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# V. DOES *RED LION* SQUARE WITH *TORNILLO*?

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In the case of *Miami Herald Publishing Co. v. Tornillo*,[1] the Supreme Court struck down a Florida statute that gave political candidates who had been editorially attacked in the press the right to reply. The opinion states:

> [T]he Florida Statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. 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.[2]

The opinion does not cite or mention *Red Lion Broadcasting Co. v. FCC*,[3] decided five years previously, which involved the right of reply in the broadcast field. In the *Red Lion* case the Court unanimously sustained an FCC regulation that had given a political candidate, attacked *on the air,* the right to reply over the same broadcast facilities. The Supreme Court noted that:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the air waves.[4]

I think there is a direct conflict between *Tornillo* and *Red Lion,* and the question is how can the two cases be reconciled? A difference in the relative importance of the media cannot be the answer. It is untenable to argue that the *New York Times* and the *Washington Post* are any less important than WQXR or WTOP. No distinction may be made on the grounds that the public reads a newspaper while it watches or listens to a broadcast. Social scientists such as Marshall McLuhan might make something out of that, but not those committed to the first amendment.

Perhaps the solution lies in a famous quotation of Mr. Justice

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1. 418 U.S. 241 (1974).
2. *Id.* at 258 (footnote omitted).
3. 395 U.S. 367 (1969).
4. *Id.* at 389.

Holmes: "The life of the law has not been logic, but experience." Experience in the two fields, print and broadcasting, are just entirely different. In the newspaper field, the thought of government licenses is an anathema. When the Florida statute came before the Supreme Court in *Tornillo,* I think the Court balked at getting the government directly involved in this field.

Now, turn to broadcasting, where you need government licenses. Experience in the twenties showed that without licenses there can be chaos—too many people trying to operate on the same frequency. In 1943, *National Broadcasting Co., v. United States*[5] held that radio is inherently not open to all. That is its unique characteristic which calls for government licensing.

Given this need for limiting the number of broadcasters, the question is how you choose among applicants: by auction, by rent, by lot? It is crucial to note that the government did not choose to auction off the frequencies, but rather chose to license them on a short-term basis with the licensee voluntarily serving the public interest.

A local station, operating as a public trustee, has to serve the needs and interests of the area, and part of serving those needs and interests is putting on informational programs. But suppose the licensee put on informational programming which contained only the viewpoints with which he agreed. Is that consistent with being a public trustee and operating in the public interest? Obviously not.

Faced with this possibility, the Commission evolved the fairness doctrine which requires that a reasonable amount of time be devoted to controversial programming and that opportunity for contrasting viewpoints be afforded. That doctrine was codified into the Communications Act of 1959.[6]

Opponents of the fairness doctrine argue that there are more broadcast stations (over 8,000) than daily newspapers (1,500) and thus there is no scarcity problem unique to broadcasting which requires government intervention beyond merely assuring orderly allocation of frequencies. But unlike print, this government chooses one party to broadcast and enjoins all others. Fairness is a necessary incident to the government's decision to allocate frequencies to serve the public interest. Without the fairness doctrine many minority groups or other interests would be denied the right to express their views over the broadcast media.

But the dissenting opinion of Chief Judge Bazelon in the *WXUR* case[7] presents an interesting view. The judge indicated that he no longer

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5. 319 U.S. 239 (1943).

6. Act of September 14, 1959, Pub. L. No. 86-274, 73 Stat. 557, *amending* act of June 19, 1934, ch. 652, § 315, 48 Stat. 1088 (presently codified as 47 U.S.C. § 315(a) (Supp. III, 1973). "The FCC has for many years imposed on radio and T.V. broadcasters the requirement that discussions of public issues be presented on radio and T.V., and that each side of those issues must be given fair coverage. This [policy] is known as the fairness doctrine." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 369 (1969).

7. Brandywine-Maine Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972).

thought the fairness doctrine was constitutional or could be adhered to. He pointed to the actions of the Nixon Administration and to what the House Commerce Committee did in its oversight of the CBS program. "The Selling of the Pentagon." He was rightfully quite concerned and expressed a desire to have government out of the media, given its possible chilling effect when involved.

I disagree with Judge Bazelon, although I share his concern. Such an approach is too simplistic. Suppose you follow Judge Bazelon's suggestion and eliminate the fairness doctrine. Would that put broadcast journalism on the same footing as print? Keep in mind that the broadcaster still has to apply for license renewal and thus is sensitive to the government pressure.

At renewal, a broadcaster can be challenged by competitors, as happened with the Post-Newsweek stations in Florida. The government decides whether Post-Newsweek or the competitor gets the permit, and this puts the licensee under the gun. Similarly, the networks can be put under the gun by issuing notices of rulemaking in the prime-time access or multiple ownership fields.

The point is that by eliminating the fairness doctrine, the problem of government control is not eliminated as long as regulation and licensing based on the public trust concept continues. But the public would be left wholly unprotected from licensees bent on presenting only one side of an issue. I, for one, would not accept that.

I am not against substituting a whole new system. If I could roll back time several decades and adopt an entirely new scheme, I would do it in a minute. However, I think it is now too late, and until we are ready to substitute a system which is not based upon the public trust concept, I believe that we are stuck with the fairness doctrine and that we must learn how to live with it. That means we have to somehow minimize the problem of governmental intervention in broadcast journalism.

I think one possible way of doing it is through an access approach. I do not think such an approach is likely to be adopted, but I believe that it is worthy of consideration. Under this system, the broadcaster would schedule an hour "access" program in prime time each week and then do whatever he pleased in all other programming without regard to fairness. The "access" program would be open to all those who wish to put on a contrasting viewpoint to the broadcaster's other programming, so long as it is not in bad taste or obscene. I think this would much reduce the need for governmental intervention. I do not push this idea very hard because broadcasters, especially in television, are not readily going to give up an hour of prime time. But it is a pity since I do think it would alleviate the problem.

Another useful approach was adopted in *National Broadcasting Co. v. FCC*.[8] That case involved a very hard-hitting broadcast by NBC on

8. National Broadcasting Co., Inc. v. FCC, 43 U.S.L.W. 2133 (1974), *vacated and remanded with direction that FCC vacate its decision,* 44 U.S.L.W. 2048 (1975).

the private pension system. The network said it was showing abuses in the private pension system and the need for remedial legislation. The Commission, acting upon a fairness complaint, ruled that NBC was really dealing with the overall system, and while it had included bits here and there about the good aspects of the private pension system, it had to add more on why the private pension system is all right. The court of appeals reversed, saying to the Commission that it had not adhered to its own principle that the Commission should not upset the licensee's judgment unless such judgment is unreasonable. The court went on to note that NBC was not unreasonable and that the Commission should stop acting as a "super-editor." I think the Commission should heed that good advice.

A final idea that I would like to raise is that the FCC get back to essentials. Since 1962, the Commission has been proceeding as if its main goal were to ensure fairness on every issue. It thus considers fairness on each complaint. I think that this is too much interference with day-to-day broadcast journalism, which ultimately has a chilling effect on fairness.

Let's go back to the *NBC* case. Suppose NBC had been unfair and had not put on enough about the good aspects of the private pension scheme. All NBC would have to do to comply with the Commission's ruling would be to put on ten minutes more, on some other show, to a different audience. Is that worth the interference? I do not think it is.

The Commission disputes that. Its position is that it does not really interfere with broadcast journalism. It points out that the Commission gets thousands of fairness complaints every year and only sends out letters to licensees on less than 100. The figure was 94 last year. Of those it found less than 10 actual violations. The statistics do bear them out, but I think the statistics do not tell the whole story. For example, a station in Spokane, Washington editorialized on the need for bonds for Expo '74. It was a very hot local issue. There was a very serious complaint that the station had not afforded reasonable opportunity for the other side to respond. The Commission resolved that complaint in favor of the licensee. So the FCC maintains there has been no interference. But when the facts are examined, it took two-and-a-half years to resolve the complaint. The station had to make several presentations, was the subject of a field investigation, and had to pay $20,000 in legal fees. It devoted 480 man-hours to that investigation and its license renewal was held up. The station wrote to the Commission:

> With due respect for the Commission's important responsibility in administering the fairness doctrine, we think there is a grave question whether it serves the public interest to require stations to account, in such minute detail, for everything said and done on a particular issue. We cannot believe that such a requirement contributes to an atmosphere of licensee independence, or a robust presentation of issues.

The next time that station comes to a hot issue, it is liable to say, "Oh, hell, why do it. It's not worth the trouble."

I would propose that the Commission refer the fairness complaint to the licensee but take no action on it. At the time of license renewal, the Commission ought to see whether there is a flagrant pattern of operation inconsistent with the fairness doctrine. If it does not find a pattern of bad faith or reckless disregard of the fairness doctrine, it should not intervene.

What I suggest is supported by a 1973 Supreme Court decision[9] involving the right to purchase editorial advertisements that deal with controversial issues. The Supreme Court held that there is no constitutional right to purchase such editorial time and indicated that finding such a right would necessitate extensive governmental involvement in day-to-day broadcast decisions. Such involvemnt, Mr. Chief Justice Burger indicated, would be inconsitent with Congress' unmistakable goal of maintaining essentially *private* broadcast journalism held only broadly accountable to a public standard. The same principle is applicable to the fairness doctrine. FCC interference in day-to-day broadcast decisions under the fairness doctrine is equally undesirable. I would urge very strongly that the case-by-case inquiry approach be abandoned. I would propose that the government return to the formulation of the fairness doctrine suggested in the *CBS* case:[10] that the Commission's responsibility is to judge overall performance in terms of a sustained effort to meet the public need for being fully and fairly informed.

The Commission has rejected that approach. It is now under reconsideration and I think this will be the next issue in the court of appeals.

What I have said does not solve the problem. I think there is no wholly satisfactory way out of the present tightrope situation until technological progress wipes this system out. Until then, unfortunately, we must continue with this balancing act.

9. Columbia Broadcasting Systems, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
10. *Id.*