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A SYMPOSIUM

INTRODUCTION

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WHEN THE QUIESCENT Federal Communications Commission began to stir in its relationship with radio and television media, the *Villanova Law Review* determined to examine the role of the Commission in regulating program content. To the casual observer there was evidence of an interest on the part of the Commission to utilize ill-defined powers in this direction. The nation's press carried stories concerning subjection of cigarette advertising to a fairness ruling and of proposals to ban same from the media; the fairness doctrine, political equal time and right of reply to personal attack were made applicable in a number of situations; Commissioners began to speak both within and outside of the FCC indicating deep misgivings concerning the seemingly unrestricted freedom of the industry in determining program content; conglomerate ownership of broadcasting played a role in the refusal of a license renewal; congressional hearings proceeded concerning the effects of violence on television; and, finally, court cases testing the fairness doctrine and the right of reply were set down for decision by the United States Supreme Court. In this climate the *Law Review* gathered representatives of various viewpoints to examine these movements in communication law. The Editors asked the participants to discuss a number of significant issues: What constitutional questions are raised by the FCC effort to obtain balance and diversity in programming? Do present FCC requirements for balanced programming contravene proscriptions against FCC censorship? Do they contravene the first amendment guarantee of free speech? Is it desirable for the Commission to obtain balance and diversity in pro-

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gramming? Are efforts in this area necessary to insure service to minority interests and less dominant needs and tastes of the general viewing audience? What effect should diversity within the total spectrum of the communication media have on the overall judgment of program diversity? Should there be different free speech patterns for television than have been established for other media? Do the technical characteristics and psychological effects of television broadcasting constitutionally distinguish it from other media? How adequate and effective are FCC guidelines concerning the program policies of broadcasters? Does the use of these guidelines result in undesirable "sameness"? Can and should the Commission concern itself with conglomerate ownership of broadcasting stations? Is the common ownership of several media within a given area a sufficient justification to deny issuance or renewal of a broadcasting license?

These questions and others were raised with the participants exploring issues in depth and detail. This was particularly true in the course of panel discussion. For this reason the Editors have departed from past format and have reproduced portions of that discussion following the presentation of formal papers. As moderator I was charged with the added responsibility of writing this introduction. It is not my purpose to summarize the content or comment on the problems raised. I find myself in the anamalous position of writing an introductory postscript. Since the Symposium, the Supreme Court has handed down a decision which touches the subject matter discussed. The Court with deceptive ease answered several questions raised by the participants. In doing so it also redefined and expanded the basis for a FCC role in TV programming regulation. I will limit myself to a description of the cases and an exposition of the decision.

Nineteen days after the Symposium the Supreme Court heard argument in *Red Lion Broadcasting Co. v. FCC*[1] and *Radio Television News Directors Ass'n v. United States*.[2] The Court was presented with a specific application of the fairness doctrine in *Red Lion,* and in *RTNDA* with a challenge to the personal attacks and political editorials regulations promulgated by the Commission. The cases were decided together on June 9, 1969[3] — three and a half months after the Symposium.

Red Lion concerned a Pennsylvania radio station which carried a broadcast by fundamentalist Reverend Bill James Hargis in which he attacked Fred J. Cook, author of "Goldwater — Extremist on the Right." Hargis characterized Cook as a writer for a left-wing publi-

1. 381 F.2d 908 (D.C. Cir. 1967).
2. 400 F.2d 1002 (7th Cir. 1968).
3. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

cation, "The Nation," which "has championed many communist causes." He stated that Cook was fired from the NEW YORK WORLD TELEGRAM after he made false charges against a city official, that he had written articles absolving Alger Hiss, attacking J. Edgar Hoover, the F.B.I. and the C.I.A., and wrote this book "to smear and destroy" Senator Goldwater. When he learned of the broadcast Cook wrote to Red Lion demanding reply time. An exchange of letters among Red Lion, the FCC and Cook followed. In its final letter the FCC informed the broadcaster that it had failed to send a tape, transcript or summary of the Hargis program and an offer of reply time to Cook as the fairness doctrine required. In answer to a specific inquiry, the Commission took the position that reply time must be offered whether or not Cook would pay for it. The District of Columbia Court of Appeals sustained the Commission.

The *RTNDA* case was a review of the FCC's final order of July 10, 1967, setting forth rules codifying procedures[4] in personal attack and political editorial situations. The journalists association, the networks and eight licensed stations sought to have the rules set aside on the grounds that they were unconstitutional burdens on freedom of the

4. As they now stand amended, the regulations read as follows:
"Personal attacks; political editorials.
"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
"(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, or other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).
"NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 F.R. 10415. The categories listed in (iii) are the same as those specified in section 315(a) of the Act.
"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

press and were vague. The Seventh Circuit endorsed the broadcaster's argument and set aside the Commission's order.

The Supreme Court held that the specific application in *Red Lion* and the regulations in *RTNDA* are authorized by Congress and "enhance rather than abridge the freedoms of speech and press."[5] In the course of the opinion Mr. Justice White addressed himself to a number of issues which materially affect program regulation. He accepted the often articulated statutory foundation of the fairness doctrine that it was grounded in the Radio Act of 1927 which established the Federal Radio Commission to allocate frequencies in a manner responsive to the public "convenience, interest or necessity."[6] The doctrine furthers this "public interest" by securing adequate coverage of public issues which "must be fair in that it accurately reflects the opposing view."[7] The fact that the personal attack rules add the requirement that the attacked person or candidate may themselves respond, rather than a presentation by the broadcaster, does not represent a critical distinction. "Indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidates, endorsed their opponents, or carried a personal attack upon them."[8] The mandate of public interest was found to be broad enough to encompass the Commission's regulations.

Justice White decided that the FCC's fairness doctrine was "expressly accepted" by Congress in the 1959 Amendments to Section 315 of the Communication Act.[9] The legislative history of the amendment reinforces the view that the fairness doctrine is an essential complement to that section. The Commission, therefore, is free to implement this Congressional purpose with reasonable rules and regulations.

The Court made it clear that what was being upheld was the regulatory power. In doing so it resisted a growing literature[10] which would limit that power to a technological function, *i.e.*, the Commission should act as a traffic policeman to prevent overlap, interference and chaos in the use of the broadcasting spectrum. Justice White, however, found that the Commission has regulatory powers in addition to the specific Congressional enactment of equal time for political candidates.

5. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969).
6. Radio Act of 1927, § 4, 44 Stat. 1163.
7. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969).
8. *Id.* at 379.
9. Act of September 14, 1959, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1948).
10. *See e.g.*, Kalven, *Broadcasting Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967).

"It would exceed our competence" wrote White, "to hold that the Commission is unauthorized by the statute to employ a similar device [to the equal time requirement] where personal attacks or political editorials are broadcast by a radio or television station."[11]

A complementary argument was raised that even if at one time lack of available frequencies justified giving those with different views access directly to broadcast facilities, this condition no longer prevails. Technological expansion of the spectrum had undercut the basis for regulation. There are sufficient frequencies available for the presentation of all views. This position had been advanced in both the *Red Lion* and *RTNDA* cases, and was specifically endorsed by the Seventh Circuit in the latter.[12] Justice White provides several answers. He finds that while technological advances have produced more efficient use of the spectrum, the uses and users have also grown. Noting that the radio spectrum has on occasions become congested, and that television channels, even with ultra high frequency transmission, are still limited, the Court concludes that "[n]othing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential."[13] Disregarding the argument based on technological advances the Court went further. Again it was made clear that the Commission's functions go beyond engineering. Justice White suggests that the Commission's role is regulatory and the public interest is substantive.

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often obtained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.[14]

The implications of this approach are significant. The Court finds a basis of regulatory power independent of the original foundation of

11. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385 (1969).
12. 400 F.2d 1002, 1019 (7th Cir. 1968).
13. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 399 (1969).
14. *Id.* at 400.

the limited spectrum. The public interest has grown as the communications industry has expanded. The nature of that industry and the preferred position of its units suggests an independent and broad justification for regulation. While the Court in a footnote[15] leaves open the question of a different conclusion if the technological situation has "radically changed," it has sown the seeds for an independent justification of regulatory power in the radio and television area. That basis is intimately connected with the Commission's role in programming regulation.

The second significant aspect of the Court's opinion deals with the twin arguments geared to free speech and free press. The petitioners asserted that the fairness doctrine and the regulations on personal attacks and political editorials constituted unconstitutional burdens on the broadcaster's first amendment rights and placed the FCC in the role of a censor. The Seventh Circuit had found that the line of cases following *N.Y. Times v. Sullivan*[16] imported that "the freedom of the press to disseminate views on issues of public importance must be protected from the imposition of unreasonable burdens by governmental action."[17] The analogy between the printed press and the broadcasters is, of course, critical to the application of the doctrine of *Times* and its progeny. Justice White rejected at the outset the appropriateness of this analogy. "Although broadcasting is clearly a medium affected by a First Amendment interest," he wrote, "differences in the characteristics of new media justify differences in First Amendment standards applied to them."[18] Relying instead on prior Supreme Court holdings in cases limiting the use of sound amplifying equipment, particularly *Kovacs v. Cooper,*[19] the Court found that the government may also limit the use of broadcast equipment. The right of free speech does not embrace a right to snuff out the free speech of others. "It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum."[20]

At this point Justice White makes a significant characterization of the legal relationships involved in broadcasting. He asserts that the paramount right is that of the viewers and listeners. The broadcasters have no *right* to the license, and when they become licensees

15. *Id.* at 399, n. 26.
16. 376 U.S. 254 (1964).
17. Radio Television News Directors v. United States, 400 F.2d 1002, 1012 (1968).
18. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).
19. 336 U.S. 77 (1949).
20. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969).

they are "proxies" or "fiduciaries." Since it is not a denial of the right of free speech to deny a license,

> [A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. 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 airwaves.[21]

The uniqueness of the medium, the relation of the broadcaster to listeners and viewers and to those unsuccessful in obtaining licenses, permit the government to place restraints on the broadcaster's use of his license. The first amendment, therefore, has an affirmative thrust in this medium. It is, in the purpose of the *Times* case, to preserve "an uninhibited market place of ideas."[22] The first amendment is, therefore, implemented and furthered by the application of the fairness doctrine and the personal attacks and political editorials regulations. Justice White concludes:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[23]

The converse of the above argument is also dealt with by the Court. If Congress and the Commission did not limit the station owners and the networks then the industry would have unfettered power over what is broadcast. The effect would be that the first amendment becomes a sanctuary for unlimited private censorship. At this point, the Court notes the argument advanced by the petitioners that the rules would inhibit dissemination of views on issues of public importance, since the broadcasters would eliminate coverage rather than risking the substantial economic and practical burdens imposed by the regulations. The effect, it was alleged, would be blandness and neutrality. The Court answered this contention by noting that the fairness doctrine has not had such an effect in the past. Fears are speculative and any change can be reconsidered in the future. However, Justice White did

21. *Id.*
22. *Id.* at 390.
23. *Id.*

not stop there. Applying again the "proxy" characterization he found that the broadcasters have an "[obligation] to give suitable time and attention to matters of great public concern."[24] Since the broadcaster does not receive ownership but only "the temporary privilege of using"[25] the license, the Court found that the Commission is not powerless to insist that attention be given to public issues.

It would seem that the Court has conferred judicial blessings on the Commission's halting attempts to influence programming. Subject to the first amendment and the censorship provision in Section 326 of the Communications Act,[26] the Court invites the Commission to forward the public interest and protect the paramount rights of the public to receive suitable broadcasts. Restrictively the case upholds the fairness doctrine and the regulations; however, in doing so Justice White has written a primer on the legal interests involved in the radio and television media. There is an explicit foundation for broad regulatory power. The "proxy" characterization imports duties to share the airwaves and operate in such a way as to serve the interests of the listening and viewing public. Constitutional doubts concerning the Commission's role in programming regulation are resolved in the Commission's favor. The implications of this opinion can have pervasive effect. In the future the Commission, and ultimately the courts, will have to work out the metes and bounds of the regulatory role. The "proxy" characterization is a formidable one. Mr. Justice White eschewed the term "trustee". He found a fiduciary relationship and carefully utilized the term "proxy" to describe it. The broadcaster-licensee could not in the classical sense, be a trustee. A trustee generally is not conceived of as an agent but "a person in whom some estate, interest or power in or affecting property is vested for another's interest."[27] Since the Court determined that the broadcaster has no proprietary interest in his assigned frequency, the use of the term "proxy" to describe the fiduciary relationship is apt, particularly when the issue concerns the duty owed to those who have suffered a personal attack. A proxy usually represents and acts for his principal. As the public interest demands a fair representation of both sides of an issue and an opportunity to correct or question the content of a personal attack, then the public "principal", operating through the Commission, has the right to demand that the "proxy" present these views. This concept, however, is not free of difficulties. Many questions are left to be answered. It must be determined who stands in the relationship of principal. The court suggests

24. *Id.* at 394.
25. *Id.*
26. 47 U.S.C. § 326 (1964).
27. Cliffs Corp. v. United States, 103 F.2d 77, 80 (6th Cir. 1939).

at least three identifiable classes: 1) the general public, 2) the listening and viewing audience, and 3) more restrictively, those who fail to secure the broadcast frequency in a comparative hearing. If these are the identifiable principals, the "proxy" characterization becomes pregnant. How will these principals secure the voicing of their judgment and will by their proxy? May they have standing to vindicate their interest directly, or does the Commission have the unique role of keeping the proxy honest on behalf of the principal? The Court has at least invited the Commission to secure the "public interest," *i.e.,* the broadest principal's viewpoint. In specific application, it is an invitation to take appropriate steps to insure that the effect of the fairness doctrine, political equal time, and the right to reply to personal attack will not result in blandness or neutrality. In periodic license renewal proceedings, the Commission has the *obligation* (if we are really talking in fiduciary language) to make certain that the interest of another "principal", the listening and viewing public, are best represented by the particular broadcaster "proxy". A fiduciary analysis could lead to some very interesting new directions. Furthermore, there is still the more restrictive class of principals to be heard from. It is difficult to identify what the interests are of those who have failed to secure the frequency.

There is a certain danger in attempting to carry a legal concept from one body of law to another. In the future, the Commission and the courts will have to elucidate the appropriateness of many aspects of the law of proxies when they are applied in a communication setting. Perhaps, another day, and another symposium might valuably explore the myriad of possibilities contained in the Supreme Court's decision and particularly in its definition of the relationships which are represented in the broadcasting industry.

Only the future will afford us answers to the sweeping implications of the *Red Lion* opinion. Certainly some of the questions raised in the succeeding pages have been answered. The Commission would seem, from the moderator's viewpoint, to have a green light to experiment with its regulatory powers. The quiescent FCC may soon feel new vigor and begin to assume the activist role to which the court has implicitly invited it.