which make up New York City, only three (the *Times*, the *News*, and the *Post*) are of general circulation in the metropolitan area; the other six are published in one or another of the five city boroughs and have a circulation essentially local. The other twelve dailies are published outside of New York City, and consist of nine published in Westchester County, one in Rockland County, and two on Long Island. Each of these is the only daily in a "one-daily" town or city; and each of them has essentially a local circulation.[16] It is quite evident that broadcasting stations, far from being "scarce", are far more numerous than the daily newspapers, and present a far greater number of "voices" to the public.

Even a community with only a few stations may be within the service area of many other stations, some of which may be sufficiently a part of the same locality to provide local news and information. Red Lion, Penn-

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[14] The following discussion is based on the New York Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Census, which includes New York City, Nassau, Suffolk, Westchester and Rockland Counties.

[15] This includes only general coverage newspapers and excludes specialized publications.

[16] Compiled from EDITOR & PUBLISHER YEARBOOK, 1966 and BROADCASTING YEARBOOK, 1966.

sylvania, the town involved in the other case involving the "fairness" doctrine now before this Court, provides a useful example. Red Lion is a town of 5,594 inhabitants, about 10 miles southeast of York, the county seat, 25 miles southeast of Harrisburg, and 17 miles southwest of Lancaster. While Red Lion has only one radio station, according to station maps it can receive television broadcasting from 8 television stations, 3 of which are located in York and Lancaster,[17] and from some 23 radio stations,[18]

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[17] The stations are as follows:

WSBA-TV, ch. 43, York, Pa., CBS.
WLYH-TV, ch. 15, Lancaster-Lebanon, Pa., CBS.
WGAL-TV, ch. 8, Lancaster, Pa., NBC.
WHPA-TV, ch. 27, Harrisburg, York, Lebanon, Pa., ABC.
WHP-TV, ch. 21, Harrisburg, Pa., CBS.
WBAL-TV, ch. 11, Baltimore, Md., NBC.
WMAR-TV, ch. 2, Baltimore, Md., CBS.
WJZ-TV, ch. 13, Baltimore, Md., ABC.

(1968-69 Edition No. 38 of TELEVISION FACTBOOK, Stations Volume.) This analysis has not been done with engineering accuracy, but is believed to be a reasonable appraisal.

[18] The stations are as follows:

WNOW, 1250 kc, York, Pa.
WORK, 1350 kc, York, Pa.
WSBA, 910 kc, York, Pa.
WHVR, 1280 kc, Hanover, Pa.
WDAC-FM, 94.5 mc, Lancaster, Pa.
WGAL, 1450 kc, Lancaster, Pa.
WGAL-FM, 101.3 mc, Lancaster, Pa.
WLAN, 1390 kc, Lancaster, Pa.
WLAN-FM, 96.9 mc, Lancaster, Pa.
WCBM, 1460 kc, Harrisburg, Pa.
WCBM-FM, 99.3 mc, Harrisburg, Pa.
WFEC, 1400 kc, Harrisburg, Pa.
WHP, 580 kc, Harrisburg, Pa.
WHYL, 960 kc, Carlisle, Pa.
WHRY, 1600 kc, Elizabethtown, Pa.
WAHT, 1510 kc, Lebanon, Pa.
WLBR, 1270 kc, Lebanon, Pa.
WLBR-FM, 100.1 mc, Lebanon, Pa.
KYW, 1060 kc, Philadelphia, Pa.

8 of which are located in York and Lancaster. In addition, no less than three companies have applied for CATV franchises in Red Lion itself.[19]

Another factor which needs to be taken into account is the increased and increasing geographical fluidity in our society. Today's ease of travel and population mobility are another force working against the localism or parochial point of view which might be fostered by any insufficiency of information sources in a particular locality. The individual communities of our country are no longer, if they ever were, surrounded by walls impenetrable to the passage of truth.

The diversity which already exists is rapidly increasing. Technological advancements such as satellite stations and translators (which retransmit the programming of television stations) and CATV systems are multiplying the diversity of information sources available in communities across the country day by day.

The only statistical or other data advanced by the Government in the face of this diversity is data with respect to the number of comparative hearings in 1967 in the broadcast field. First of all, 73 comparative hearings in a year in all of broadcasting, when there are more than 7,000 stations operating, is not a very significant number.

In any event, the statistic does not suggest that there is any lack of diversity, but only that, in some areas, more

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WCAU, 1210 kc, Philadelphia, Pa.
WIBG, 990 kc, Philadelphia, Pa.
WRCP, 1540 kc, Philadelphia, Pa.
WBAL, 1090 kc, Baltimore, Md.
(1968 BROADCASTING YEARBOOK, Section B.)

[19] 1968-69 TELEVISION FACTBOOK, Services Volume, p. 500a.

people want to operate broadcast facilities of a particular kind than can.

The other arguments which the Government makes can be quickly disposed of. They are all qualitative, rather than quantitative, and none is supported by any statistics, data, or other hard facts.

The Government first argues (Government Brief, p. 45) that it is improper to compare numbers of broadcasters with numbers of newspapers since this ignores "the great number—and wide circulation—of printed materials other than daily newspapers, such as weekly newspapers, magazines and books." The Government suggests no reason, however, why the diversity existing in these other media argues against regulation of the content of newspapers, but does not argue against regulation of the content of broadcasts. We agree that there is great diversity in these other media. We do not agree with the Government's unspoken—and unproved—assumption that such other media do not reach the broadcasting audience. As we shall show (pp. 27-30) the Government here, and elsewhere, falsely assumes that the broadcast audience is somehow isolated from all other forms of human communication.

The Government next argues that regulation is justified because "in the case of most television and much radio broadcasting the programming received by the public, however many stations it may be tuned to, emanates primarily from a handful of network sources" (*Ibid.*). It is odd for the Government to attempt to justify the regulations and the Commission's policy on such a basis when the Commission made no findings on the point and did not even suggest that this was a reason for the adoption of its rules, and when the rules are so drawn as to apply across

the board to every station licensee, whether he be a network affiliate or an independent station, and whether he is in a market with 20 other outlets or two.

It is also an odd justification for the regulations in the face of the argument, by *amici* supporting the Government, that "fairness" doctrine complaints against networks are "extremely rare" [20] and that an examination of all complaints from July 1, 1965 to June 30, 1966 indicated that "almost all the complaints were against local programming." [21] Indeed, that brief concludes that "all reported cases involving Fairness Doctrine complaints (including personal attacks) were against local stations, none of which was in a major market." [22] It is obvious that the regulations were not designed to meet a problem arising out of networking.

Finally, the Government is fundamentally wrong in suggesting that network operations diminish the diversity available. Prior to the advent of radio and television broadcasting the people in our country relied for their local news principally on their local newspapers and for their national and international news principally on the wire services, A.P., U.P., and I.N.S., and the reporting staffs of those national magazines and newspapers strong enough to maintain them.[23] The advent of radio and tele-

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[20] *Brief of Office of Communication of the United Church of Christ, et al.*, p. 12.

[21] *Ibid.*

[22] *Id.* at 12-13.

[23] Most newspapers in the country rely, for their national and international news on a single wire service. In 1962 after I.N.S. had been absorbed into U.P., 70.2% of American daily newspapers took only one service. 41.5% took A.P.; 28.7% took U.P.I. and,

vision made available to the public a greater diversity of local news sources since each local broadcasting station develops and presents its own local news programming. As to national and international news, the large news organizations maintained by the three networks now supplement, and compete with, the wire services and national magazines as sources of such material. Since it is beyond the capacity of the typical local station to maintain the staff and facilities for national and international news coverage, they would, without the networks, be compelled to rely on the same sources the newspapers use, *i.e.*, the wire services. Thus, the existence of the networks and their news organizations multiplies the national and international news sources available in the communities across the country, rather than diminishing them.

When our Constitution was written the availability of news from distant places was limited by the cost and difficulty of travel. It was necessary to rely for news of distant events on the few people who had the time and money and reason to go to distant places. Today the avail-

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of the remainder, 4.4% took neither. RUCKER, THE FIRST FREEDOM (1968), p. 68. Rucker goes on to say:

> "Unfortunately, only 16.4 per cent of the dailies receive a service other than AP and UPI. And most of these are large dailies which also receive both AP and UPI. The New York Times Service has one hundred subscribers, the Chicago Daily News more than seventy. None of the other approximately forty-five supplemental news agencies serve as many as sixty dailies. The only foreign world news service received by more than one or two newspapers is Reuters, with forty-one subscribers.
>
> "Obviously, large segments of the population rely on AP or UPI for their picture of the world. Their newspapers and their broadcasting stations subscribe to no alternate source of nonlocal news." (*Ibid.*)

ability of news of distant events in our increasingly complex world is limited by the cost of collecting, organizing and presenting it. There are only a limited number of organizations capable of performing that task. It does not follow, however, in either situation that the persons or organizations who bring news from a distance should be brought under governmental control of the content of the news they provide.

The Government next argues that, because of the physical limitations on the service area of each broadcasting station, viewers are restricted to a small number of stations, whereas there are no such limits on the circulation of printed material (Government Brief, p. 45). This merely ignores the facts as to the number of outlets, already cited, and disregards the fact that any given publication, particularly in the case of local newspapers, only reaches a limited audience in spite of the fact that there is no law of nature which prevents its wider distribution.

It is difficult to understand what the Government is attempting to deduce from its reference (p. 46) to the limited broadcast day. The fact that the broadcast day does have finite limits, unlike the size of a newspaper or other periodical, does make more difficult the broadcaster's problem of selecting among competing materials. This, however, makes governmental control or compulsion more, not less, onerous and dangerous. Every idea or datum which the broadcaster is compelled to express displaces something else that he might have expressed. In such a context the compulsion of expression automatically produces a suppression of expression. The broadcaster, unlike the newspaper publisher, cannot merely print another page.

In sum, none of the arguments advanced by the Government contradicts the plain facts that there is enormous diversity and multiplicity in broadcasting.

3. Broadcasting Must Be Considered in the Context of the Communications Complex

Broadcasting is not a phenomenon that exists in isolation. People who watch television and listen to the radio also read newspapers, magazines and books, see signs and posters and picketers and demonstrators, and talk to their friends and associates. The Government tries very hard to ignore this simple fact.

We do not undertake to demonstrate in detail that, if we include media other than broadcasting, there is an enormous diversity of expression in this country. The Government concedes as much when it refers to "the great number" and "wide circulation" of printed materials of all kinds. Each of us is aware from his own experience of the variety of information and opinion, of almost every kind and every point of view, available at small expense through the mail and at the newsstands and paperback book counters across the country. The Commission made no finding and heard no evidence that such material does not reach and affect the broadcast audience. The Government's Brief ignores the question. The fact is that the various media and modes of expression constitute a continuum, not a series of discrete categories of expression each reaching a separate isolated audience.[24]

The Court of Appeals for the Seventh Circuit correctly observed that:

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[24] *E.g.*, Blumer, *Suggestions for the Study of Mass-Media Effects* (Chapter 10 of BURDICK & BRODBECK, AMERICAN VOTING BEHAVIOR (1959)), at pp. 199, 208.

> "Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television in conjunction with other media of communication." (400 F.2d at 1020)

The Government's image of broadcasters as pumping stations pouring information into receptive, but otherwise empty, minds vastly oversimplifies and misconceives the process by which public opinion is formed in this country. Studies which have been made of the matter suggest that neither broadcasting nor the mass media in general are as dominant a force in shaping opinion in this country as the Government suggests, and that, to the extent that they do shape opinion, it is by far less direct a process than the Government's image would indicate.

The study of opinion formation is by no means an exact science. There is, nevertheless, considerable evidence that the formation of personal opinions is much more affected by interpersonal private communications among friends and acquaintances than by the mass media.[25] As V. O. Key pointed out in a recent study, the idea that the public is "a plastic to be molded by the masters of the media into almost any form they desire" contains "a generous component of buncombe."[26]

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[25] KATZ & LAZARSFELD, PERSONAL INFLUENCE (1955), p. xv (Foreword by Elmo Roper) and see *id.* at p. 3; Berelson, *Communications and Public Opinion* in SCHRAMM, MASS COMMUNICATIONS (1960), pp. 531-32.

[26] KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY (1961), p. 344.

Not only are there many other forces at work, but even the effect that the media do have is largely an indirect one involving the diffusion of information from the media and other sources through individuals and groups in our society. Particularly important in the operation of the mechanism of opinion formation are those whom Key describes as "political activists" or "attentive publics" as opposed to "inattentive publics." These persons and groups who are catalysts to opinion formation, by their very nature, seek out information from many sources, rather than relying on a single one.[27]

The point was well stated by Professor Jaffe in a paper submitted to the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce:

> "Closely related to the notion of TV's uniqueness is the notion of what I would call its autonomy. This is the notion—more or less resting on its uniqueness—that TV is not simply a part of the whole complex of communication. It is thought to be separate, a complete system of communication in itself, in the sense that it has an audience which is reached primarily, even exclusively, by it. A large mass of TV and radio listeners are conceived as insulated from other channels of communication. It is supposed that they do not read newspapers, magazines, or books and, it would seem, do not receive information informally from their friends, associates, or organizations. Thus, if an attack on the personal honesty of a reporter is broadcast, it is assumed that unless a defense is subsequently broadcast the listener will not otherwise receive any counter-communication.

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[27] *Id.* at 535-58.

> "In the absence of more precise information than I have, I can only speculate as to its validity. *I question the validity of the notion of the insulated listener both as a fact and as a significant phenomenon.* My questions go, of course, only to degree. Undoubtedly there are insulated listeners but what I question is that the typical listener is thus insulated, that is to say, that he hears and knows only what is broadcast." [28]

It is evident that broadcasting cannot be viewed in isolation. The communications complex, taken as a whole, disseminates a great diversity of information and points of view, from a multiplicity of sources.

B. *The First Amendment Guarantees a Free Press, Not Governmentally Regulated Access to the Press*

One of the recurring themes of the Government's Brief is the idea that what the First Amendment mandates is not that the press be free, but that access to the press be somehow governmentally secured. (*E.g.,* Government Brief, pp. 38, 42). Thus, the Government argues that what the Commission is doing is to "protect the public's interest in the use of the available channels of communication" and that is a "clearly appropriate implementation of the First Amendment's basic purpose" (Government's Brief, p. 52).

The Government's argument distorts beyond recognition traditional concepts of the free press. It turns constitutional theory upside down. The history of the development and interpretation of the constitutional guarantee of freedom of the press makes it perfectly clear that the

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[28] Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change,* at pp. 2-3 (U.S. Government Printing Office 1968) (emphasis added).

First Amendment contemplated that the press would be free and independent, not that the government would regulate access to it.

The press was selected along with the rights of assembly, petition, and free speech, as a separate instrument of popular government the vitality of which should be protected in the interest of effective self government. Professor Meiklejohn has said that the First Amendment:

> ". . . correlating the freedom of speech in which it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation, beyond even the due process of law." [29]

Jefferson's appreciation of the importance of the role performed by the press led him to say that:

> ". . . were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." [30]

The concept of a free press which was forged out of the colonial and revolutionary experience, and which was embodied in the brief phrase "Congress shall make no law . . . abridging the freedom of . . . the press," was the concept of a press unfettered and capable of acting as a positive and independent force, one of whose principal

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[29] MEIKLEJOHN, *Free Speech in Its Relation to Self Government,* reprinted in POLITICAL FREEDOM (1960), p. 37.

[30] Letter from Thomas Jefferson to Edward Carrington, January 16, 1787, in *The Papers of Thomas Jefferson,* ed. Boyd, XII, 48-49 reprinted in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, ed. LEVY (1966) p. 333.

functions would be to serve as an outspoken critic of, and check upon, the activities of the government and those public men and groups who governed and shaped the Nation's life.

It was, of course, recognized that a press free of restraint might, on occasion, be licentious, dishonorable or unfair and might, at any given moment, communicate what was useless or dangerous rather than what the public needed to know. The Framers were alive to this danger but they thought that the benefits of an unfettered press were worth this risk. In Madison's words:

> "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true, than in that of the press." [31]

In his reply in 1798 to a letter from Talleyrand protesting against the pamphlets printed in the United States containing "insults and calumnies" against the French Government, John Marshall said:

> "Among those principles deemed sacred in America, . . . there is no one . . . more deeply impressed on the public mind, than the liberty of the press. *That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn.*" [32]

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[31] 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION (1876), p. 571.

[32] II BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919) pp. 329-30 (emphasis added).

Jefferson made the same point:

> ". . . the abuses of the freedom of the press here have been carried to a length never before known or borne by any civilized nation. But it is so difficult to draw a clear line of separation between the abuse and the wholesome use of the press, that as yet we have found it better to trust the public judgment, rather than the magistrate, with the discrimination between truth and falsehood." [33]

There are two views which might be taken of the role of the government with respect to the press in a free society. One view is that the government should regulate the press in such fashion that it serves as a platform for all voices that wish to be heard. The difficulties with such a view, among others, are that it places the government in a position to control, either overtly or subtly, the information and views which are disseminated by the press to the public and that it seriously impedes the press in the performance of its active and independent role in criticizing public and private action.[34]

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[33] Letter of Thomas Jefferson to Monsieur Pictet, February 5, 1803, in *The Writings of Thomas Jefferson*, ed. Lipscombe and Bergh, X, 357 reprinted in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, ed. LEVY (1966) pp. 360-61.

[34] A substantial body of case law has held that there is no right of access to the press. In *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia,* 151 F.2d 597 (3d Cir. 1945), *cert. denied,* 327 U.S. 779 (1946), which involved a federal action by a clergyman whose broadcasting contracts had been broken by defendant's radio station, the court affirmed the dismissal of the complaint on the ground that it failed to state a federal cause of action and stated:

> "Assuming arguendo that the defendant's cancellations of the plaintiffs' contracts have limited plaintiffs' opportunities to speak or preach freely, the First Amendment was intended to operate as a limitation to the actions of Congress and of

The second view, and the one undoubtedly enshrined in the Constitution, is that the safer and better course is to deprive the government of any power to control and regulate the press, particularly with respect to reporting or comment which might affect political, social, and economic judgments.

This Court has frequently recognized that the role contemplated for the press was an active one, that it was to be not merely a conduit of information or views, but a critic and gadfly. It was viewed as one of the independent but interacting forces which would combine to ensure a government responsive to criticism and reflective of the will of the people. Mr. Justice Black eloquently confirmed the active and independent function of the press in *Mills* v. *Alabama,* 384 U.S. 214 (1966):

> the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind." (151 F.2d at 601)

Accord, *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.,* 183 F.2d 497 (1st Cir. 1950); *Bloss* v. *Federated Publications, Inc.,* 5 Mich. App. 74, 145 N.W.2d 800 (1966); *Lord* v. *Winchester Star, Inc.,* 346 Mass. 764, 190 N.E.2d 875 (1963), *cert. denied,* 376 U.S. 221 (1964); *Commonwealth* v. *Boston Transcript Company,* 249 Mass. 477, 144 N.E. 400 (1924); *Shuck* v. *Carroll Daily Herald,* 215 Iowa 1276, 247 N.W. 813 (1933); *Mack* v. *Costello,* 32 S.D. 511, 143 N.W. 950 (1913); *Approved Personsonel, Inc.* v. *Tribune Co.,* 177 So.2d 704 (D.C. App. Fla. 1965); *Friedenberg* v. *Times Publishing Co.,* 170 La. 3, 127 So. 345 (1930); *In re Louis Wohl, Inc.,* 50 F.2d 254 (E.D. Mich. 1931); *Poughkeepsie Buying Service, Inc.* v. *Poughkeepsie Newspapers, Inc.,* 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. Orange Co. 1954).

> ". . . the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as *a constitutionally chosen means* for keeping officials elected by the people responsible to all the people whom they were selected to serve. *Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.*" (384 U.S. at 219) (emphasis added).

In the *Mills* case, the Court invalidated a statute prohibiting the publication of editorials on election day urging people to vote in a particular way as to the candidates or issues presented to them. The same argument was made in support of that statute that has been made in support of the FCC's rules, *i.e.*, that it promoted fairness by preventing publication of views in circumstances in which they could not be effectively answered. In the *Mills* case the Court found such a justification insufficient to support encroachment on the freedom of the press.

A praiseworthy motive, or even a desire to promote diverse speech, will not justify regulation of the content of what is disseminated by the press. In commenting on proposals that it regulate programming by requiring that specific types of programs be presented, the Commission itself recognized at a different time:

> "With respect to this proposition we are constrained to point out that *the First Amendment forbids governmental interference asserted in aid of free speech as well as governmental action repressive of it.* The protection against abridgement of freedom

> of speech and press flatly forbids governmental interference, benign or otherwise." [35]

The cases relied on by the Government as supporting the power of Congress, or its agency, to "implement a rather general right of access on behalf of elements of the public whose ideas might not otherwise be promulgated" (Government Brief, p. 57, n. 28) are singularly inapposite. In all of them, this Court struck down governmental action attempting to regulate free expression. In *Schneider* v. *State,* 308 U.S. 147 (1939), the Court invalidated municipal ordinances regulating the distribution of handbills. In *Martin* v. *Struthers,* 319 U.S. 141 (1943), the Court struck down a municipal ordinance prohibiting the distribution of handbills directly to a home. In *Staub* v. *City of Baxley,* 355 U.S. 313 (1958), the Court held unconstitutional a municipal ordinance regulating the solicitation of membership for organizations. In each case, the Court emphasized the danger of setting government officials astride any medium of communication. For example, in the *Schneider* case the Court held unlawful what it described as the "bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information . . . " (308 U.S. at 164). In the *Staub* case the Court found the municipal ordinance unlawful because it made free expression "contingent upon the will of the Mayor and Council of the City . . . " (355 U.S. at 325). It is evident that these

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[35] Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, FCC Public Notice B, July 25, 1960, as reprinted in "Television Network Program Procurement," Report of the Committee on Interstate and Foreign Commerce, H.R.REP. No. 281, 88th Cong., 1st Sess. (1963), pp. 157, 162 (emphasis added).

decisions condemn, rather than support, the policies of the Commission which are at issue here.

The government consistently misses the important distinction between the desirability of divergent views having access to the media of expression and the propriety of permitting government officials to regulate such access. As this Court again, quite recently, reaffirmed, the government "may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare', 'decency' or morals of the community." *Shuttlesworth* v. *City of Birmingham,* 37 U.S. Law Week 4203, 4204 (March 10, 1969).

It is noteworthy that in a comprehensive brief the Government says so little about the impact of the Commission's policy on the *freedom of the press.* The Government devotes much attention to the right of free speech and the way in which the Commission's policy allegedly implements it. The Government fails, however, to consider the right of freedom of the press, a distinct right, also separately guaranteed by the First Amendment.

Perhaps the Government intends to dispose of the issue by its suggestion that "the First Amendment's protection of free speech and a free press is to protect the public generally, and not the parochial interests of the news media." (Government Brief, p. 53). That of course is true, but it does not meet the point. The First Amendment recognizes that it is *in the public interest* that *the press* be free. The purpose is, of course, not to protect the freedom of action of the press for its own sake; rather,

the First Amendment recognizes that the public will be served if there is a free and independent press active as a force in our society. Such a press serves a function which is not served by merely insuring that every private individual may speak his mind. Just as the right of assembly insures the right of individuals to gather together so that their collective voice may be more strongly heard, and the right of petition insures that individuals or groups may make demands upon their government, so the guarantee of a free press insures that there will be groups in our society, beyond the control of government, with the facilities and resources to arrive at their view of the truth and speak loud enough for all, or many, to hear.

Although the Government purports to base its argument on the need to increase the public's access to information, in the name of free speech, its thesis, if accepted, would work a fundamental change in this Court's approach to free press issues. What the Government is suggesting is that the structure of our society has altered so fundamentally since 1789 that the government must now supervise the selection by the press of what it will publish, a power which the Framers certainly never intended the government to have, and which this Court has consistently denied it.

That this is the real import of the Government's Brief can be seen from its prominent reliance upon the thesis of Professor Barron[36] and its admission at page 57 of its Brief that the "fairness" doctrine and rules in contest here are "at most an application of the notion [Barron's thesis] to the field of broadcasting . . . ."

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[36] Barron, *Access to the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967).

Barron thoroughly disagrees with the Government's position that broadcasting may be regulated in a way in which the other media may not. He notes that there are many more broadcasting stations than newspapers and that the need for regulation is not diminished as to newspapers because the limitation on their number is economic rather than technological. He therefore concludes that newspapers should be viewed as "impressed with a public service stamp." [37]

Barron argues that because, in his view, the public is not getting access to enough of the right kind of information there must be some governmentally sanctioned right of access to the press—both broadcasting and printed. He recognizes that this view is flatly contradictory to the view which this Court has consistently taken, which he characterizes as "romantic".[38] He reserves particular criticism for this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) as being wholly inconsistent with his views.

There can be no doubt that Barron is arguing for a radical change in this Court's approach to free press questions. The Government, in order to sustain its position, is driven to the endorsement of Barron's view, or something approximating it.

Also revealing is Barron's approach to the crucial question of what he refers to as the "administrative feasibility" of the remedy he would like to see created. He suggests that the right to a judicially enforced access to the press should depend on such criteria as whether "the peti-

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[37] *Id.* at 1666.

[38] *Id.* at 1642, 1643 and *passim*.

tioner seeking access represents a significant sector of the community" and whether "the material for which access is sought is indeed suppressed and underrepresented by the newspaper."[39] Professor Barron has obviously encountered the same difficulty the Commission has in attempting to find a standard clear enough for the government to use in testing the editorial judgments which the press makes.

The press must inevitably decide which issues to cover, and which materials and viewpoints to present on each of them. No member of the press can present everything, especially in broadcasting, with the limited time available. Even a broadcaster who is highly sensitive to his duty of informing the public on crucial issues, and who wishes to present a balanced coverage, must decide what is "controversial" and what is of "public importance". Having decided to focus on an issue, he must decide which of the many possible viewpoints to present. This will inevitably involve value judgments. He may decide that a view is too narrowly held, or wholly irrational, or so similar to another point of view that it does not require separate expression. The Government recognizes that such judgments must be made when it refers to:

> ". . . access of the public, *or, more precisely, those elements of the public with responsible ideas warranting a general airing,* to the news media . . . ." (Government Brief, p. 56). (emphasis added)

The question is: Who shall decide whether an idea is "responsible" or whether it "warrants a general airing?" Shall it be the individual broadcasters or shall it be a

[39] *Id.* at 1677.

governmental agency? The Commission cannot enforce a "fairness" doctrine without becoming involved in such judgments.[40]

No one claims that the judgments made by the press, either broadcasting or printed, are always right, or always fair, or always in the public interest. No one claims that the press has finally outgrown the vices and abuses of which Jefferson and Madison complained. But William Allen White has told us clearly and pungently why it is that the existence of those vices and abuses does not warrant giving up on the idea of a free press:

> ". . . bad as he is, the crookedest, rich, property-minded publisher is vastly better than he would be if he was operating under a government controlled press. For on seven sides out of ten, the most prejudiced, unscrupulous publisher is fair and his columns in those areas are reasonably dependable.
>
> "In a government controlled press, nothing is fair, nothing is left to the routine professional judgment of the editor. A crooked, kept press, privately owned and operated, dominated by an arrogant, class-conscious individual or group of individuals, at its worst blinds only one eye of the public. But a government censored press blinds both eyes. . . .
>
> "At least the readers of a biased press have got the editor's number. They have taken his measure. They know how to get the truth out of his paper by discounting at a certain per cent and allowing certain dependable margins for lying. Then this biased, class-conscious editor is most enterprising in realms that do not affect his social bias and economic position.

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[40] Many people, including Commissioner Loevinger, apparently believe that it has already become involved in them. (See p. 52, *infra*.)

> After all, bad as the biased editor is, his faults are not fatal. For there are chinks in his armor of untruth through which the facts leak out." [41]

Professor Chafee, in pointing out the risks and dangers of governmental regulation of the press, has also alerted us to the fact that the Commission or body doing the regulating will not be free of political and other pressures and will be at least as fallible as the private press.[42] He goes on to say:

> "Whenever anybody is inclined to look to the government for help in making the mass media do what we desire of them, he had better ask himself one antiseptic question: 'Am I envisaging myself as the official who is going to administer the policy which seems to me so good?' Justice Holmes remarked that, when socialism came, he hoped he would be 'on the committee.' You and I are not going to be on the committee which is charged with making newspapers or radio scripts better written and more accurate and impartial. It is very easy to assume that splendid fellows in our crowd will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society, but that is an iridescent dream. We must be prepared to take our chances with the kind of politicians we particularly dislike, because that is what we may get." [43]

We question the Government's easy assumption that a governmental agency will do a better job than a free press in

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[41] WHITE, *Canons of Journalism—IX*, reprinted in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, ed. NELSON (1967), pp. 365-66.

[42] CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1965), pp. 707-08.

[43] *Id.* at 709.

promoting expression of the views the people need to hear and in securing, sometimes in the face of fierce pressures, the robust debate that everyone agrees is desirable.

Professor Chafee concluded that:

> ". . . free instruments and organizations seem more qualified than the state for this task of enlightenment, guidance and education." [44]

An enormous burden of proof would have to be carried to demonstrate that broadcasting and the printed media of communication have become so deficient as a mechanism for disseminating the information which the people need in a self governing society that we now need a government regulated press rather than a free press. That burden has not been carried here.

A democratic society is complex. It requires for its effective functioning the interaction of a multitude of persons, groups, and forces. An independent press is a part of that scheme. V. O. Key, a student of public opinion and its formation, has recently reaffirmed this truth:

> ". . . development and maintenance of the type of leadership essential for the operation of a democratic political order is facilitated by the existence of a social system of some complexity with many centers that have some autonomy and economic independence."

Key includes among these "centers" "communications enterprises, important in the operation of democracies," which "gain independence from government by their commercial position." [45]

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[44] *Id.* at 711-12.

[45] KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY (1961), pp. 540-41.

There is as much need for a free press as there has ever been; the danger in compromising that freedom is as great as it ever was.

C. *The Commission's Rules Burden the Broadcast Press in a Way Which the First Amendment Does Not Permit*

We have demonstrated above that the guarantee of freedom for the press forbids any form of governmental control, overt or subtle, which impedes or discourages a broadcaster from an active and vigorous role in taking or endorsing positions with respect to political, social or economic issues, or in criticizing or praising public officials and public figures.

That the Commission's policy and rules have such an impact is evident, in spite of the Government's fervent, though unsupported, denials. (*E.g.,* Government Brief, pp. 68-69).

The precise quantitative impact of the Commission's "fairness" doctrine rulings on what is broadcast cannot, of course, be measured, and can never be measured, since we can never know for any period of time what would have been broadcast had the Commission's policy been other than it is. The distribution of programming among program categories, the content of particular programming, and the extent and nature of broadcasting on controversial issues are the results of the interaction of a multitude of social, economic, political and legal forces, only one element of which is the Commission's "fairness" doctrine.

It has never been thought necessary, however, in cases where governmental action threatens to impinge upon free

expression, to analyze nicely the precise quantum of suppression produced by the particular government practice or policy complained of. Thus, in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965) the Court did not find it necessary to determine just how much communist mail would remain undelivered as a result of the requirement that a reply card be returned in order to secure delivery, and in *Mills* v. *Alabama,* 384 U.S. 214 (1966) the Court found it unnecessary to analyze precisely how much political debate would be restrained by a statute prohibiting the publication on election day of editorials relating to the issues or candidates in the election. In the latter case it was evident that the impact would be small since the statute in no way impaired debate up to and including the very eve of the election.

The inquiry has always been merely whether, as a matter of logic and common experience, a particular governmental restriction is likely to limit free expression by the public or the press in some degree.

It is evident that the "fairness" doctrine and the Commission's rules have such an effect.

The very purpose of the Commission's policy is to affect and control the content of what is broadcast. To the extent that the doctrine is enforced by the Commission it forces some broadcasters to refrain from broadcasting certain material because they are unwilling to broadcast other material which the "fairness" doctrine would require to be presented. It forces other broadcasters to broadcast material which they would not otherwise have presented. The penalties for failure to comply are the threat of fines and forfeitures and the ultimate weapon of license denial.

The form of regulation which the Commission has attempted here is precisely the kind of regulation which this Court struck down in *Near* v. *Minnesota,* 283 U.S. 697 (1931). There an attempt was made to suppress future publication of a newspaper as a public nuisance because it had consistently published defamatory material and was "largely" or "chiefly" devoted to such material. This Court held that, if the publisher had the right to publish the prior editions, without previous restraint, he had the same right to continue such publication in the future. The Court went on to say: "If the publisher has a right, without previous restraint, to publish . . . [the material], *his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.*" (283 U.S. at 720) (emphasis added). Those words could have been written about the Commission's "fairness" doctrine.

Where a rule or policy is specifically directed at securing a result which the First Amendment proscribes, no additional showing of burdensomeness or repressiveness should be necessary. It is perfectly clear, however, that the "fairness" doctrine, and particularly the implementing rules here under attack, will, if enforced by the Commission, impose substantial burdens on free expression by the broadcast press.

Some of the obvious effects of the FCC's enforcement of its rules are as follows:

1. *The Rules Discourage Radio and Television Broadcasters from Dealing with Controversial Issues of Public Importance.*[46]

It is obvious that many, if not most, programs dealing with issues of a controversial nature involve, either directly or inferentially, attacks on individuals or groups who are involved in or have taken positions with respect to those controversies. If a personal attack occurs, the licensee must incur the administrative burden and expense of making and sending transcripts or summaries to those attacked; he must disrupt his program schedule by providing time periods for any necessary replies; he must suffer the financial penalty of donating time on his facilities; and he must incur the risk that whatever action he takes, the FCC may subsequently conclude, either that there was a "personal attack" in material he thought inoffensive, or that his compliance with the rule has been inadequate. A further risk is that a communication advising an individual that he has been "personally attacked," and offering reply time, may invite, if it does not affirmatively support, a libel action based on the controversial issue broadcast.

It is apparent that the safer course is to avoid broadcasts involving controversial public issues. The dampening effect of the Commission's policy on broadcasters' attention to public issues has been recognized by a recent commentator after a careful study (McMillin, *New Voices in a Democracy,* 3 TELEVISION QUARTERLY 27, 41-8 (1964)), and by members of Congress.[47] Thus Mr. McMillin quotes a let-

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[46] This point is more fully developed, with many specific examples, in the Brief submitted in behalf of Respondent, CBS.

[47] That the equal time provision of Section 315 has had such an effect was acknowledged by the Senate Committee on Inter-

ter from Representative Oren Harris asking rhetorically "Will not broadcasters want to avoid starting an interminable chain of argument and debate?" (*Id.* at 48). The Government cannot deny that, in the light of the Commission's policy, the safer course is to avoid controversial issue broadcasting.

2. *The Rules Will Require Broadcasters Themselves To Impose Rigorous Censorship on Those Who Appear on Their Programs.*

Since the broadcaster is accountable, not only for his own use of his facilities to state positions, but for all material broadcast, he must carefully control what is uttered by those who appear on his station in order to insure that their utterances will not expose him to the penalties of a "personal attack" broadcast. Spontaneous discussion of a public issue, for example, will in many instances involve inadmissible risks. Even where there is a script, any copy dealing with a public issue will require careful screening. Moreover, the material to be screened out is not merely the untrue, the defamatory or the scurrilous, but anything which is in any respect critical of the "honesty, character, integrity, or like personal qualities" of a person or group. The burdens imposed by the principle are imposed irrespective of the extent to which the criticism is merited and, indeed, irrespective of whether the public interest urgently requires that the criticism be voiced.

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state and Foreign Commerce in its Report favoring a joint resolution to suspend that provision during the 1960 Presidential campaign (S. REP. No. 1539, 86th Cong., 2d Sess. (1960)), and by Congress in enacting the suspension. (Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554). For the reasons indicated in the RTNDA Brief the constitutionality of Section 315 is not here in issue.

3. *The Rules, to the Extent to Which They Are Successful in Securing Their Objective, Insure a Bland Impartiality in the Presentation of Views on Public Issues.*

Criticism is muffled by being incorporated in a total context which gives equal voice to every view.[48] Thus the official or private culprit is assured that, whatever he may do, his conduct will receive from the broadcast press a measure of adulation or explanation equal to any criticism.

4. *The Rules Will Place in the Hands of the FCC the Power, by Its Interpretations of the Rules, To Affect in More Subtle Ways the Content of What Is Broadcast by Its Licensees.*

The rules contain many words and expressions of unclear content and susceptible of various interpretations, *e.g.*, "like personal qualities," "controversial issue of public importance," "group," and the like.

The Government's Brief nicely exemplifies the vagueness of the rules. Thus, the Government says:

> "It is clear that an 'attack' is something quite different from mere mention, comment, or even criticism." (Government Brief, p. 72).

The precise dividing line between "criticism" and "attack" is not as clear to us as it is to the Government.

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[48] A criticism which has been made of broadcasters over the years is that their programming is too even-handed and neutral and that there is too great a reluctance to take positions. See, *e.g.*, Variety, November 30, 1966, p. 24; The Nation, January 23, 1967, pp. 99, 100; The New York Times, July 30, 1966, p. 53. Against this background it is anomalous for the Commission to adopt a rule mandating neutrality.

The Commission has frequently recognized in discussing the requirements of "fairness" the complexity and subtlety of the judgments which must be made in this area. Thus, in its 1949 REPORT ON EDITORIALIZING the Commission emphasized that the requirements of "fairness" might differ in different contexts and that in responding to specific requests for time the licensee would be required to weigh and balance a multitude of factors.

The Commission is inevitably required to apply this uncertain standard in highly controversial situations. A recent example is the Commission's response to the criticism of press coverage of the Democratic National Convention held in Chicago in August, 1968. Following the Convention the FCC wrote to NBC, and to the other networks, demanding that they respond to its request for comment on the "hundreds" of complaints received by the Commission with respect to the convention coverage. The Commission specifically referred to the following objections as having been made in the complaints:

> "Failure to give exposure to the views or statements of city government officials of Chicago, with respect to alleged 'brutality' by the police; and bias in favor of views or opinions in opposition to the policies of the national government with respect to the war in Vietnam." [49]

It is significant that, while many of the letters fell into these categories, the letters expressed many other points of view which the Commission did not mention in its letter. The networks responded, describing in detail their Con-

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[49] Letter from William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, FCC to NBC dated September 13, 1968.

vention coverage and objecting to the Commission's intrusion into their journalistic performance and editorial judgments. Although the Commission concluded that the "fairness" doctrine had been complied with in this instance and disclaimed any intention of judging the "quality" or the "truthfulness" of the coverage, it reaffirmed its power to apply the "fairness" doctrine and to regulate what it referred to as "distorted" news.[50]

It is evident that the government's calling a journalist to task for his treatment of explosive political issues cuts to the very heart of a free press. Can a broadcaster, with the renewal of the license he needs for survival hanging in the balance, afford to provide coverage of centers of raging controversy? Can he do this when he knows that his coverage will be subject to surveillance by a Commission which is itself at the vortex of the whirling currents of public opinion, Congressional pressure, and Executive control?

The Commission's action in *Mrs. Madalyn Murray,* 5 R.R. 2d 263 (1965), provides further evidence that this problem is by no means hypothetical. In that case the Commission was requested, pursuant to the "fairness" doctrine, to direct 15 Hawaii radio stations to afford broadcast time for the discussion of atheism. The licensees argued that "free thought" was not a controversial issue in their area and that the broadcast of religious services and prayers did not raise a "controversial issue of public importance." The Commission ruled that the licensees had "acted reasonably and in good faith." (5 R.R. 2d at 264) Two Commissioners, in a separate concurring opinion, spe-

[50] Letter from FCC to NBC, CBS and ABC dated February 28, 1969.

cifically found that the broadcasting of "church services, devotionals, and prayers" did not constitute the presentation of one side of a controversial issue of public importance. (5 R.R. 2d at 266-67) In contrasting the opinions in that case with the opinions in *Brandywine-Main Line Radio, Inc.* (WXUR), 4 R. R. 2d 697 (1965), Commissioner Loevinger said, in a dissenting opinion:

> "The contrasting opinions in that case and this one suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation. This anomaly simply emphasizes the error of the Commission's whole approach to this subject." (5 R.R. 2d at 269).

Another illustration of the fact that value judgments are inextricable from the Commission's application of its "fairness" doctrine may be found in *Tri-State Broadcasting Co.* (KTSM-TV), 3 R. R. 2d 175 (1962), where the Commission wrote to a broadcaster concerning a "fairness" complaint arising out of a program entitled "Communist Encirclement—1961". In apprising the station of its obligations the Commission said:

> "As you know, it was not and is not the intention of the Commission that you make time available to communists or the communist viewpoint. You will recognize, however, that there are varying views existent with respect to the most effective and proper method of combating Communism and Communist infiltration and that broadcasts of proposals supporting one method raise the question whether reasonable opportunity has been afforded for the expression on the station of opposing viewpoints.
>
> "Accordingly, in light of the above, you are requested to inform the Commission within twenty days of the

measures taken by you to assure compliance with the 'fairness doctrine'" (3 R. R. 2d at 176).

There are other indications that, in an industry as sensitive to the real or imagined attitudes and requirements of the regulatory agency as broadcasting is, the Commission's policy brings powerful influences to bear on the selection and emphasis of political, social and economic views by broadcasters. Thus, one commentator saw in the Commission's specific reference in its 1963 Public Notice to the "segregation—civil rights controversy" a suggestion that "the FCC was less interested in principle than in furthering administration policy." McMillin, *supra* at 36. That same writer quoted a "prominent attorney" as expressing the view "as a practical matter," that "a broadcaster is going to get into trouble if he expresses any editorial viewpoint which is displeasing to the Administration." (*Id.* at 45). When broadcasters must depend on the Commission for the license they require for continued existence, they cannot take lightly the Commission's hints and warnings. The important thing is not whether such statements accurately reflect the FCC's policy, but whether there is reason for broadcasters to believe that they do. If they do, it cannot help but influence their judgments. Once the Commission embarks on a day-by-day and program-by-program regulation of public issue broadcasting, it is difficult to dispel such fears.

CONCLUSION

No one can quarrel with the proposition that, in a democratic society, it is important that a diversity of views and information reach the public ear and that no significant point of view be denied access to the public. The question posed by this case, however, is what means are permissible to secure that end. If it is to be secured by the day-to-day supervision of the broadcast press by the government which has the power to compel it to publish particular views, or to prevent it from publishing certain views unless it also publishes others, the government becomes actively engaged in controlling what the public will hear from the press. It is precisely that risk which the First Amendment was designed to meet.

The decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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