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Public Broadcasting and the Problem of Government Influence: Towards a Legislative Solution

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PUBLIC BROADCASTING AND THE PROBLEM OF GOVERNMENT INFLUENCE: TOWARDS A LEGISLATIVE SOLUTION

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PUBLIC BROADCASTING AND THE PROBLEM OF GOVERNMENT INFLUENCE: TOWARDS A LEGISLATIVE SOLUTION

Oscar G. Chase*

The story is told that when Fiorello H. La Guardia was running New York City he decided, in the face of a tax base eroded by the Depression, to support continued funding for WNYC, New York's municipally owned radio system. Accepting the thanks of the station's leadership, the Mayor said:

Maestro, we're gonna keep that damn old radio station, and you're on the right track with that good music. Leave jazz to the other stations. I don't want any hot stuff.¹

Even the Mayor's recognizable touch of grace could not disguise the presence of a principle which haunts publicly funded broadcasting: government control follows its funds.

Nonetheless, the alternative, commercial control, has itself been subject to such severe limitations that government funding has not lacked enthusiastic advocates. Among these advocates was the Carnegie Commission on Educational Television, whose report, *Public Television, A Program for Action*,² provided much of the impetus for the adoption of the Public Broadcasting Act of 1967³ under which was established the American

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The author is one of the attorneys for the plaintiffs in *Network Project v. Corporation for Public Broadcasting*, 398 F. Supp. 1332 (D.D.C. 1975), an action in which the plaintiffs have alleged illegal and unconstitutional attempts by the defendants to control the content of public television broadcasting and have sought injunctive, monetary, and declaratory relief. (Motions to dismiss the action on the grounds of lack of jurisdiction and mootness were granted by the district court in an opinion and order filed July 23, 1975. Plaintiffs have appealed.)

The research assistance of Arnold Bartfeld, J.D., 1974, Brooklyn Law School, and Nancy Burton, a student at Brooklyn Law School, is gratefully acknowledged. Sincere appreciation is also due to the members of the Network Project for sharing their many insights into the American public broadcasting system.

¹ N.Y. Times, July 9, 1974, at 39, col. 6.

² The Carnegie Commission on Educational Television was created pursuant to a grant from the Carnegie Corporation in order to study the development of non-commercial television in the United States. Its report and recommendations were published under this title. CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, *PUBLIC TELEVISION, A PROGRAM FOR ACTION* (1967) [hereinafter cited as REPORT].

³ 47 U.S.C. § 390 *et seq.* (1970). See generally text accompanying notes 52-109 *infra*.

system of public broadcasting⁴ as it now exists. Although aware of the dangers of government involvement, the Commission was decidedly optimistic about the possibilities of the new medium:

If we were to sum up our proposal with all the brevity at our command, we would say that what we recommend is freedom. We seek freedom from the constraints, however necessary in their context, of commercial television. . . . We seek for the artist, the technician, the journalist, the scholar, and the public servant freedom to create, freedom to innovate, freedom to be heard in this most far-reaching medium. We seek for the citizen freedom to view, to see programs that the present system, by its incompleteness, denies him.⁵

Unfortunately, the Commission's vision has not been realized. Partly because the Congress did not adopt all of the safeguards recommended by the Commission,⁶ partly because of the centralized infrastructure established by the administrators of public broadcasting funds,⁷ partly because of pressure applied by government officials,⁸ and partly because of niggardly funding,⁹ the federal government has had far more influence than is desirable.

This article will explore the problems raised by the emergence of the federal government as a television "sponsor." It will argue that fundamental structural reform is needed to promote the constitutional values at issue, that such reform will also promote the interests of local control sought by the Public Broadcasting Act of 1967, and that legislative action in furtherance of this structural solution is desirable.¹⁰ In this context this

⁴ The term "public broadcasting" is not defined in the Act, although it does define "noncommercial educational broadcast station:"

(7) The term 'noncommercial educational broadcast station' means a television or radio broadcast station, which (A) under the rules and regulations of the Federal Communications Commission in effect on the date of enactment of the Public Broadcasting Act of 1967, is eligible to be licensed or is licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.

47 U.S.C. § 397(7) (1970).

For the purposes of this article the term "public broadcasting" will mean the broadcasting done by such stations. While the term includes radio as well as television broadcasting, we are here concerned with the latter only. The abbreviation "ptv" will be used for public television broadcasting.

See also text accompanying note 20 *infra*.

⁵ REPORT, *supra* note 2, at 98-99.

⁶ See text accompanying notes 67-74, 94-100 *infra*.

⁷ See text accompanying notes 101-60 *infra*.

⁸ See text accompanying notes 161-201 *infra*.

⁹ See text accompanying notes 94-100, 335-39 *infra*.

¹⁰ This in no way implies that judicial relief is not authorized on the basis of the constitutional or statutory claims which can be made by appropriate plaintiffs. Congressional action is desirable *despite* the possible intervention of the courts because, first, litigation is subject to protracted delay and, second, the outcome of the litigation could be affected by factors unrelated to the merits, such as standing or jurisdictional problems. In short, Congress has its own responsibility for the system it created.

article will consider the proposed Public Broadcasting Financing Act of 1974¹¹ and will argue that any bill modeled on it would not eliminate the problems despite its salutary innovations. Not considered, except by implication, is the parallel national public radio structure,¹² the use of public money for television by the Department of Health, Education and Welfare¹³ or the somewhat remote issues raised by activities of the National Endowment for the Arts.¹⁴

I. THE DEVELOPMENT OF THE PUBLIC TELEVISION SYSTEM

Although the Carnegie Commission has been credited with originating the term "public television,"¹⁵ there were already 124 "educational" television stations in existence at the time of the Commission's report, that is, stations owned and operated by nonprofit organizations, such as educational institutions, which did not carry advertising. The licensees fell into four general categories: systems serving elementary and secondary schools, state agencies such as state boards of education, public universities, and nonprofit corporations serving various municipalities.¹⁶

Not all of the programming broadcast by these educational stations was, in the Commission's view, "public" television, for it distinguished that concept from "instructional" television.¹⁷ This distinction played a major part

¹¹ S. 3825, 93d Cong., 2d Sess. (1974). See *Hearings on S. 3825 Before the Subcomm. on Communications of the Senate Commerce Comm.*, 93d Cong., 2d Sess., ser. 97 (1974) [hereinafter cited as *1974 Senate Hearings*]. The bill was not enacted. Nonetheless, because its basic structure was endorsed by the administration and by a broad segment of public broadcasting officials, the bill has served as a model for others. In recent oversight hearings held by the House Subcommittee on Communications, the 1974 Act was implicitly adopted as a basis for discussion. *Hearings Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce*, 94th Cong., 1st Sess. (1975). The Public Broadcasting Financing Act of 1975, H.R. 4563, 94th Cong., 1st Sess. (1975), is essentially a reintroduction of the 1974 Act. See *Hearings on H.R. 4563 Before the Subcomm. on Communication of the House Comm. on Interstate & Foreign Commerce*, 94th Cong., 1st Sess., ser. 34 (1975).

¹² The Act also established a national public radio system. 47 U.S.C. § 396 (1970).

¹³ See REPORT, *supra* note 2, at 24. According to the Carnegie Commission, television programming has also been produced by the Departments of Defense and Health, Education and Welfare and the National Aeronautics and Space Administration. REPORT, *supra* note 2, at 24.

¹⁴ The Endowment provides federal funds to assist the arts. 20 U.S.C. § 954 (Supp. 1974).

¹⁵ F. POWLEDGE, PUBLIC TELEVISION: A QUESTION OF SURVIVAL (A REPORT OF THE AMERICAN CIVIL LIBERTIES UNION) 5 (1972).

¹⁶ REPORT, *supra* note 2, at 21-22. *Sui generis*, as a municipal licensee, was the City of New York (WNYC-TV). *Id.* at 22.

¹⁷ The Carnegie Commission reported that it had separated educational television into two parts: (1) instructional television, directed at students in the classroom or otherwise in the general context of formal education, and (2) what we shall call Public Television which is directed at the general community. . . . [It] includes all that is of human interest and importance which is not at the moment appropriate or available for support by advertising, and which is not arranged for formal instruction.

Id. at 1.

in the Commission's recommendations. Before passing to the plan put forth by the Commission, however, three problem areas which helped to shape the plan and which are still of concern should be noted: funding, program sources, and interstation program distribution facilities.

Funds for these stations came primarily from state and local governments, with lesser amounts from the Ford Foundation, public contributions, and corporate underwriters.¹⁸ The federal government also provided financial aid, for technical facilities only, pursuant to the Educational Television Facilities Act of 1962.¹⁹ Although funding sources were diverse, in the Commission's view the total funds available were grossly insufficient to meet public broadcasting's needs.²⁰

Programming sources are important not only because it is, after all, what appears on the screen that matters most to the viewing public but also because assured wide range distribution of a tv program results in a flow of power to the program's creators. The primary source of ptv programming was National Educational Television (NET), a nongovernmental agency established with Ford Foundation support.²¹ Almost half of an "average" ptv station's entire programming in 1966 was contracted for by NET.²² Other programs were locally produced,²³ and these programs were frequently exchanged among the stations.²⁴ Still other programs were obtained from federal agencies, including the Department of Defense, NASA, and the Department of Health, Education and Welfare.²⁵

Exchange of programming among the stations was limited by the primitive distribution facilities then in use. Most stations could obtain a program only if a video tape copy was physically delivered to them. A far more efficient alternative was the use of an electronic interconnection,²⁶ which enabled simultaneous transmission of a program to as many stations

¹⁸ *Id.* at 27-28. Of a total of \$60 million available to all stations in 1965-66, state and local governments provided \$33.5 million, the federal government \$7 million, the Ford Foundation \$8.5 million, individual contributors \$3 million, and corporations \$2 million.

¹⁹ 47 U.S.C. § 390 *et seq.* (1970). Funds are provided through the Department of Health, Education and Welfare.

²⁰ The Carnegie Commission estimated the annual cost of an adequate ptv system would be \$178 million initially, rising to \$270 million by 1980 as anticipated expansion occurred. REPORT, *supra* note 2, at 76-77, 135-91. The total ptv budget (including income from all sources) in fiscal 1972 was \$166.8 million. 1973 CPB ANN. REP. 22. This sum has proven insufficient to accomplish the goals set by the Commission. See notes 94-100, 335-39 and accompanying text *infra*.

²¹ The bulk of NET's funds came from the Fund for Adult Education, itself financed largely by the Ford Foundation. F. POWLEDGE, *supra* note 15, at 3. See also REPORT, *supra* note 2, at 23-24. The Ford Foundation's large role in the funding of the early educational tv system, coupled with its active interest in the medium, led one study to conclude that by 1961 "Ford . . . had direct and practically total control over 'educational' television in America." THE NETWORK PROJECT, THE FOURTH NETWORK (1971) [hereinafter cited as THE FOURTH NETWORK].

²² REPORT, *supra* note 2, at 23-24.

²³ *Id.* at 24.

²⁴ *Id.*

²⁵ *Id.*

²⁶ For a discussion of the electronic interconnection, see notes 129-60 and accompanying text *infra*.

as were linked to the system. Receiving stations could either broadcast the material as it came in or tape it for later use. Although such systems were then in use by the commercial networks they were too expensive for most educational tv use given the funds then available.²⁷

The Commission concluded that a well-financed and well-directed educational television system, substantially larger and far more pervasive and effective than that which now exists in the United States, must be brought into being if the full needs of the American public are to be served.²⁸

The "needs" to be met were not those pragmatic ends which could be served by instructional tv but rather the "public" spiritual, cultural, and political needs, which, the Commission thought, were within the reach of the technology of television but which could not be met by television as a commercial institution.²⁹ Public television could reflect the diversity of America, not only in the cultural sense but in the geographic as well, by reflecting the views of the communities served by the stations.³⁰ The medium could, in the ultimate analysis, serve nothing less than "freedom."³¹

The Commission argued that freedom could be served only if funds were sufficient to ensure that local stations were well-equipped technically³² and were provided with "such abundant programming as to offer . . . both diversity and choice."³³ Since the costs projected were beyond reach without federal assistance³⁴ the Commission had to face the effect of consequent federal control and the problems it raised. The proposed solution was two-fold: to establish a nonprofit corporation, to be called the Corporation for Public Television (CPT) which would receive and administer federal funds; and then to insulate the proposed corporation from the risks of annual appropriation requests by establishing a tax on the sale of tv sets, the proceeds of which would be for the sole use of public broadcasting.³⁵

The new corporation was to be "nongovernmental,"³⁶ not an agency of the United States but "a freestanding institution, like other nonprofit cor-

²⁷ REPORT, *supra* note 2, at 26. An interconnection was, however, used by eight stations in the Eastern Educational Network. *Id.* When federal funds became available under the Act, a national interconnection was established. See text accompanying notes 108-15 *infra*.

²⁸ REPORT, *supra* note 2, at 3.

²⁹ *Id.* at 13-16.

I think television should be the visual counterpart of the literary essay, should arouse our dreams, satisfy our hunger for beauty, take us on journeys, enable us to participate in events, present great drama and music, explore the sea and the sky and the woods and the hills. It should be our Lyceum, our Chatauqua, our Minsky's, and our Camelot. It should restate and clarify the social dilemma and political pickle.

Id. at 13 (quoting E. B. White).

³⁰ *Id.* at 14, 33-35.

³¹ *Id.* at 98-99. See text accompanying note 2 *supra*.

³² *Id.* at 33-35, 74-75.

³³ *Id.* at 87.

³⁴ See note 20 *supra*. The cost of operating the existing ptv system in 1966 was approximately \$57 million. REPORT, *supra* note 2, at 241.

³⁵ REPORT, *supra* note 2, at 36-41, 68-73.

³⁶ *Id.* at 37-38.

porations created to serve the public interest."³⁷ Among CPT's broad powers and responsibilities, it was to disburse funds for program production,³⁸ to assist in upgrading local stations,³⁹ to solicit funds outside of government,⁴⁰ to establish an effective national interconnection system,⁴¹ and in a broad sense to lead the development of a growing public broadcasting system.⁴² Although expecting CPT to play a central role in the new system, the Commission advised that it be secondary to the role of the local stations, "the bedrock" of pvt.⁴³ Somehow the amalgam was to be a "national institution" within which the autonomy of the local entities would be secure.⁴⁴

In recommending the second of its insulators, the excise tax on tv sets, the Commission argued that relieving pvt of the need to make recurrent appropriation requests to the government would increase the likelihood of independence.⁴⁵ Though Congress initially rejected the recommendation, this concern for pvt's independence proved well-founded. In belated tribute to the Commission's prescience, the proposed Public Broadcasting Funding Act includes a five year funding provision.⁴⁶ However, it is not yet clear whether this will ensure pvt's independence.⁴⁷

II. THE PUBLIC BROADCASTING ACT OF 1967

A. *An Outline of the Act*

The Public Broadcasting Act of 1967 (the Act) consists of three titles: Title I provides for additional grants for educational broadcasting facilities and is essentially an extension and amendment of the Educational Television Facilities Act of 1962.⁴⁸ Grants would continue to be made by the Department of Health, Education and Welfare.⁴⁹ Title III authorizes HEW to conduct "a major study of instructional television."⁵⁰ Title II establishes the structure through which, for the first time, federal funds are used for a system of public television⁵¹ and is of primary concern to our present inquiry.

³⁷ *Id.* at 37. Curiously, the Commission proposed that half the members of the board of directors of this corporation be appointed by the President, certainly compromising its supposed independence from government. *Id.* The remaining directors were to be selected by the presidential appointees. *Id.*

³⁸ *Id.* at 38. The Commission thought that this should be the "principal responsibility of the Corporation." *Id.* at 42.

³⁹ *Id.* at 38.

⁴⁰ *Id.* at 40-41.

⁴¹ *Id.* at 38.

⁴² *Id.* at 36-37, 41.

⁴³ *Id.* at 36.

⁴⁴ *Id.*

⁴⁵ *Id.* at 69.

⁴⁶ S. 3825, 93d Cong., 2d Sess. § 1 (1974).

⁴⁷ See notes 297-307 and accompanying text *infra*.

⁴⁸ 47 U.S.C. § 396 (1970).

⁴⁹ 47 U.S.C. § 396 (1970).

⁵⁰ 47 U.S.C. § 390 note (1970).

⁵¹ 47 U.S.C. §§ 390-396 (1970).

The imprint of the Carnegie Commission on Title II is unmistakable. One writer called it an "excellent sample of the usefulness of public-spirited commissions."⁵² In the Act's preamble⁵³ Congress announced that the development of "noncommercial educational radio and television broadcasting" was in the public interest,⁵⁴ that it was appropriate for the federal government to assist in its development,⁵⁵ that the programming to be broadcast should be "an expression of diversity and excellence"⁵⁶ which would depend on "freedom, imagination, and initiative. . . ."⁵⁷ and finally that a "private corporation" should be established to develop public broadcasting "and to afford maximum protection to such broadcasting from extraneous interference and control."⁵⁸

Under the Act's plan the new corporation, called the Corporation for Public Broadcasting (CPB)⁵⁹ would receive and disburse federal funds in pursuance of its basic goal: the development of a public broadcasting system.⁶⁰ Some of the specific functions Congress thought CPB would perform included raising funds, publicizing, making direct grants to public broadcasting stations, obtaining programs, and establishing an interconnection system.⁶¹ Although CPB was to have broad responsibilities, its powers were limited. Notably, it was prohibited from owning or operating any broadcasting, receiving, or production facilities.⁶² In short, CPB was expected to develop and fund the new system and all of its necessary components but not to itself operate or control any part of it.⁶³

⁵² F. POWLEDGE, *supra* note 15, at 7. The debt has received official acknowledgment as well. S. REP. No. 222, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 1774. *See also* H.R. REP. No. 572, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 1800.

⁵³ 47 U.S.C. § 396(a) (1970).

⁵⁴ 47 U.S.C. § 396(a)(1) (1970). Although the term "public broadcasting" was used in the title as well as in the name of the corporation established by the Act, Congress elsewhere used the term "noncommercial educational radio and television broadcasting." *Compare* 47 U.S.C. § 396(b) (1970), *with* 47 U.S.C. § 396(a)(1) (1970). There is no indication that Congress was thus making a less than wholehearted endorsement of the Commission's view that the nation should move beyond "educational" broadcasting into "public" broadcasting. *See* notes 15, 17 and accompanying text *supra*.

The Act also defines "educational television or radio programs" as those "which are primarily designed for educational or cultural purposes," 47 U.S.C. § 397(9) (1970). Deleted from the Act in conference was a provision which the House would have added, "and not primarily for amusement or entertainment purposes." *See* CONF. REP. No. 794, 90th Cong., 1st Sess. (1967) at 1967 U.S. CODE CONG. & AD. NEWS 1834, 1835. In a different sense the Congress went beyond the Commission in including radio in the expanded public broadcasting package. 47 U.S.C. § 396(a)(1) (1970).

⁵⁵ 47 U.S.C. §§ 396(a)(3), (5) (1970).

⁵⁶ 47 U.S.C. § 396(a)(4) (1970).

⁵⁷ 47 U.S.C. § 396(a)(2) (1970).

⁵⁸ 47 U.S.C. § 396(a)(6) (1970).

⁵⁹ 47 U.S.C. § 396(b) (1970).

⁶⁰ 47 U.S.C. §§ 396(a)(6), (g)(1)(A) (1970).

⁶¹ 47 U.S.C. § 396(g) (1970).

⁶² 47 U.S.C. § 396(g)(3) (1970).

⁶³ For example, CPB was expected to "assist in the development" of an interconnection system, 47 U.S.C. § 396(g)(1)(B) (1970), but was prohibited from owning or operating the system it helped establish. 47 U.S.C. § 396(g)(3) (1970). *See* text accom-

CPB was obviously modeled on the Commission's proposed CPT.⁶⁴ That CPB exists demonstrates congressional concern with the issue of governmental control, as it was intended to serve as the needed buffer between the government and the broadcasters, producers, and artists destined to receive the funds. CPB, the Act states, would "not be an agency or establishment of the United States Government."⁶⁵ It was enjoined to

[c]arry out its purposes and engage in its activities in ways that will most effectively assure the maximum freedom of the noncommercial educational television or radio broadcast systems and local stations from interference with or control of program content or other activities.⁶⁶

Yet, when one examines the Act in detail it becomes clear that CPB was far from the independent entity promised. Congress was torn by two concerns: its desire for a nongovernmental CPB on the one hand and its unwillingness to yield all control over its creation. Congress sought to resolve the conflict by proclaiming CPB's autonomy while at the same time writing controls into the law which assured the corporation's continuing subjugation.

B. Statutory Limits on CPB Independence

1. *Board of Directors*—The most striking control compromising CPB's independence was the power given to the President to appoint the entire fifteen member Board of Directors, subject to confirmation by the Senate.⁶⁷ Three limits were placed on the appointing power which somewhat lessen its political impact: first, selection standards are described, although in quite broad terms;⁶⁸ second, no more than eight members may be of the same political party;⁶⁹ and third, the members serve for staggered six-year

panying notes 81-93 *infra* for an explanation of Congress' motivation in limiting CPB's power.

⁶⁴ The variance in the corporate name reflects Congress' desire to include radio in the new program. See note 54 *supra*.

⁶⁵ 47 U.S.C. § 396(b) (1970). It was also provided that CPB would be a nonprofit corporation, 47 U.S.C. § 396(f)(1)(2) (1970), and could not support any political party or candidate for political office. 47 U.S.C. § 396(f)(3) (1970).

⁶⁶ 47 U.S.C. § 396(g)(1)(D) (1970).

How can the Federal Government provide a source of funds to pay part of the cost of educational broadcasting and not control the final product? That question is answered in the bill by the creation of a nonprofit educational broadcasting corporation.

Every witness who discussed the operation agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit Corporation, directed by a Board of Directors, none of whom will be Government employees, will provide the most effective insulation from Government control or influence over the expenditure of funds.

H.R. REP. NO. 572, *supra* note 52, at 1805.

⁶⁷ 47 U.S.C. § 396(c)(1) (1970).

⁶⁸ They were to be eminent in cultural or civic affairs, and to be broadly representative of the nation's various regions, professions and occupations. 47 U.S.C. § 396(c)(2) (1970).

⁶⁹ 47 U.S.C. § 396(c)(1) (1970).

terms.⁷⁰ The fact that all of the members of the Board owe their appointments to the President necessarily threatens the independence of the corporation.⁷¹ The Carnegie Commission, though allowing some presidential input, would have limited him to naming half the members of a board of twelve.⁷² Although this position was favored by the Senate committee⁷³ its view was not adopted.⁷⁴

2. *Auditing and Reporting Requirements*—The Act additionally insured a direct and continuing relationship between CPB and the government by imposing federal auditing and reporting requirements. CPB is required to make annual reports to Congress,⁷⁵ it is subject to audit by the General Accounting Office⁷⁶ with the results of such audits reported to Congress, and all recipients of CPB funds are themselves subject to audit by the Comptroller General of the United States.⁷⁷

3. *Limits on Freedom in Program Development*—The effectiveness of CPB as a buffer was further limited by congressional attempts to rough out the dimensions of the programming ultimately to be produced. CPB was charged with developing a system which would ensure that programs of “high quality” would be made available to broadcasters.⁷⁸ Congress also required that the programs be “obtained from diverse sources”⁷⁹ with

⁷⁰ 47 U.S.C. § 396(c)(4) (1970).

⁷¹ The CPB board membership has been criticized for failing to meet the Act's requirement of “broad representation”. 47 U.S.C. § 396(c)(2) (1970). See *THE FOURTH NETWORK*, *supra* note 21, at 27, which charges that it is “weighted . . . preponderantly in favor of the ruling Establishment” in that its members were “recruited from the highest levels of military, industrial and governmental bureaucracies. . . .”

It has been alleged that President Nixon's appointees to the Board were chosen in order to influence CPB programming policy in accordance with the President's wishes. Friendly, *The Campaign to Politicize Broadcasting*, *COLUM. JOURNALISM REV.* 9, 13-14 (1973).

⁷² REPORT, *supra* note 2, at 37.

⁷³ S. REP. NO. 222, *supra* note 52, at 1784-85.

⁷⁴ The House bill, H.R. 6736, provided for the appointment scheme which was eventually adopted, H.R. REP. NO. 572, *supra* note 52, at 1805.

⁷⁵ 47 U.S.C. § 396(i) (1970).

⁷⁶ 47 U.S.C. § 396(l)(2) (1970).

⁷⁷ 47 U.S.C. § 396(l)(3)(B) (1970). In justifying these links to government the Senate Committee said: “Congress must be assured of the Corporation's responsible management without creating public confusion as to its independence.” S. REP. NO. 222, *supra* note 52, at 1778.

⁷⁸ 47 U.S.C. § 396(g)(1)(A) (1970). Congress could not be faulted for urging attention to quality, but its treatment of public broadcasting hardly served that goal. See text accompanying notes 94-100, 334-38 *infra*. What programming would constitute “high quality” is unclear. Surely it includes high technical standards, see S. REP. NO. 222, *supra* note 52, at 1778, but beyond that does it mean “highbrow” programs, those with mass appeal, or something in between? The Senate Commerce Committee seemed not entirely sure:

Although the aims of noncommercial broadcasting should be directed toward cultural and information programs, it should not be so highly specialized, however, that it caters only to the most esoteric tastes.

Id. at 1777-78. See also note 54 *supra* and text accompanying notes 121, 134-35 *infra*.

⁷⁹ 47 U.S.C. § 396(g)(1)(A) (1970). The Senate Report mentions national production centers, independent producers and local stations as possible sources of programs. S. REP. NO. 222, *supra* note 52, at 1778.

“strict adherence to objectivity and balance in all programs and series of programs of a controversial nature.”⁸⁰ Plainly these provisions were intended to restrict the ptv system’s freedom of operation, but some restrictions could have been argued to be desirable because they would promote the freedom of the public broadcasting stations which CPB was to supply with services, money, and programs. Thus, if programming was obtained from “diverse sources,” as opposed to one or two major production centers, it would be more likely to reflect a greater range of political, ideological and artistic viewpoints. The local stations, having a greater selection, could choose to broadcast only those programs which suited them.

We have already seen that the Act contained safeguards against the centralization of excessive power in CPB⁸¹ and that these controls were prompted by congressional fear that CPB would otherwise come to control

⁸⁰ 47 U.S.C. § 396(g)(1)(A) (1970). The effect of this provision remains unclear. CPB has taken the position that it requires of public broadcasters more stringent neutrality than does the fairness doctrine, in that the latter requires a balanced approach to public issues in the context of a licensee’s entire program schedule while § 396(g)(1)(A) requires balance in each program funded by CPB. Comments of Corporation for Public Broadcasting *In re* Jurisdiction of the Commission with Respect to § 396 of the Communications Act of 1934, *as amended*, Reply No. 8330-Q, C9-1317 (April 5, 1973) at 19. The Public Broadcasting Service (PBS), which operates the ptv interconnection, see text accompanying notes 118-24 *infra*, has argued that the “objectivity and balance” requirement is simply a restatement of the fairness doctrine and imposes no new standards or obligations. Memorandum of Public Broadcasting Service *In re* Commission Jurisdiction and Interpretation of § 396(g)(1)(A) of the Communications Act of 1934, *as amended*, Ref. No. 833-Q, C9-1317 (Mar. 26, 1973) at 11-19 [hereinafter cited as Memorandum]. The legislative history leaves little doubt that the requirement need not be met in every program so long as the program is part of a series. The balance can be provided in a subsequent program in the series. CONF. REP. NO. 794, *supra* note 58, at 1835-36. See also 113 CONG. REC. 29386 (1967) (remarks of Representative Staggers). Even if the statute can be satisfied by an objective series in which some programs were not objective, it could be read to allow less flexibility than the fairness doctrine if the word “series” includes only those programs funded by CPB in a specific grant rather than including all programs broadcast on an issue by a given ptv station, whether or not funded by CPB. If Congress intended the former interpretation (as the context suggests) it no doubt did so in order to prevent CPB from putting across its own (or a producer’s) viewpoint on a controversial issue. See text accompanying notes 88-93 *infra*. Insofar as it is thus controlling the speech of the producer by the threat of withholding government funds the statute raises serious first amendment problems. In *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 396 (1969), the Court approved the fairness doctrine but suggested reservations about further possible government attempts to regulate broadcasting content. See also first amendment argument made by PBS in Memorandum, *supra*, at 20-25; cf. Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEXAS L. REV. 1123, 1161 (1974).

Recognizing the first amendment problems inherent in enforcement of the “objectivity and balance” provision, it was held in *Accuracy in Media v. FCC*, 521 F.2d 288 (D.C. Cir. 1975) that the effect of the provision was horatory only, that it is “a guide to the Congressional oversight policy and . . . a set of goals to which . . . CPB should aspire.” *Id.* at 297. The court affirmed an FCC ruling that the Commission could not enforce the provision against CPB or a noncommercial station.

⁸¹ See notes 62-66 and accompanying text *supra*.

the programming of the local stations.⁸² The prohibition against CPB owning or operating a "network" is traceable to this fear,⁸³ since central control over programming would probably diminish the local nature of the ptv stations, thus inhibiting their ability to serve their own communities in ways that commercial stations can or will not.⁸⁴ Indeed, restrictions on CPB's authority, even those dealing with programming, are arguably proper so long as they promote freedom of the licensees or the program producers and so long as CPB is recognized as imbued with state action.⁸⁵ If state action is involved then protection of the licensees and producers from CPB is perhaps a matter of constitutional necessity and is, of course, an appropriate goal of legislation.

The requirement that programming be from diverse sources⁸⁶ also seems defensible, as stations fed nothing but "Eastern liberal" productions might legitimately feel cabined in, but the objectivity and balance provision⁸⁷ is less satisfactory. If the treatment of a given issue is considered unbalanced by a local station, the station could, of course, simply pass up the program, but the reach of the provision itself has an obvious chilling effect that could significantly reduce the artistic freedom of a producer making a program with CPB funds. When Congress enacted this provision it was responding to a second major concern about the legislation: the possibility that the new system might be used to spread ideological views with which many citizens or legislators disagreed.⁸⁸ Significantly, many legislators who shared this concern thought that the Act sufficiently safeguarded against the danger.⁸⁹

⁸² The Senate Report stated:

We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast.

S. REP. NO. 222, *supra* note 51, at 1782. See generally *Accuracy in Media v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975).

⁸³ See note 62 and accompanying text *supra*. The term "network" was not defined in the Act. However, H.R. REP. NO. 572, *supra* note 52, at 1809, states that [I]t is assumed that, in compliance with this prohibition, the Corporation will not have a staff of producers, commentators, announcers, and others directly associated with program production; a system of fixed schedule broadcasting; ownership or operative authority over program production equipment, studios, or interconnection facilities; or station affiliates.

⁸⁴ The Carnegie Commission stressed the importance of strong local stations because of such concerns. REPORT, *supra* note 2, at 32-36. The Senate Report also shared this view, see text accompanying note 91 *supra*, as did the House Report: ". . . a fundamental concept . . . runs throughout Title II—localism: local stations shall retain both the opportunity and responsibility for broadcasting programs they feel best serve their communities." H.R. REP. NO. 572, *supra* note 52, at 1808.

⁸⁵ For a discussion of the state action problem, see note 208 *infra*.

⁸⁶ See note 79 *supra*.

⁸⁷ See note 80 *supra*.

⁸⁸ Witness Senator Thurmond warned, "nothing in this bill safeguards against the capture of the corporation by a small clique with definite ideological biases [sic]." 119 CONG. REC. 14515 (1973) (quoted by Senator Helms).

⁸⁹ The minority report stated:

We know that we are not alone in feeling some misgivings about creating a mechanism for the kind of broadcasting which might result from

Further evidence that the Act sought to discourage controversy in programming is its explicit prohibition of editorializing. Congress reached past its supposed buffer to the ptv stations themselves by providing that "[n]o noncommercial educational broadcasting may engage in editorializing or may support or oppose any candidate for political office."⁹⁰ By "editorializing" the Act meant the broadcast of positions taken by station management.⁹¹ Stations were free to broadcast programs in which views were espoused, so long as the "editorial" format was not used. By contrast, commercial stations are permitted to express "editorial" opinions so long as an opportunity to reply is given to persons of differing views.⁹²

In narrowing, even slightly, the range of programming options the new system could exercise, Congress retreated from the bold outlines of the Act's preamble, betraying the early advocates of a free, unfettered medium⁹³ in deference to a political expediency born of caution.

4. *Inadequate Funding*—The most harmful congressional departure from the Carnegie Commission's plan was the failure to insure adequate long range funding outside the normal annual appropriation process. Despite the Commission's warnings against such a provision, the Act contained only a one-year funding authorization in the amount of only nine million dollars.⁹⁴ This was explained on the ground that it was impossible to predict in advance either the actual financial needs of the system or the amounts it would be able to raise from nonfederal sources.⁹⁵ Additional reasons were uncertainty as to the composition of the CPB Board and its "operational policies." Until the Public Broadcasting Act of 1974⁹⁶ was introduced no long range funding proposal was adopted or even seriously considered by Congress. Annual appropriations were the rule until 1973, when a two-year funding bill was adopted.⁹⁷ Indeed, the Commission's fears were realized in a series of attempts by the Executive to use its control over funds to influence the conduct of the ptv system. These attempts reached even to program content.⁹⁸

Adoption of the normal appropriation process for public broadcasting badly served the goal of freedom from government interference in public

ambitions such as these. It is not the gist of our complaint with the bill, however. The committee has worked very hard to devise and incorporate safeguards. . . . [W]e feel that the committee version of the Corporation, with the caveats and policy statements applicable thereto, can be workable.

Minority views of Reps. Broyhill, Hawey, Watson, Carter and Brown, H.R. REP. NO. 572, *supra* note 52, at 1832.

⁹⁰ 47 U.S.C. § 399 (1970).

⁹¹ H.R. REP. NO. 572, *supra* note 52, at 1810; CONF. REP. NO. 794, *supra* note 54, at 1835.

⁹² 47 C.F.R. § 73.123 (1973); 13 F.C.C. 1246, 1257 (Editorializing by Broadcast Licensees).

⁹³ See text accompanying notes 5, 23-31 *supra*.

⁹⁴ 47 U.S.C. § 396(k)(1) (1970).

⁹⁵ H.R. REP. NO. 572, *supra* note 52, at 1811-12.

⁹⁶ S. 3825, 93d Cong., 2d Sess. (1974).

⁹⁷ 47 U.S.C. § 391 (Supp. 1974).

⁹⁸ See text accompanying notes 178-207 *infra*.

broadcasting, but so too did the penurious amounts appropriated. Though the annual appropriation was increased to \$50 million in 1974 and \$60 million in 1975,⁹⁹ the funding level has not approached that suggested by the Commission.¹⁰⁰ Ironically, the result has been an augmentation of CPB's power in relation to the ptv licensees, whose freedom has accordingly been diminished. In part, this is because a lack of funds has meant that few programs can be funded, thereby reducing the range from which the licensees could select. Lack of funds has also deprived the system of the technical equipment which is necessary to allow the licensees to broadcast on independently determined schedules. Exactly how this works will be made clear in the following section.

III. POWER AND ITS ABUSE

At this point, the endeavor to establish freedom of expression in noncommercial broadcasting must be deemed a failure.¹⁰¹

This was the judgment in 1972 by John W. Macy, the first President of CPB. From his vantage point the cause of the failure was executive branch interference with the ptv system.¹⁰² The blame for it may also be traced to the structure within which ptv is operated by the Public Broadcasting Service (PBS).¹⁰³ Together, these organizations largely determine what programs shall be produced for ptv and by whom;¹⁰⁴ they decide what programs shall be distributed to the ptv licensees;¹⁰⁵ they decide what the distribution schedule shall be;¹⁰⁶ they can and do preview every finished program prior to its distribution.¹⁰⁷ Because both CPB and PBS are subject to close control by the federal government, the centralization of power in these agencies has been an important factor in the failing effort to keep ptv independent of government.

A. The Concentration of Power Under Current Organization of the PTV System

Although, as the predominant organization in the ptv system, CPB has already been discussed,¹⁰⁸ no understanding of the system is complete which does not also take into account CPB's creation and "partner",¹⁰⁹

⁹⁹ 47 U.S.C. § 391 (Supp. 1974).

¹⁰⁰ See notes 20, 34 *supra*.

¹⁰¹ John Macy, former President of the CPB, *quoted in* H. ASHMORE, *FEAR IN THE AIR* 95 (1973).

¹⁰² *Id.* at 94-95.

¹⁰³ See text accompanying notes 108-15 *infra* for a description of PBS.

¹⁰⁴ See text accompanying notes 116-28 *infra*.

¹⁰⁵ See text accompanying notes 129-35 *infra*.

¹⁰⁶ See text accompanying note 130 *infra*.

¹⁰⁷ See text accompanying notes 135-60 *infra*.

¹⁰⁸ See text accompanying notes 58-93 *supra*.

¹⁰⁹ CPB and PBS in 1973 executed a "partnership agreement" in which they described their shared authority over the ptv system. *A Joint Resolution of CPB and PBS*, 1973 CPB ANN. REP. 8-9.

PBS, which shares considerable general authority with its parent and exercises even more day-to-day decision-making power. PBS was organized by CPB in 1969 pursuant to its authority under the Act to create a system of interconnection,¹¹⁰ as a means of delivering programs to ptv stations which desire them.¹¹¹ This is physically accomplished by transmitting the programs electronically to the stations in some cases via facilities leased from AT&T.¹¹² Stations receiving these programs may broadcast them directly as they come in, tape them for broadcast at a later date if they have technical capability, or decide not to broadcast them at all.¹¹³ Later, in 1973, PBS underwent a substantial reorganization and became, in addition to the manager of the interconnection, the representative body of the ptv stations, who now comprise its membership and elect its Board of Governors.¹¹⁴ Though nominally independent and self-governing, PBS may be subject to influence by CPB, primarily because most of PBS funds are provided by CPB.¹¹⁵

1. *Program Production*—Programs are produced for public television with funds obtained from federal as well as several nonfederal sources such as charitable foundations and corporations.¹¹⁶ Since the Act itself does not mandate the use of program production funds for any specific purpose, CPB has largely been free to decide how much to spend for programming and how to spend it. As CPB has traditionally budgeted its funds, program money has been allocated in two ways: through direct grants from CPB to producers whose productions are intended for national ptv distribution and through grants from CPB to ptv licensees which the latter may use for local productions not intended (but not barred from) national distribution.¹¹⁷ Authority to allocate national program production funds rests primarily with CPB,¹¹⁸ but it is obligated to “consult” with PBS.¹¹⁹ In the event of

¹¹⁰ Statement of Hartford N. Gunn, Jr., President, PBS, *Hearings on S. 1090, S. 1228 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 145 (1973) [hereinafter cited as *1973 Hearings*]. See 47 U.S.C. § 396(g)(1)(B) (1970).

¹¹¹ H.R. REP. No. 572, *supra* note 52, at 1808-09.

¹¹² PBS—A Licensee Membership Corporation, A Background Paper, *1973 Hearings, supra* note 110, at 478-79.

¹¹³ *Id.*

¹¹⁴ PBS BY-LAWS § 5.4 (March 30, 1973). In 1973 there were 238 ptv stations. 1973 CPB ANN. REP., *supra* note 109, at 19.

¹¹⁵ *1973 Hearings, supra* note 110, at 69. Subsequent to its 1973 reorganization, PBS became a dues paying organization with each station obliged to pay annual dues. The stations' expected source of the dues, however, are funds provided by CPB in the form of “Community Service Grants.” BROADCASTING, Nov. 19, 1973, at 30; *id.* Oct. 1, 1973. See note 326 and accompanying text *infra*.

¹¹⁶ 1973 CPB ANN. REP., *supra* note 109, at 23.

¹¹⁷ Testimony of Thomas B. Curtis, Chairman, CPB, *1973 Hearings, supra* note 110, at 14, 16. In fiscal year 1973, \$15 million was allocated for national radio and tv programming. *Id.* at 14. Although grants to local radio and tv stations (“Community Service Grants”) were \$6.6 million, or 18 percent of CPB's federal funds, *id.* at 16, 65, not all of the local tv station funds would actually be used for program production. *Id.* at 16.

¹¹⁸ *Joint Resolution, supra* note 109, at para. 1.

¹¹⁹ *Id.*

disagreement between CPB and PBS staff, resolution is by "appeal" to the respective chairmen of the two organizations.¹²⁰

The philosophy which generally guides CPB in choosing which programs to fund is that

[t]he mission of public broadcasting is to meet the special audiences; those with great interest in public affairs, children, the aged, racial minorities, drama lovers, the undereducated, the erudite.¹²¹

Apparently the most important of these has been children, as 48 percent of the available national program funds have gone for children's programs.¹²² In formulating its recommendations to CPB on program funding, PBS relies on general factors such as audience appeal, inability to produce the program locally, diversity of programming, stimulation of audience interest in ptv, etc.¹²³

A new approach to national funding was effected on July 1, 1974. CPB then committed part of its available national programming funds to the stations under a new Station Program Cooperative plan.¹²⁴ To summarize the complex new arrangement, the ptv stations decide, by vote, which programs will be funded for the coming program year,¹²⁵ with voting power being allocated roughly according to the size of each station's audience.¹²⁶ CPB will, however, provide programming funds on a matching basis only: three dollars by CPB for each one dollar provided by the stations.¹²⁷ The programming funds not committed by CPB to the Station Program Cooperative will be used to develop new programs chosen by CPB and to support the continuation of programs chosen by CPB.¹²⁸

2. *Operation of the Interconnection*—By the end of 1973 over two hundred ptv stations were part of the PBS system and thus linked to the interconnection.¹²⁹ If PBS decides to transmit a program, more than 200 stations will receive it and may choose to broadcast it. (Of course, anyone may send a videotape to a ptv station in the hope that it will be broadcast and anyone willing, or able, to make 200 copies of the tape may duplicate the PBS distribution system by using the mails instead. However, even if

¹²⁰ *Id.*

¹²¹ Statement of Henry Loomis, President, CPB, *Hearings on S. 3825 Before the Subcomm. on Communications of the Senate Commerce Comm.*, 93d Cong., 2d Sess. 56 (1974).

¹²² Testimony of Thomas B. Curtis, Chairman, CPB, *1973 Hearings, supra* note 110, at 27.

¹²³ "Public Broadcasting Service," statement appended to testimony of Hartford Gunn, President, PBS, *1973 Hearings, supra* note 110, at 408-11.

¹²⁴ N.Y. Times, Feb. 13, 1974, at 78, col. 1.

¹²⁵ N.Y. Times, March 15, 1974, at 67, col. 2.

¹²⁶ *Id.*

¹²⁷ *Id.* See also *Accuracy in Media v. FCC*, 521 F.2d 288, 292 n.14, which states the matching formula to be four to five (station funds to material cooperative funds).

¹²⁸ N.Y. Times, Feb. 13, 1974, at 78, col. 1.

¹²⁹ Not all stations are electronically linked; those that are not are served by mail. Testimony of Thomas B. Curtis, Chairman, CPB, *1973 Hearings, supra* note 110, at 70.

one could do so, we can assume that the recipients would be less likely to broadcast the program than they would a program selected and implicitly endorsed by PBS.) Moreover, if PBS transmits a program during regularly scheduled broadcast hours almost two-thirds of the interconnected pvt stations will broadcast it directly as it is transmitted to them simply because they do not have the equipment which would allow them to tape it while simultaneously broadcasting another program.¹³⁰ Consequently, if they do not broadcast the PBS transmission as it comes in they will never be able to do so, at least unless PBS retransmits it. Any station which does not broadcast the transmission must have something else immediately available to substitute or it cannot broadcast at all. As CPB President Loomis said of the many stations with insufficient equipment, "They are locked into the fixed schedule network distribution. . . ."¹³¹

Not all programs are transmitted by PBS at a time when it would be suitable to broadcast them directly. A smaller proportion are transmitted "off-schedule" so that even the equipment-deficient station can tape them and review them for possible later broadcast.¹³²

Given these facts, the PBS interconnection is of enormous importance in the process of distributing ideas in the United States. How is it determined who shall have access to this system? The answer depends essentially on the source of funds used to produce a program. Programs funded by CPB will presumably be transmitted by PBS.¹³³ Thus, although CPB effectively makes the decision to transmit, PBS decides which programs not funded by CPB (programs produced locally or with foundation or corporate support) will be scheduled for distribution.¹³⁴

A commitment by PBS to transmit a program, however, does not guarantee transmission in the exact form produced since prior to actual transmission, PBS reviews each program for compliance with certain PBS programming standards.¹³⁵ These are contained in two policy statements adopted by the PBS Board, a Statement on Program Standards¹³⁶ and a Statement of Journalism Standards and Guidelines.¹³⁷ Both were promulgated in order to assure that programs transmitted will be "acceptable to a substantial portion of the local stations."¹³⁸ Each has procedural as well as substantive provisions. According to the Statement on Program Standards

¹³⁰ Testimony of Henry Loomis, President, CPB, 1973 *Hearings, supra* note 110, at 45.

¹³¹ *Id.*

¹³² "Public Broadcasting Service," addendum to testimony of Hartford N. Gunn, Jr., President, PBS, 1973 *Hearings, supra* note 110, at 412-13.

¹³³ *Id.* at 407, 409-11.

¹³⁴ *Id.* at 411-13. According to PBS:

Programs are generally chosen for PBS national distribution where they are timely, provided [sic] balance to the interconnection schedule and have a general audience appeal or appeal to a defined audience identified as a valuable target for national programming.

Id. at 412.

¹³⁵ *Id.* at 413.

¹³⁶ *Id.* at 414-15.

¹³⁷ *Id.* at 415-16.

¹³⁸ *Id.* at 414.

PBS will transmit "in some fashion," any program to which it has previously made a commitment, unless the content is illegal, with illegality apparently including violations of the fairness doctrine and other provisions of the Communications Act of 1934.¹³⁹ (PBS is further obligated to transmit previously scheduled programs by the partnership agreement with CPB. That obligation is also subject to PBS standards.)¹⁴⁰ PBS procedures in furtherance of the fairness doctrine are noteworthy because of the special burden they put on producers for ptv. Since these procedures require that such producers themselves meet the requirements of the doctrine, if a producer does a program on one side of an issue he must also agree to do one on the other side, if asked.¹⁴¹

Even if obligated to transmit a program, PBS does not lose all control over it because that obligation is satisfied by transmitting the program "off schedule,"¹⁴² at times when stations are not likely to broadcast it directly as it is transmitted to them but must instead tape it and broadcast later if they so choose.¹⁴³ Under a related policy, PBS reserves the right to "demand an alternative version of a program with difficult taste problems."¹⁴⁴ Given the power to remove a program from the interconnection mainstream and thereby deprive it of much of its audience, a "demand" from PBS to a producer is not likely to go unheeded. Additional control is exercised by PBS when it alerts the local station to the content problem prior to transmission¹⁴⁵ ("flags" the problem). This might cause a station to decide not to broadcast it.

In determining whether to distribute a program off schedule, or have it altered, or flag it, PBS refers to the substantive provision of its Statement on Program Standards and its Statement of Journalism Standards and

¹³⁹ *Id.* at 407, 415. As understood by PBS,

The Fairness Doctrine is designed to promote the presentation of uninhibited, robust, and wide-open debate on issues of public importance. It requires that, where a program concerns a controversial issue of public importance, the broadcaster has an affirmative obligation to present responsible spokesmen with contrasting viewpoints. This obligation does not require that each program broadcast must contain a balanced presentation of the various viewpoints on a given issue, but that the necessary balance must be struck over the entire range of a broadcaster's programming. The obligations imposed by the Fairness Doctrine, as is the case with the equal time obligations, may not be delegated by the broadcaster.

Id. at 416-17.

¹⁴⁰ According to paragraph two of the *Joint Resolution*, *supra* note 109,

All non-CPB funded programs accepted under PBS Broadcast Journalism standards and normal PBS procedures will have access to the interconnection. In the event of disagreement between CPB and PBS over whether a program should be scheduled for transmission the dispute is resolved by a joint CPB-PBS committee set up under the partnership agreement.

¹⁴¹ Addendum to 1973 *Hearings*, *supra* note 132, at 417.

¹⁴² *Id.* at 407.

¹⁴³ *Id.* at 413.

¹⁴⁴ *Id.* at 407.

¹⁴⁵ *Id.* at 413-14.

Guidelines.¹⁴⁶ The latter statement requires that ptv journalism be "fair, balanced and objective and that it afford access to views both inside and outside the existing consensus."¹⁴⁷ More specifically, it abjures ptv reporters to avoid affecting the events they are covering, prohibits staging of events, requires editing faithful to the tone of the original material, asks that clear distinctions be drawn between news and commentary, and requires that the prejudice of criminal trials by publicity be avoided.¹⁴⁸ The Statement on Program Standards, insofar as it addresses itself to the substance of material not illegal, goes primarily to questions of taste.¹⁴⁹ Under this statement, PBS seeks to protect local audiences from ptv programming distasteful to them, but does not expect the "most timid" local station to be able to impose its standards on the entire system.¹⁵⁰ Exercise of PBS control over the interconnection has reportedly resulted in some troublesome decisions.¹⁵¹ Among these was the deletion of a segment of the ptv-produced *Great American Dream Machine* in which the FBI was accused of using *agents provocateurs* in its policing of radical groups.¹⁵² The material was deleted by PBS prior to transmission to the ptv stations¹⁵³ who then had no choice but to broadcast the cut version of the program or not broadcast it at all. PBS justified the deletion as concern for legal problems which might arise if it were broadcast.¹⁵⁴ Nonetheless, the segment was broadcast a few days later as a part of a program called *Behind the Lines* which dealt with problems in journalism and this program was transmitted in its entirety by PBS to its member stations.¹⁵⁵

Other programming alleged to have been edited at PBS' instance prior to broadcast included parts of the *Nader Report* critical of tv cereal advertising and gasoline commercials.¹⁵⁶ PBS objections to material in a Woody Allen skit scheduled to be broadcast led to its cancellation as well.¹⁵⁷ *Steambath*, a play by Bruce Jay Friedman produced for ptv by KCET in Los Angeles, was not nationally distributed by PBS reportedly because some scenes included semi-nudity and blasphemy.¹⁵⁸ National distribution was also refused to a BBC dramatization of *Nana* by Emil Zola, which was reportedly considered too sexually explicit by PBS.¹⁵⁹ These

¹⁴⁶ *Id.* at 414-16.

¹⁴⁷ *Id.* at 415.

¹⁴⁸ *Id.* at 415-16.

¹⁴⁹ The addendum to *1973 Hearings* states: "The Statement requires [sic] that producers adhere strictly to the requirements of the Communications Act and the Fairness Doctrine." *Id.* at 415.

¹⁵⁰ *Id.* at 413-14.

¹⁵¹ The incidents described herein are based on reports in the public press.

¹⁵² F. POWLEDGE, *supra* note 15, at 39-43.

¹⁵³ *Id.* at 41. The deletion followed an attempt to negotiate changes satisfactory to PBS and the producer. *Id.*

¹⁵⁴ *Id.* at 39-41.

¹⁵⁵ *Id.* at 41-42.

¹⁵⁶ THE FOURTH NETWORK, *supra* note 21, at 34.

¹⁵⁷ F. POWLEDGE, *supra* note 15, at 44-46.

¹⁵⁸ N.Y. Times, March 2, 1974, at 63, col. 3.

¹⁵⁹ N.Y. Times, Nov. 29, 1973, at 86, col. 1.

reports have resulted in "self-censorship" on the part of people producing programs for ptv.¹⁶⁰

B. *The Misuse of Federal Power Over PTV*

The power over communications enjoyed by the CPB and PBS officials can be abused simply by its exercise, no matter how benevolent the ends. Closely tied to government in numerous ways¹⁶¹ and dependent on government for funds,¹⁶² these officials are so hard to separate from government that their power to determine which voices shall be heard and which shall not raise serious questions. Although this alone is cause for concern, a more disturbing problem is the exercise of that power in response to perceived wishes of federal government officials. The public record indicates that such abuse is present and that it flows primarily from dependence on federal funds. This problem has been openly acknowledged by CPB officials.¹⁶³

1. *The Origins of the Power*—The special ties between CPB and government have already been described.¹⁶⁴ Before turning to the indications that those ties have opened it to government influence we should describe the relationship of PBS to the federal government.

Unlike CPB, PBS management is not chosen by government¹⁶⁵ and its funds are indirectly provided by government.¹⁶⁶ Nonetheless, the potential for influence, either directly from the government or indirectly through CPB, appears to be significant. By way of background we should reiterate that PBS was created to serve the important public purposes of the Act in which Congress recognized that "one or more systems of interconnection" ought be established as part of the congressional plan to aid public broadcasting.¹⁶⁷ PBS was created by CPB to fulfill that end.¹⁶⁸ In recognition of the importance of the interconnection to the statutory plan, Congress not only funds PBS but also authorizes the common carriers which transmit the interconnection signals to provide this service at reduced rates.¹⁶⁹ This recognition is likewise reflected in the PBS corporate charter.¹⁷⁰

¹⁶⁰ F. POWLEDGE, *supra* note 15, at 15 (quoting James Day, head of National Educational Television, a major ptv producer).

¹⁶¹ See text accompanying notes 67-77 *supra*.

¹⁶² See text accompanying notes 94-95 *supra*.

¹⁶³ See note 241 *infra*. Arguing for long term public broadcasting funding, CPB President Henry Loomis said:

Since the appropriation process is a matter of judgment, public broadcasting remains vulnerable to undue pressures from the executive and legislative branches of government and from all types of interest groups.

Statement of Henry Loomis, President of CPB, *Hearings on S. 3825 Before the Subcomm. on Communications of the Senate Commerce Comm.*, 93d Cong., 2d Sess. 57 (1974).

¹⁶⁴ See text accompanying notes 67-77 *supra*.

¹⁶⁵ PBS' directors are chosen by its members, *i.e.*, the ptv licensees. See note 114 *supra*.

¹⁶⁶ See note 115 *supra* and note 171 *infra*.

¹⁶⁷ 47 U.S.C. § 396(g)(1)(B) (1970).

¹⁶⁸ See 1973 *Hearings*, *supra* note 110, at 221.

¹⁶⁹ 47 U.S.C. § 396(h) (1970).

¹⁷⁰ Certificate and Articles of PBS § 8 (1969).

PBS has historically been financed by grants from CPB¹⁷¹ and since roughly 90 percent of CPB's budget is derived from the United States¹⁷² it is apparent that PBS is in large part publicly funded as well. That the funds are not provided directly by the United States is not significant because the money granted to PBS by CPB is not a matter of discretion with the CPB. CPB serves as a mere conduit for money appropriated by Congress with the intent that it be used by PBS for the interconnection.¹⁷³ During the appropriation process PBS relates to Congress as it would if it received direct appropriations: its officials testify at the relevant committee hearings as to budgetary and policy matters.¹⁷⁴ In fact in its 1973 hearings on public television appropriations, some members of the Senate Subcommittee on Communication expressed a desire¹⁷⁵ that federal funds, including those granted to PBS, be controlled by CPB and thus ultimately by Congress.¹⁷⁶

Consistently with its representations to Congress, CPB has publicly claimed the power to dictate the allocation of authority between it and PBS, though PBS has not endorsed the CPB view. The CPB Board adopted a resolution on January 10, 1973, whereby, pursuant to creating a "new relationship" with PBS, it withdrew from PBS the power to share with CPB the authority for decisions relating to program funding and program trans-

¹⁷¹ E.g., in each of fiscal years 1971 and 1972, the grants amounted to almost \$9 million. See financial statements included in *1973 Hearings, supra* note 110, at 400 n.1, 402 n.1. Since PBS now collects dues from member stations the amount it receives from CPB will be less, but will nonetheless remain substantial. 1973 CPB ANN. REP., *supra* note 118, at 19.

¹⁷² 1973 CPB ANN. REP., *supra* note 118, at 22.

¹⁷³ See CPB budget summaries for years 1971-1975 provided to Congress by CPB at the 1973 appropriation hearings. Each annual budget whether actual or future estimate includes a substantial sum labeled "Distribution (PBS)." *1973 Hearings, supra* note 110, at 68, Table 2.

¹⁷⁴ See, e.g., *1973 Hearings, supra* note 110, at 145. See also testimony of Hartford N. Gunn, Jr., President, PBS, *id.* at 106-39.

¹⁷⁵ Senator Baker put it this way in his opening statement:

While I believe there must be meaningful consultation with the local stations on program development, the Corporation [for Public Broadcasting] is responsible under the law for the interconnection system, how it is used, what it is used for, and who uses it.

The ultimate responsibility cannot be delegated or shared.

The Corporation must remain fully accountable to the Congress, not only for its use of federally appropriated funds, but also for the stewardship of the publicly subsidized and federally funded interconnection system.

1973 Hearings, supra note 110, at 7.

¹⁷⁶ Senator Baker was assured by Thomas B. Curtis, then President of CPB, that such control over PBS was indeed maintained.

Senator Baker: All you have to do to put my mind at rest is to say one thing, and that is that you recognize and you understand your statutory responsibility as the agency for the handling of Federal funds, and that you are going to do that to the best of your ability.

Mr. Curtis: The buck stops here. You are darn right it does. And we will not avoid it.

Id. at 34.

mission.¹⁷⁷ The formulation was unacceptable to PBS and its member licensees.¹⁷⁸ A period of negotiation between the two corporations followed which, on May 31, 1973, led to the announcement of the partnership agreement under which they agreed to share authority over the interconnection.¹⁷⁹ Under the terms of the agreement CPB and PBS are committed to joint decision making in the crucial areas of program funding, distribution, and scheduling.¹⁸⁰

If the ability of PBS to negotiate a share of power from CPB appears to indicate that PBS is not subject to total control by the former, the agreement arrived at by them evidences the continuing power of CPB to at least influence PBS management of the interconnection, a task which is of course PBS' "primary function."¹⁸¹ Thus government influence over PBS might make itself felt directly as a result of the appropriation process or, indirectly, through CPB and the partnership agreement.

2. *The Exercise of Power*—Officials of the Nixon administration openly attempted to influence the development of pty on two levels: they sought to modify the structure of the system and to affect the kinds of programs the structure produced. As to the former the basic thrust of administration spokesmen was that the system had become too centralized under the too vigorous leadership of CPB, thus frustrating the statutory goal of localism.¹⁸² This was the theme of a major speech to the National Association of Educational Broadcasters by Clay T. Whitehead, then Director of the Office of Telecommunications Policy (OTP). Mr. Whitehead specifically accused CPB of establishing a fourth network in contravention of the Act.¹⁸³ His criticisms were coupled with an implied threat to oppose fund-

¹⁷⁷ According to a CPB press release which described the resolution, it contained a restatement of some of the language of the law establishing the Corporation, which holds the CPB Board solely responsible for the federal money in public broadcasting. The Board resolution further states that all of the authorities and all of the responsibilities vested in the Corporation pursuant to the Public Broadcasting Act of 1967 are those of the CPB Board. While, in appropriate circumstances, the Board may delegate its authority or arrange to exercise its authority by contractual or other arrangements, it may not and should not delegate its responsibilities under the Act. . . . The Board also received—and fully concurred in—advice from counsel that the 1967 Act gives CPB the ultimate responsibility, and accountability to Congress, for the proper use of the interconnection facilities funded by CPB.

CPB Board Revises Relationship With PBS, CPB Press Release (Jan. 11, 1973).

¹⁷⁸ Statement of William Harley, Chairman, National Association of Educational Broadcasters, 1973 *Hearings*, *supra* note 110, at 108. The NAEB was then in the process of merger with PBS. *Id.* at 120. The conflict between PBS and CPB which relates to the questions of authority and which took place in the spring of 1973 is described in *A Hot Campaign to Interest Public in Public TV*, BROADCASTING, Jan. 28, 1974, at 36-37.

¹⁷⁹ See discussion at 1973 *Hearings*, *supra* note 110, at 121-31.

¹⁸⁰ *Joint Resolution*, *supra* note 109.

¹⁸¹ Statement of PBS President Gunn, *Hearings on H.R. 16338 and H.R. 16580 Before the Subcomm. on Communications and Power, Comm. on Interstate & Foreign Commerce*, 91st Cong., 2d Sess., ser. 91-153, 84 (1970).

¹⁸² See text accompanying notes 183-93 *infra*.

¹⁸³ Remarks of Clay T. Whitehead, Director, OTP, Executive Office of the

ing efforts if no change in policy was forthcoming.¹⁸⁴ This speech was viewed by public broadcasting as an "intensely political" effort to "shake the uneasy public broadcasting structure."¹⁸⁵ The culmination of this campaign, according to then CPB President John Macy was the 1972 presidential veto of the CPB funding bill.¹⁸⁶

Administration support for ptv funding was again linked to structural change by Mr. Whitehead in the 1973 hearings before the Senate Communications Subcommittee¹⁸⁷ when he opposed a bill containing a two year appropriation on the ground that annual review of the system's "progress"¹⁸⁸ with regard to achieving a more localized structure was necessary.¹⁸⁹ When CPB subsequently announced the formation of the Station Program Cooperative¹⁹⁰ with its localization of control over some ptv programming funds, it was speculated that this change in structure was an attempt to satisfy administration critics and it was predicted that executive support of long range funding would follow.¹⁹¹ In fact, a five year funding bill was produced by Mr. Whitehead's office and forwarded to Congress in July, 1974, some months after the Station Program Cooperative was announced.¹⁹² This was seen by some as a reflection of administration approval of CPB's new directions.¹⁹³

Administration attempts to affect the organization of the ptv system through the legislative process should be viewed as properly within the scope of review of any federal program. No social program has a legal claim to funding in perpetuity, but on the basis of the public record it is arguable that Mr. Whitehead's objections to the structure of the system incorporated an objection to the program content produced by the structure. This raises problems of a very different sort. In his 1971 speech before the National Association of Educational Broadcasters, for example, Mr. Whitehead tied his structural and programming criticisms closely to-

President, at the 47th Annual Convention, National Association of Educational Broadcasters, Oct. 20, 1971, reproduced in BARRET, *THE POLITICS OF BROADCASTING* 219, 221 (1973).

¹⁸⁴ *Id.* at 224.

¹⁸⁵ John Macy, President, CPB, quoted in H. ASHMORE, *supra* note 101, at 95.

¹⁸⁶ *Id.*

¹⁸⁷ Testimony of Clay T. Whitehead, 1973 *Hearings*, *supra* note 110, at 85-93.

¹⁸⁸ *Id.* at 90.

¹⁸⁹ *Id.* at 87-90.

¹⁹⁰ See text accompanying notes 24-28 *supra*.

¹⁹¹ N.Y. Times, Feb. 13, 1974, at 78, col. 1.

¹⁹² N.Y. Times, July 21, 1974, at 2E, col. 2.

¹⁹³ The *New York Times* reported that,

[p]ractically everyone in public broadcasting had understood that Mr. Whitehead was proposing a deal: That if the industry decentralized and balanced its political spectrum, the White House would recommend legislation for the kind of funding that would enable the non-commercial television industry to plan beyond a year at a time. . . . Mr. Whitehead's office began working on the bill to fulfill its ends of the bargain, after the public broadcasting industry demonstrated its compliance with the wishes of the White House.

N.Y. Times, June 10, 1974, at 63, col. 3.

gether.¹⁹⁴ One theme of the speech was that centralization was not only an evil in itself but that the programs reflected the views of the CPB superstructure which, he thought, was both too weighted in favor of public affairs and too East Coast oriented.¹⁹⁵ In a subsequent radio interview, Mr. Whitehead questioned whether public affairs programs and news commentary could properly be produced with federal funds provided by the Act.¹⁹⁶

A more direct attack on CPB funded programming was also made by Patrick Buchanan, an aide to President Nixon.¹⁹⁷ CPB reportedly decided

¹⁹⁴ Remarks of Clay T. Whitehead, *supra* note 183. Mr. Whitehead said, *e.g.*, CPB seems to have decided to make permanent financing the principal goal and to aim for programming with a national impact on the public and the Congress to achieve it. But look at the box that puts you in. The local station is asked—and sometimes willingly accedes—to sacrifice its autonomy to facilitate funding for the national system. When this happens, it also jeopardizes your ability to serve the educational and instructional needs of your communities. All the glamor is packed into your nighttime schedules and the tendency is to get more public attention by focusing on the news, public affairs and cultural programs that are aimed for the general audience. But there must be more balance in your service to your communities. In quantitative terms, your schedules are already split equally between instructional and general programming. But in qualitative terms, are you devoting enough of your resources to the learning needs of your in-school and in-home audiences?

Id. at 223-24.

¹⁹⁵ Mr. Whitehead also stated that,

[o]n a national basis, PBS says that some 40 percent of its programming is devoted to public affairs. You're centralizing your public affairs programs in the National Public Affairs Center in Washington, because someone thinks autonomy in regional centers leads to wasteful overlap and duplication. Instead of aiming for "overprogramming" so local stations can select among the programs produced and presented in an atmosphere of diversity, the system chooses central control for 'efficient' long-range planning and so-called 'coordination' of news and public affairs—coordinated by people with essentially similar outlooks. How different will be your networked news programs from the programs that Fred Friendly and Sander Vanocur wanted to do at CBS and NBC?

Id. at 220.

¹⁹⁶ As quoted by John Macy (then CPB President) in H. ASHMORE, *supra* note 101, at 95.

¹⁹⁷ Mr. Buchanan said:

Now, when that came down to the White House, we took a look at [the proposed funding] and we also looked at the situation over there, I did personally. I had a hand in drafting the veto message. And if you look at the public television, you will find you've got Sander Vanocur and Robert MacNeil, the first of whom, Sander Vanocur, is a notorious Kennedy sycophant, in my judgment, and Robert MacNeil, who is anti-administration. You have the Elizabeth Drew show on, which is, she personally is definitely not pro-administration. I would say anti-administration. Washington Week Review is unbalanced against us, you have Black Journal, which is unbalanced against us . . . you have Bill Moyer's, which is unbalanced against the [Administration]. . . . And then for a fig leaf they throw in William F. Buckley's program. So they sent down there a \$165 million package, voted 82 to 1 out of the Senate, thinking that Richard Nixon would therefore—he would have to sign it, he couldn't possibly have the courage to veto some-

not to provide funds for the programs criticized by Mr. Buchanan except for *Black Journal*.¹⁹⁸ Nongovernment funds were later found for the threatened programs.¹⁹⁹

Congress' influence on the ptv system, like that of the Executive, is present whether or not it is exercised directly. Its power over ptv funds means that ptv officials are influenced by their perception of congressional desires, even if Congress expresses no desires.²⁰⁰ On the whole Congress has been more gentle in its efforts to influence the program content than has the Executive, and a substantial part of congressional concern with program content has come only in response to the executive attack already described. The Senate Commerce Committee in 1973 asserted that public affairs broadcasting was an appropriate part of the federally funded system.²⁰¹ Regardless of the committee's motivation however, this assertion demonstrates that Congress also will involve itself in programming decisions when members are moved to do so.²⁰² However, individual members of Congress have not restricted themselves to a concern for programs attacked by the Executive.²⁰³ During the 1973 authorization hearings Senator Pastore

thing like that. . . . And all this Administration has ever asked for on that, or on any network television, frankly, is a fair shake.

Quoted by Senator Pastore at 1973 *Hearings*, *supra* note 110, at 8.

¹⁹⁸ *Id.* See also CPB Board Approves \$2.3 million in TV Programs, CPB Press Release (March 7, 1973). Since the press release is dated prior to Mr. Buchanan's statement, it is impossible for the funding decisions to have been made in response to it. However, the statement was apparently a summation of the administration's views on public affairs programming and may have been communicated privately at an earlier date. Thomas Curtis, CPB Chairman at the time the programs were reviewed, commented that "[C]ertain people in the Nixon Administration, have clearly expressed [dissatisfaction] and . . . put pressure on . . ." *The Campaign to Politicize Broadcasting*, COLUM. JOURNALISM REV., March/April, 1973, at 14.

According to the *New York Times* the programs were deleted because some CPB board members believed federal funds should not be used for the production of "controversial" programs. *N.Y. Times*, June 23, 1973, at 63, col. 2.

¹⁹⁹ *N.Y. Times*, June 23, 1973, at 63, col. 2.

²⁰⁰ As John Macy, a former CPB President, put it, "[w]e had anticipated trouble with Congress, but objections from Capitol Hill were reasonable and infrequent until the Executive Branch began to orchestrate the attack. H. ASHMORE, *supra* note 101, at 95. See also statements collected at F. POWLEDGE, *THE ENGINEERING OF RESTRAINT (A REPORT OF THE AMERICAN CIVIL LIBERTIES UNION)* 36-38 (1971).

In *Accuracy in Media v. FCC*, 521 F.2d 288, 294 (D.C. Cir. 1975), the court stated: "Congress reserved for itself the oversight responsibility for CPB." At note 31 the court quotes some Congressmen who expressed a willingness to use the appropriation process to control program content.

²⁰¹ S. REP. NO. 123, 93d Cong., 1st Sess. 7 (1973).

²⁰² See 1973 *Hearings*, *supra* note 110, at 8-9. Later in the course of these hearings the following related discussion took place:

Sen. Hollings: I most respectfully demur from that idea that you don't know how you cut off known popular programs, such as the Buckley program, and in their place put others that are completely unknown, popular or otherwise. I mean what kind of policy is that. . . .

Mr. Curtis: Well, we didn't. I don't think you would say "Sesame Street" is unpopular, or "Zoom," or these children programs.

Sen. Pastore: If you cut that out you are going to lose me.

Id. at 27.

²⁰³ Note Senator Pastore's expression of support for children's programs. *Id.* In this he has been joined by Senator Cook. *Id.* at 91.

introduced a letter from Senator Williams urging more programming for handicapped viewers.²⁰⁴ In a subsequent responsive letter CPB assured the subcommittee that it "is committed as a matter of policy to providing programs for special audiences such as the handicapped."²⁰⁵

Program content considerations also underlay an amendment to the Act²⁰⁶ adopted by Congress in 1973 which requires ptv licensees to retain audio tapes of programs in which "any issue of public importance is discussed."²⁰⁷ The tapes (to be retained for sixty days) must be made available, upon demand, to the FCC or to any person tendering payment of the cost of a copy.²⁰⁸ This amendment was proposed by Senator Griffin who argued that the requirement was necessary in order to assure the public that the objectivity and balance²⁰⁹ provisions of the Act were being met.²¹⁰ The Senator's concern was sparked when PBS refused to make available to him a transcript of a ptv program about the ABM, which, he had heard, was "biased and unbalanced."²¹¹ Although Senator Griffin stated that the availability of such tapes would avoid government censorship,²¹² it would seem rather that the maintenance of tapes could lead to censorship by facilitating an intensive post-broadcast scrutiny of programming. More important, perhaps, is the lesson learned by PBS: even a single "controversial" program may so pique a given legislator that it alone could result in additional restrictions in the ptv system. This is likely to have an effect on the kinds of programming funded and distributed on the interconnection.

To read the foregoing publicly reported events as an isolated political attack by one administration or given legislators would be to miss the deeper point. Politicians will act on their interests as they see them. Their control over ptv funds gives them a lever which some will find too tempting not to use and when so used, it both strains credulity and denies history to believe that the administrators of public broadcasting will not be responsive.²¹³

²⁰⁴ *Id.* at 52.

²⁰⁵ *Id.* at 60.

²⁰⁶ 47 U.S.C. § 399(b) (Supp. 1973).

²⁰⁷ 47 U.S.C. § 399(b) (1970). No such requirement applies to commercial broadcasters. *Cf.* 47 C.F.R. § 73.669, mandating program logs.

²⁰⁸ 47 U.S.C. § 399(b) (Supp. 1973).

²⁰⁹ 47 U.S.C. § 396(g)(1)(A) (1970). *See* text accompanying note 80 *supra*.

²¹⁰ 1973 *Hearings, supra* note 110, at 114-16.

²¹¹ *Id.* at 114.

²¹² *Id.*

²¹³ Responsiveness to the political will has been alleged most often with regard to funding decisions. *See* notes 196-200 and accompanying text *supra*. *See also* Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEXAS L. REV. 1123 (1974). There are some indications, however, which would support the logical surmise that the administration of the interconnection has been likewise influenced. In a public discussion of the decision to delete the FBI segment from *The Great American Dream Machine* (see text accompanying notes 152-55 *supra*) Hartford N. Gunn, Jr., President of PBS at the time, hinted at the problem raised for him by public funding:

It seems to me the crucial question is whether our confidence—or,

IV. THE PTV SYSTEM IN RELATION TO FIRST AMENDMENT VALUES

A. *The Interests at Stake*

Three different classes of persons have free speech interests relevant to the public broadcasting system:²¹⁴ the program producer, whose interest is in creating and distributing his product free from government control; the broadcaster, whose interest is in exercising his own editorial judgment when deciding what to broadcast; and the viewer, whose interest is in receiving the programming free of government influence. The interests of all of these are not only in freedom from negative restrictions, that is, censorship, but also in freedom from government efforts to appropriate the ptv system for the promotion of its own views. The latter concern might be seen in terms of party politics since neither major party wants the other to be able to use ptv as a reelection aid. It could be viewed in more funda-

rather, whether the public's confidence in us would be jeopardized; and we try to look at programming and the problems that programs present in terms of maintaining credibility with the public. If we lose—if we were ever to lose that credibility, then all of what we are trying to accomplish in Public Broadcasting goes down the drain.

THE FOURTH NETWORK, *supra* note 21, at 39. It has been suggested that PBS' assumption of control over content of interconnected programming was intended to assure Congress that public broadcasting could keep its own house in order. F. POWLEDGE, *supra* note 15, at 16. Cf. statement of James Day, head of National Educational Television, to the effect that the caution of the local stations rather than the federal government is the cause of "blandness" in ptv. *Id.* at 15. See also Canby, *supra* note 213.

²¹⁴ Of course, the first amendment is irrelevant unless governmental action is present but no court has yet decided whether CPB, PBS, or any ptv station is vested with state action. In dictum, Justice Douglas stated that first amendment considerations would be relevant to ptv activities generally as opposed to private broadcast licensees.

Public broadcasting, of course, raises quite different problems from those tendered by the TV outlets involved in this litigation. . . . Congress has authorized the creation of the Corporation for Public Broadcasting, whose Board of Directors is appointed by the President by and with the advice and consent of the Senate. 47 U.S.C. § 396. . . . It is a nonprofit organization and by the terms of § 396(b) is said not to be "an agency or establishment of the United States Government." Yet, since it is a creature of Congress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a "press" as that word is used in the First Amendment.

CBS v. Democratic Nat'l Comm., 412 U.S. 94, 149 (1973) (Douglas, J., concurring).

Professor Canby has also concluded that state action was present as to CPB, PBS, and the ptv stations. Canby, *supra* note 213, at 1151-53, 1159. Both CPB and PBS have argued, however, that they are not state action entities. See briefs filed in support of motion to dismiss in Network Project v. CPB, 398 F. Supp. 1332 (D.D.C. 1975). Brief of CPB at 35; Brief of PBS at 44. See also Jennes, *Memorandum of Law: Various Legal Aspects of the Corporation for Public Television*, REPORT, *supra* note 2, at 131. For the purposes of this article, whether it is conclusive as a matter of law that state action is present is not of importance inasmuch as we are here concerned with legislative, not judicial, review of ptv. The importance of federal funds to the system and the apparent attempts by federal officials to use those funds as a means of influence should concern Congress whether or not it concerns the courts.

mental terms: government might expect ptv to promote support for the established American society or at least to keep its programming free of subversive (in the broad sense) activities.

Presentation of government-endorsed opinions or information is neither illegal nor undesirable. Government has a duty to inform the people about its policies and the reasons for choosing them. Even the mobilization of public opinion behind official programs is, within limits, not inappropriate. It is nonetheless doubtful whether a national tv network operated by the government could find constitutional support in these considerations because the large scale of the system would involve risks of manipulation far outweighing any foreseeable justification.²¹⁵ (Such constitutional limits are only indirectly relevant here, though, because the ptv system is by statute prohibited from directly serving as a government network.)²¹⁶ Neither party has so far been able to use ptv as a political vehicle, and it is not likely to happen as the Act is well designed to prevent at least that.²¹⁷

Efforts to promote "the system" are difficult to isolate or even define. It has been alleged that the educational component of ptv programming is used to promote governmentally approved values which may or may not be universally shared.²¹⁸ This may be an unavoidable concomitant of any educational effort, but acceptance of this fact should not end the inquiry. Education via ptv has about it attributes not present in the normal public school system. It is national rather than local, thus expanding the power of those who design the curriculum, and it involves greater passivity on the part of the pupil. A three year old viewing *Sesame Street* watches, listens, learns, and enjoys, but does not participate and cannot object or criticize.²¹⁹ Still, the most obvious problems that have been raised by ptv thus far have not involved efforts to promote, but rather efforts to censor motivated political concerns.²²⁰

All of those with first amendment interests related to ptv are threatened by its current structure because of the control PBS and CPB exercise over

²¹⁵ This fear was expressed in the comments of the Corporation for Public Broadcasting, *In re Jurisdiction of the Commission with Respect to Section 396 of the Communications Act of 1934, as amended* (April 15, 1973) at 14:

Historically, the American system of mass communications has been one of free enterprise, free competition and private ownership. There has been a traditional and compelling reluctance to embark on any program of Government-operated radio or television, which would have clear Orwellian connotations.

See also 2 Z. CHAFFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 762-63 (1947). In *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 396 (1969), the Court said that a discussion of ". . . the official government view dominating public broadcasting . . . would raise more serious First Amendment issues."

²¹⁶ See text accompanying notes 64-66, 68-71, 86 *supra*.

²¹⁷ See text accompanying notes 68-71 *supra*. See also Canby, *supra* note 213, at 1152-53.

²¹⁸ *THE NETWORK PROJECT, DOWN SESAME STREET* (1973).

²¹⁹ These problems are examined in detail at *id.* Viewing some educational programs is by no means wholly voluntary, as many school systems have incorporated them into the required curriculum. *Id.* at 31.

²²⁰ See text accompanying notes 183-202 *supra*.

the interconnection,²²¹ and because of CPB's power to choose which programs to fund.²²² The interests of producers and audience can likewise be threatened by broadcaster decisions.²²³ Two different first amendment doctrines are applicable to the protection of these interests.

Under one approach government influence is minimized by authorizing persons with ongoing editorial responsibility to exercise it according to their own personal preferences and relying upon the courts to protect them from interference by other officials.²²⁴ A different tack is to bar all the managers of the resource in question from exercising control over content.²²⁵ It is our contention that each of these approaches may be relevant to ptv but that application of the latter to CPB and PBS would more effectively reduce government influence.

B. Comparative Suitability for PTV of Available First Amendment Approaches

1. Cases Permitting Content Control by Government Sponsored Communications Facilities—A number of cases have recognized the right of government-supported facilities to exercise editorial powers not unlike those held by managers of privately owned periodicals.²²⁶ In *Avins v. Rutgers*²²⁷ the court rejected an author's attempt to obtain a judicial reversal of the *Rutgers Law Review's* refusal to publish his manuscript. The plaintiff had argued that the *Review* had discriminated against him because of his conservative approach to school segregation law. The discrimination was illegal, he urged, because the *Review* operated with state funds. The district court, and the court of appeals in affirmance, held that the undeniable presence of state action did not deprive the editors of the discretion they needed to produce a quality journal.²²⁸ This decision was dictated by the reality that no state university could publish a law review or any other serious journal without the power to edit. Given the importance of state

²²¹ See text accompanying notes 129-55 *supra*.

²²² See text accompanying notes 117-28 *supra*.

²²³ Most ptv stations receive substantial amounts of state and local funds. 1974 *Senate Hearings*, *supra* note 11, at 51-52. Those local governments too can be a source of improper influence. See text accompanying note 1 *supra*. See also BARRET, *supra* note 183, at 74, in which the following statement is attributed to the "Mississippi educational tv network" [sic]:

The Board of Directors for the Mississippi Authority for Educational Television has squelched most attempts at public affairs programming. We are a state-owned agency and the board feels we should stay away from controversy as much as possible.

²²⁴ See text accompanying notes 226-34 *infra*.

²²⁵ This is usually referred to as the "public forum doctrine." See text accompanying notes 236-40 *infra*.

²²⁶ A thorough and insightful discussion of these cases is found at Canby, *supra* note 213, at 1131-43.

²²⁷ 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). Rutgers is a state-supported university.

²²⁸ *Id.* at 153-54.

support to American education, the Third Circuit could hardly have gone the other way.²²⁹

The true independence of the editors of government-supported media is not easily won. We have observed that state support can lead to state influence or attempts at influence. In the context of a journal published with state funds the intrusion usually comes at the hands of a university official who seeks to censor editorial content believed unwise, inappropriate, or in conflict with general university goals.²³⁰ Although the prior commitment of editorial power is often disregarded in favor of either prior restraint or punishment of an offending student, in general, the courts have been ready to enjoin direct official interference with editorial control previously reposed elsewhere. This is justifiable in part by reference to the first amendment rights of the journal editors and it also finds support in the rights of the readers. They have an interest that communications purportedly free of government control be actually so, since otherwise they will be subjected to hidden manipulation by the holders of power. For this reason Professor Emerson, who indorses a limited power of government to speak to the public via the media, conditions his endorsement on disclosure of the government presence.²³¹

In insisting on an absence of censorship of state-supported media, the courts have permitted the states to establish a medium enjoying the same editorial discretion as the private media, but have not permitted them to use their official ties to the medium in a manner inconsistent with its supposed privateness.

The same approach could be used as a model for the ptv system. Under a similar fiction the ptv stations, CPB, PBS, and ptv producers could all be regarded as private media each entitled to exercise editorial control over its own communication facility. CPB, for example, would be free to fund programs on the present basis (which takes content into account), yet should any federal official attempt to control or influence a programming decision, an injunction against him would lie to preserve the independence of the ultimate decisions.

A variant of this model was suggested for ptv by Professor Canby. His construct is more complex in that it also takes into account the need to protect each ptv entity from the others, for example, the producers from CPB, PBS, and the stations.²³² Professor Canby sees the ptv system as an editorial chain comprised of the funding authority, the program producer, and the ptv station manager. In his model system the funding authority is initially vested with the editorial function, but when the authority delegates that function to the program producer, the producer's judgment ought not be subject to interference by anyone else in the chain. When CPB is not in

²²⁹ *Accord*, Canby, *supra* note 213, at 1132-34.

²³⁰ *See, e.g.*, *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Dickey v. State Board of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated on other grounds sub nom.* *Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968). These cases and others are discussed in Canby, *supra* note 213, at 1138-49.

²³¹ T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 697 (1970).

²³² Canby, *supra* note 213, at 1158-60.

the chain at all (in the case of non-CPB-funded programs), CPB is never vested with the editorial function and should be precluded from interfering with content selection. Likewise, when PBS has not been in on the initial decision-making, it is not in the chain and it ought not play a role in content selection at any subsequent point. The ptv station manager, Canby argues, is vested with his own editorial function which allows him to select from among programs offered on the interconnection, although he is probably constitutionally proscribed from editing them or running only part of a series since this is an editorial function already committed.²³³ In Professor Canby's view, the courts should be available to prevent improper attempts by an entity to control content.²³⁴

Particularly troublesome about Professor Canby's approach is his willingness to allow PBS and CPB to continue to control ptv content on even a limited basis. He does not sufficiently take into account the fact that CPB and PBS enjoy power over a *national* system of communications and that their power is magnified by the technological weaknesses within the ptv system of the broadcasting stations. As noted previously, most of the broadcasters are locked into programming choices made centrally.²³⁵ To analogize CPB or PBS to a university journal is inadequate because of the enormous difference in the power they exercise. This greater power is not only important in itself but it also magnifies the likelihood that government will seek to appropriate the power to its own use. This brings us to a second reason for questioning Professor Canby's approach. He does not recognize the difficulty—not to say impossibility—of insulating CPB, PBS, or any other centralized facility from direct or indirect efforts to influence them. Thirdly, and perhaps most importantly, Canby's analogy fails because the argument that a journal must have editorial powers if it is to enjoy a meaningful existence does not apply to CPB and PBS. Editorial supervision over ptv programming can be vested with the ptv stations alone. So long as the stations can choose the programs to be funded and edit completed programs prior to broadcast it can not be argued that the CPB-PBS editorial judgment is necessary (in the *Avins* sense) to protect the public interest in quality programming. These considerations dictate a structural reorganization of the ptv system modeled on the public forum concept of government-supported communications media.

2. *The Public Forum Doctrine*—Under the public forum doctrine, government facilities suitable for the communication of ideas must be allocated in a procedurally fair manner and without regard to the content of the views sought to be expressed.²³⁶ One court nicely summed up the theoretical basis for the public forum doctrine:

²³³ *Id.* Professor Canby would apparently endorse PBS editing of non-CPB funded programs. *Id.* at 1159.

²³⁴ *Id.* at 1165.

²³⁵ See text accompanying notes 129-31 *supra*.

²³⁶ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 193-96 (1973) (Brennan, J., dissenting). See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 298 *et seq.* (1970); Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931. See also note 240 *infra*.

An official who can grant or deny the right to speak according to what he deems to be in the 'public interest' is undistinguishable in all relevant respects from a censor.²³⁷

Congress has imposed public forum status on several important communications media, among them the postal service²³⁸ and telephone service.²³⁹ Additionally, the courts have held the doctrine to be a constitutional requirement in a number of different contexts.²⁴⁰ Because the merits of the doctrine have been more searchingly and recently examined by the judiciary, we will use the rationale of three leading cases as the basis of discussion. The Supreme Court recently narrowed the public forum doctrine in *Lehman v. Shaker Heights*.²⁴¹ The plaintiff was a candidate for state office who had been denied advertising space on vehicles of the city transit system due to a municipal policy which did not permit political advertising in the city's buses, although allowing other types of advertising. Urging that the bus posters constituted a public forum protected by the first amendment, petitioner argued that "there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication 're-

²³⁷ *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1286 (D.C. Cir. 1972).

²³⁸ Postal Reorganization Act, 39 U.S.C. § 101 *et seq.* (1970). *See esp.* 39 U.S.C. §§ 101(a), 403(a), (c), 3683 (1970). *Cf.* 39 U.S.C. § 30061 (1970), prohibiting use of the mails for certain purposes, including lotteries, fraud, obscenity, information regarding abortion, incitement of crimes and foreign divorce information. The prohibition against abortion information was declared unconstitutional in *Atlanta Co-op News Project v. United States Postal Service*, 350 F. Supp. 234 (N.D. Ga. 1972) (three judge court), because it involved a prior restraint on speech. *See also* *Lamont v. Postmaster General*, 381 U.S. 301 (1965), holding unconstitutional 39 U.S.C. § 4008(a) (1970) which prohibited the delivery through the mails of foreign Communist political propaganda in the absence of a request by the addressee that it be delivered to him. The Court held the requirement to be an abridgement of the recipient's first amendment rights.

²³⁹ Communications Act of 1934, 47 U.S.C. § 202 (1970); *cf.* 47 U.S.C. § 223 (1970) (prohibiting obscene, annoying, and threatening phone calls). *See also* Communications Satellite Act of 1962, 47 U.S.C. § 701(c) (1970).

²⁴⁰ The public forum doctrine has been applied when physical facilities such as a park or auditorium are involved. *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (illegal to discriminate against Jehovah's Witnesses seeking to hold a meeting in a public park); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972) (unconstitutional to bar peace display from the Washington Monument area); *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 P.2d 885 (1946) (illegal to deny use of school auditorium to "subversive elements"). Public transit authorities have also been barred from denying use of their advertising facilities on a content basis. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (public thoroughfares in bus terminal may not be closed to political leafleters and pickets when they are open to glee clubs and the like); *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967) (barred a refusal to sell advertising to peace groups). *But see* *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) and text accompanying notes 241-49 *infra*. Use of the streets for free expression purposes is subject to the same rule. *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (improper to prohibit diverse kinds of picketing near public schools so long as labor picketing was allowed in the same area). *See generally* T. EMERSON, *supra* note 231, at 298-328, 359-64, 645-53; Gorlick, *Right to a Forum*, 71 DICK. L. REV. 273 (1966); Horning, *supra* note 236.

²⁴¹ 418 U.S. 298 (1974).

ardless of the primary purpose to which the area is dedicated.' ”²⁴² The Court disagreed:

Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.²⁴³

The Court noted that the case did not involve a meeting place or other facility which had communication as its primary purpose. Rather, the city was engaged in the business of public transportation and the advertising space was incidental to the provision of public transportation as part of a commercial venture. In these circumstances the Court was willing to respect the “business” decisions of the transit system’s managers. Also important to the Court, and decisive to Justice Douglas, whose vote in concurrence was pivotal, was the need to protect the passengers, a captive audience, from communications which might be offensive.²⁴⁴

The importance of the type of forum at issue was underscored by a second major case, *Southeastern Promotions, Ltd. v. Conrad*,²⁴⁵ which concerned access to a municipal auditorium. Specifically, the road production of *Hair* had been barred from two theaters operated by the city of Chatanooga because it reportedly included “nudity and obscenity.” Plaintiff-producer sought a federal decree permitting the show to go on. The Supreme Court did not reach the substance of the obscenity issue but did decide that the refusal to allow access to the theaters was the equivalent of a prior restraint on speech, even though no effort had been made by the city to bar *Hair* from private theaters within its jurisdiction. Prior restraint, the Court noted, could be imposed only if the would-be censor proved the illegality of the speech at a judicial proceeding commenced before the censorship was imposed.²⁴⁶ Of special relevance here is the Court’s willingness to equate withholding of the forum with prior restraint, thus embracing the public forum doctrine. *Lehman v. Shaker Heights*²⁴⁷ was specifically distinguished because of the lack of a captive audience for the auditoriums.²⁴⁸ It was also distinguishable (though the Court did not bother to say so) in that unlike commuter buses, the theaters were “public forums designed for and dedicated to expressive activities.”²⁴⁹ Taken together, *Lehman* and *Southeastern Promotions* indicate the applicability of the public forum doctrine to ptv, as the reasons the Court gave for its refusal to apply the doctrine to the former case cannot be fairly applied to ptv.

²⁴² *Id.* at 301.

²⁴³ *Id.* at 302-03.

²⁴⁴ Opinion of the Court at 302-03; Opinion of Justice Douglas at 306-08.

²⁴⁵ 420 U.S. 546 (1975).

²⁴⁶ *Id.* at 559-60.

²⁴⁷ 418 U.S. 298 (1974).

²⁴⁸ 420 U.S. at 556.

²⁴⁹ *Id.* at 555.

Previously the Court has referred to the tv viewer as a captive,²⁵⁰ though surely this is true to a lesser degree. There is more volition involved in deciding whether to watch tv than in deciding whether or how to travel to work. Furthermore far less is a viewer of *public* tv its captive than is the "habitual" watcher of tv a captive of commercials. Having decided against watching ptv at a given time the viewer can escape to another channel but the viewer cannot escape the advertiser with a pervasive campaign by one switch of the tuner. He must keep switching. Eventually he may tire out and be captured. The disenchanted ptv viewer has only to switch once.

As to the distinction made between a forum traditionally or primarily available for the exercise of speech and a forum only incidentally so related, since the *raison d'être* of the public broadcasting system is the communication of ideas, it cannot be said that its treatment as a forum conflicts as in *Lehman* with its primary purpose. It might be argued, though, that the primary purpose of ptv is communication of selected, high-quality programs, and that the public forum doctrine would thus be inconsistent. This argument rests on an interpretation of the Act, and it, together with several other statutory problems relevant to the public forum doctrine, will be treated together.²⁵¹

The third case in which the public forum doctrine was of concern is *CBS v. Democratic National Committee*.²⁵² This case can be read as taking a negative view of the doctrine, for the Court refused to treat private broadcasters as a public forum even to the extent of requiring them to accept all advertisements. The plurality opinion, resting primarily on the absence of governmental action,²⁵³ held as an alternative ground that the first amend-

²⁵⁰ The plurality opinion in *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), adopted the suggestion of *Banzhaff v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), that a tv viewer is a captive of commercial advertisers. "[A]n ordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act." 412 U.S. at 128.

²⁵¹ See text accompanying notes 308-42 *infra*.

²⁵² 412 U.S. 94 (1973).

²⁵³ 412 U.S. at 97-132. The Court was divided on the issue. In the plurality opinion, Chief Justice Burger, joined by Justices Stewart and Rehnquist, held that state action was absent. They rested in part on a finding that the licensee's policy of rejecting editorial advertising was not "fostered", *id.* at 118, by the government through the FCC, although the latter had approved the policy. The Chief Justice's opinion also noted both a significant limit to the arguably pervasive government control over licensees and the freedom Congress left to licensees to make their own journalistic decisions. *Id.* at 120. The opinion also noted that a finding of state action would impose on the licensees the "rigid limitations" of the first amendment which would work to limit, not broaden, their treatment of important public issues. *Id.* at 121. See also Justice Douglas' concurring opinion. *Id.* at 149-50. In a separate opinion, Justice White refrained from deciding the question but noted that:

... it is at least arguable, and strongly so, that the Communications Act and the policies of the Commission, including the Fairness Doctrine, are here sufficiently implicated to require review of the Commission's orders under the First Amendment.

Id. at 146. Likewise, Justice Blackmun, joined by Justice Powell, did not decide the issue. *Id.* at 148.

In dissent, Justices Brennan and Marshall argued strenuously that state action was involved. They relied on a number of indicia, including the use of a public

ment did not require the relief sought.²⁵⁴ Some of the arguments used to support this result might weigh as well against the use of the public forum doctrine as to the issues involving CPB and PBS, but at the core of the *CBS* decision is a belief that broadcasters should not be subjected to any additional regulation of their own speech,²⁵⁵ a belief which dictates the applicability of the public forum doctrine to ptv.

In writing for the plurality, Chief Justice Burger relied in part on the FCC's approval of the defendant's policy.²⁵⁶ He urged that the agency's expertise and its long efforts to achieve a delicate balance among competing users were entitled to great weight.²⁵⁷ It might be argued that a similar argument applies to CPB as it too is charged by Congress with the responsibility of developing a communications system, but there the parallel ends, for Congress has nowhere given CPB (or PBS) the power to regulate broadcast speech. Secondly, the agency discretion here under question concerns the limits of its own powers to control content. Given the seemingly unavoidable tendency of institutions to maximize their spheres of influence it is unsound to presume agency correctness on that issue. The disinterestedness which ought to underly the decision is simply lacking.

Another point made in the opinion was that the forum under attack, the broadcasters, had an affirmative duty to present conflicting views on issues of public importance springing from the fairness doctrine. The desirability of requiring them to accept ads from all comers was therefore attenuated.²⁵⁸ "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."²⁵⁹ Again, CPB is under a mandate to insure that ptv programming will be obtained from "diverse sources,"²⁶⁰ and will strictly adhere to "objectivity and balance in all programs or series of programs of a controversial nature."²⁶¹ Do these requirements, like the fairness doctrine, insure that CPB will fund and distribute programs so that everything that should be said, is said? (There is no exemption for ptv stations from the fairness requirement, and this aspect of the *CBS* reasoning should be applicable to the ptv stations though not to CPB and PBS.) The issue has never been judicially determined, but CPB has taken the position that it is not subject to any affirmative duty to fund or distribute

resource (the airwaves), and close regulation through governmental approval of the specific policy at issue. *Id.* at 172-81. The test, they thought,

. . . depends not on any formalistic "private-public" dichotomy but, rather, upon more functional considerations concerning the extent of governmental involvement in, and public character of, a particular "private" enterprise.

Id. at 172. In sum, only four Justices could conclude that no state action was present in *CBS*.

²⁵⁴ 412 U.S. at 129-30.

²⁵⁵ *Id.* at 120-21.

²⁵⁶ *Id.* at 122-23.

²⁵⁷ *Id.* at 117.

²⁵⁸ *Id.* at 124.

²⁵⁹ *Id.* at 122.

²⁶⁰ 47 U.S.C. § 396(g)(1)(A) (1970).

²⁶¹ 47 U.S.C. § 396(g)(1)(A) (1970).

public affairs programming.²⁶² Given this position, the analogy to the fairness doctrine must fail.

At several points the Chief Justice in *CBS* stressed his concern that adoption of the plaintiffs' position would lead to new limits on broadcaster freedom.²⁶³ He noted that requests to air editorial advertising might be so numerous that resulting diminution of available air time would cause "a further erosion of the journalistic discretion of broadcasters in the coverage of public issues. . . ."²⁶⁴ He also saw a related problem in the likelihood that the FCC would have to promulgate additional regulations to govern the broadcasters' allocation of their limited time for advertising, involving "the risk of an enlargement of government control over the content of broadcast discussion of public issues."²⁶⁵

The central question before the Court, as put by the Chief Justice, was "who shall determine what issues are to be discussed by whom, and when."²⁶⁶ The plurality opinion left no doubt that the broadcaster, subject only to the requirements of the fairness doctrine, had both the power and the responsibility. If the freedom of the broadcaster is to remain the focus of any first amendment inquiry then protection of the ptv stations from program control by CPB or PBS seems a worthy goal. Furthermore, two of the concurring Justices raised the public forum doctrine in a manner which left no doubt about their view of its applicability here.²⁶⁷ Assuming then, the continued vitality of the public forum doctrine, prior to urging its legislative imposition we must analyze its potential impact on each of the three forums which make up the ptv system: program production funds, the interconnection, and the ptv stations.²⁶⁸

²⁶² Brief of CPB in support of motion to dismiss the complaint, *Network Project v. CPB*, 398 F. Supp. 1332 (D.D.C. 1975).

²⁶³ 412 U.S. at 124, 126-27.

²⁶⁴ *Id.* at 124.

²⁶⁵ *Id.* at 126.

²⁶⁶ *Id.* at 130.

²⁶⁷ In what was assuredly dictum, Justice Douglas said,

Public broadcasting, of course, raises quite different problems from those tendered by the TV outlets involved in this litigation. . . .

If these cases involved [CPB], we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper like the *New York Times*, *Washington Post*, or *Sacramento Bee*. The Government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not censor or enact or enforce any other "law" abridging freedom of the press. Politics, ideological slants, rightist or leftist tendencies could play no part in its design of programs. . . . More specifically, the programs tendered by the respondents in the present cases could not then be turned down.

412 U.S. at 149-50.

Justice Stewart picked up the point:

Were the Government really operating the electronic press, it would, as my Brother Douglas points out, be *prevented* by the First Amendment from selection of broadcast content and the exercise of editorial judgment.

412 U.S. at 143.

²⁶⁸ Even a rejection of the doctrine by the courts would not prevent Congress from

V. OUTLINE OF A PTV STRUCTURE MODELED ON
THE PUBLIC FORUM DOCTRINE

Under our proposed model, CPB and PBS would be divested of all editorial power. Programming funds would go directly from CPB to the ptv stations, each of which could use its funds locally or pool them with other stations to produce national programs. PBS would be barred from selecting programs for the interconnection on the basis of content and would likewise be barred from editing any programs distributed over it. The ptv stations would be provided with the technological capability of editing all programs distributed to them, and they would have the authority and the responsibility to edit the material broadcast by them. The result would be a diffusion of authority which would make attempts to control the content of the entire system less likely to occur and less likely to succeed when attempted.

A. *Program Production Funds Under the
Public Forum Doctrine*

Though no case dealing with fund allocation has been found, the underlying logic of the doctrine calls for its imposition when the government allocates funds intended to facilitate communication.²⁶⁹ We must recognize, however, that special difficulties will arise with regard to fund allocation not ordinarily present when physical facilities are at stake because of the flood of potential users.²⁷⁰ It would not do to adopt a simplistic solution such as a first come-first served rule, or a lottery of some kind because of the likelihood that the resulting programs would be so uneven as to threaten the continuation of federal funds by eliminating a political base for it. Such systems also fly in the face of CPB's statutory obligations to seek program quality and balance.²⁷¹ This problem may be solved by directly allocating program production funds to the stations themselves, thus taking CPB out of the decision-making process. Either of the two systems already used to distribute some CPB funds to the stations, unearmarked Community Service Grants²⁷² or grants to the Station Program Cooperative,²⁷³ could be expanded to meet this requirement.

Divesting CPB of editorial power over programs it funds is feasible but raises the question whether the Act would be violated thereby. Because of

implementing it. The discussion of case law has shown that the value of the doctrine has been recognized in other situations in which freedom from government control was desired.

²⁶⁹ Professor Emerson has concluded that the first amendment does pose such limits on expenditures:

In general these limitations would be the same as in the case of the government furnishing physical facilities: there could be no discrimination between users and no regulation of content.

T. EMERSON, *supra* note 231, at 651.

²⁷⁰ *Id.* at 652.

²⁷¹ See text accompanying notes 78-80 *supra*.

²⁷² These are grants made directly to ptv stations. See note 117 *supra*.

²⁷³ See text accompanying notes 124-27 *supra*.

the complexity of the relationship between the Act and the forum doctrine we shall hold our discussion of the issue for the present.²⁷⁴

B. *The Interconnection as a Public Forum*

PBS uses government funds to operate the interconnection for PBS' primary purpose, the communication of ideas.²⁷⁵ In that sense the interconnection is so similar to the traditional forums that the public forum doctrine may be relevant. If the doctrine were not to apply to the interconnection, officials imbued with government power and subject to government influence could decide which ideas to distribute and in what form.²⁷⁶ On the other hand, PBS is a membership organization composed of the ptv stations,²⁷⁷ and since it will be argued that the first amendment is not offended by allowing the individual stations to exercise editorial discretion,²⁷⁸ is it not inconsistent to take a contrary view as to PBS itself?

The distinction between individual stations and PBS finds support in the reasoning of cases such as *Avins v. Rutgers*,²⁷⁹ which upheld the power of government to create communications media which retain editorial discretion so long as the existence of the medium in a form appropriate to its purposes would be impossible if it did not enjoy that power. As a practical matter, the stations could not operate very long without it, but PBS certainly could. The distinction also makes sense given the underlying policy problem with which we are here concerned, federal control of a national medium. Finally, there is considerable support for making such a distinction in *CBS v. Democratic National Committee*.²⁸⁰

Before public forum rules can be imposed, however, the problem of overwhelming demand must be considered. Assuming a demand for use exceeding capacity, is there a rational basis for sorting requests without yielding forum principles? This can in part be achieved by allocating interconnection time according to program source. Categorizing by originating source, there are three types of programs for which interconnection time might be sought: programs chosen and funded by the stations collectively, as through the Station Program Cooperative; programs chosen and funded by an individual station; and programs chosen and funded by a private donor or by some other government agency.

Logically all programs funded through a station election system like the Station Program Cooperative²⁸¹ should have the first claim on interconnection use. Since the original decision to produce the program with

²⁷⁴ See text accompanying notes 317-21 *infra*.

²⁷⁵ See text accompanying notes 109-15 *supra*.

²⁷⁶ See text accompanying notes 161-81 *supra*.

²⁷⁷ See notes 114-15 *supra*.

²⁷⁸ See text accompanying notes 284-96 *infra*.

²⁷⁹ 385 F.2d 161 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). See note 227 and accompanying text *supra*.

²⁸⁰ 412 U.S. 94 (1973). See text accompanying notes 252-67 *supra*.

²⁸¹ See text accompanying notes 124-28 *supra*.

government funds is constitutional there is no problem in imposing a concomitant obligation to distribute it. A failure to do so would lead to the absurd result that much of the public would be unable to view the program despite a national decision to produce it. Assuming further that collectively funded programs would not exhaust interconnection resources, its managers must choose among programs in the remaining two categories. Neither category is entitled to automatic precedence. The origin of the program tells us nothing about key factors such as quality, likely audience interest, and overlap with other programs scheduled for distribution, which would govern individual broadcaster decisions to use the material. Privately funded programming might run the gamut from a big-name dramatization of an important play to the author's home movies. Some private programming might be of greater interest to the pvt broadcasters as a whole than a local production by one of their own number, even if produced with Act funds.

We suggest that the solution is to allow the stations themselves to govern the interconnection so long as they do it directly. Descriptions of proposed or completed programs could be regularly distributed to all of the pvt stations so that they could indicate a preference. Programs would be distributed according to the response. No station would necessarily be deprived of a program it wished to broadcast for if it were not obtainable via the interconnection a copy could be obtained directly from the producer. A byproduct of this approach is that the catalogue of available programs will enhance the diversity of public broadcast sources by allowing producers and broadcasters to work together efficiently. If each station has the capacity to operate independently of the interconnection, as we urge,²⁸² then none will be forced to broadcast a program against its wishes.

The suggested approach to the interconnection is admittedly more cumbersome than that now in use. Centralized decision making is always more efficient, but the dangers of centralism here outweigh its utility. One type of programming, however, might require the delegation of emergency authority to PBS or some other central entity (possibly an executive committee of stations): public events which arise suddenly and which are of such widespread interest that ordinary programs ought to be preempted. Such occasions should be rare and the delegation of appropriate authority to PBS officers would therefore be less offensive.

Needless to say, PBS would be prohibited by the forum doctrine from editing as well as selecting the interconnected programs. Since the Act imposes no obligation on PBS to answer for program quality there should be little objection to the loss of this type of control.²⁸³

²⁸² See text accompanying note 309 *infra*.

²⁸³ PBS officials have argued that their control over content is important in upholding the integrity of the pvt system. See, e.g., statement of PBS President Gunn at note 213 *supra*. However, if each station had the independent capacity to preview and edit its own programming, no reason appears why PBS need assume that responsibility and the power that goes with it.

C. PTV Stations as Public Forums

In *CBS v. Democratic National Committee*²⁸⁴ the Court concluded that a commercial broadcast licensee is in no sense a public forum²⁸⁵ although conceivably the result would have been different if the defendants had been ptv stations. The problem as to whether governmental action existed, which gave rise to such difficulty in *CBS*,²⁸⁶ would then seem clear-cut since many ptv stations are literally state agencies.²⁸⁷ Many others receive substantial state monetary support in addition to their federal funds.²⁸⁸ Almost surely, though, the public forum doctrine should be deemed inapplicable to the individual stations even if state action is present. The full imposition of the doctrine would eliminate all editing of the stations' product which would threaten the very existence of the medium. The elimination would ill serve the first amendment and, as in the case of the state university journal, editorial power should therefore be tolerated. Of course, other devices could be used to insulate ptv stations from state control such as judicial review of interference by state officials and the use of boards not appointed by or directly responsible to the state.

Another alternative might be to impose a limited public forum obligation, by requiring that a given number of hours per week be allocated to citizen access. It is unlikely that even this minimum could be required under the authority of *CBS*. All of the considerations cited by the Court in support of the substantive result in *CBS*²⁸⁹ apply as much to the public stations as to private once we accept the applicability of the legal fiction used to support editorial discretion in other state supported media.

Another factor against finding forum status for local stations is that access to ptv broadcast time does not take the form of advertisements but of editorial programming. This has both legal and practical consequences. Stations would be giving up air time without any consideration. Their efforts to develop public financial support through contributions²⁹⁰ would be jeopardized by "inferior" broadcast product, particularly if the public access programs used prime time.²⁹¹ Alternatively, if only off hours were turned over to the public, the purpose of public access would be little served. These problems have no doubt contributed to the development of the law relating to state-supported print media. Several cases have held that government-supported publications may not discriminate among adver-

²⁸⁴ 412 U.S. 94 (1973).

²⁸⁵ See text accompanying notes 252-67 *supra*.

²⁸⁶ See notes 213, 253 *supra*.

²⁸⁷ See note 16 *supra*. See also Canby, *supra* note 213, at 1159.

²⁸⁸ See note 18 *supra*. See also 1974 Senate Hearings, *supra* note 11, at 51-52.

²⁸⁹ See text accompanying notes 252-67 *supra*.

²⁹⁰ The ptv stations are increasingly relying on donations from the general public. See 1974 Senate Hearings, *supra* note 11, at 74.

²⁹¹ It could arguably work the other way. For example, people might be more generous in supporting a station which gave air time to the public generally. To the author's knowledge no ptv station has done this and it therefore appears that the stations believe that it would not help raise money.

tisers,²⁹² but the power to reject material submitted for inclusion as editorial matter has been upheld.²⁹³ Given the similar underlying consideration, state-supported broadcast stations should be treated similarly.

Nonetheless, the first amendment has an indispensable role in relation to all state-supported media. Its role is to protect those charged with the day-to-day editorial power from sporadic interference by administrative officials²⁹⁴—interference that is as likely to occur at the state or local level as it is nationally.²⁹⁵ The judicial power to protect against extraneous interference is fortunately well-established.²⁹⁶ Were this safeguard not available the validity of all state-supported media would be questionable.

D. The Effect of Long Term Funding on the Need for a Public Forum Approach

Had Congress provided long term funding,²⁹⁷ adequate in amount, or were it to do so in the future, the urgency of the public forum approach would arguably be diminished because the responsiveness of the managers of the ptv system to the breezes of government would be reduced. Admitting the force of this point, nonetheless, no long-range funding bill that is likely to be enacted would provide a degree of insulation which would make other structural changes unnecessary. Weaknesses in the Public Broadcasting Financing Act of 1974²⁹⁸ exemplify this problem. This bill would establish a public broadcasting fund within the Treasury and would authorize and appropriate to the fund sums for each of the five years commencing July 1, 1975.²⁹⁹ The amount authorized for each year would depend upon a matching formula subject to specific ceilings.³⁰⁰ The appropriation for each of the five years would be available to CPB, provided that specified percentages are distributed to the broadcasting stations, which are free to use

²⁹² *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971); *Radical Lawyers v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

²⁹³ See notes 226-35 and accompanying text *supra*.

²⁹⁴ *Id.*

²⁹⁵ See note 223 *supra*.

²⁹⁶ See text accompanying notes 226-35 *supra*.

²⁹⁷ See text accompanying notes 94-100 *supra*.

²⁹⁸ S. 3825, 93d Cong., 2d Sess. (1974).

²⁹⁹ *Id.* § 1.

³⁰⁰ The authorization would equal 40 percent of the total nonfederal funds received by all "public broadcasting entities" during the second preceding fiscal year. *Id.* "Public broadcasting entities" are defined to include CPB, the public broadcasting stations and "any nonprofit institution engaged primarily in the production, acquisition, distribution, or dissemination of educational television and radio programs." *Id.* § 4. The amount could in no event exceed maxima rising from \$70 million in the first year to \$100 million in the fifth year. *Id.* § 1. No change in these figures was made in the 1975 revision of the bill. *Hearings on H.R. 4563, supra* note 11.

There would apparently be little difficulty in raising the nonfederal support needed to reach the federal levels at which the maxima would become operative. In 1973 the reported nonfederal income was \$199 million. Testimony of Joseph D. Hughes, Chairman of Long-Range Financing Task Force and Member of the CPB Board, *1974 Senate Hearings, supra* note 11, at 61.

them to finance their broadcasting activities.³⁰¹

By authorizing and appropriating public broadcasting funds for a five-year period, the bill would free its officials from the need to return to Congress and the Executive annually to seek funds. This would certainly reduce the capacity of those branches to influence the pvt decision-makers. Hopefully, the freedom would filter throughout the entire system and be felt by producers and broadcasters as well. Although the knowledge that the government must again be approached at the end of the five-year period will dampen somewhat the freeing effect of the bill, five years is a relatively long time in the perspective of broadcasting, and a flap over a given program would probably subside by the time the government must once again act on public broadcasting. Of course, one can imagine without too much effort a long-running program series becoming an issue and remaining so if still on the air during the fifth year. Similarly, allegations of overall program direction may well become an issue as it has in the past.³⁰² Also dampening any new sense of freedom is a pointed reminder in the bill that CPB officers and directors must be available to testify before Congress annually.³⁰³ It is to be expected and hoped that Congress will not see fit to exercise the procedure, but its inclusion will no doubt be taken by CPB and PBS as a warning against boat rocking.

Since even the enactment of the Public Broadcasting Financing Act of 1974 would not lead to the permanent separation of funding from the political process seen by the Carnegie Commission and others as a condition for independence,³⁰⁴ the centralization of power over program content in the agencies most subject to political pressure must remain an area of concern. The bill also addresses this problem but in only a limited way, by requiring CPB to distribute a minimum percentage of its federal funds directly to the stations.³⁰⁵ By relieving some of the flow of funds to the stations from the attachment of strings by CPB this provision should strengthen the independence of the former. Under the bill, though, CPB would continue to control at least some program production funds. Further, the projected funding level would not be sufficient to enable the production of enough national programs to give the stations a meaningful opportunity

³⁰¹ The percentage of the funds CPB receives under the bill which it must distribute to the stations varies with the dollar amount it receives from the Treasury. The distributed amount must be not less than 40 percent of the funds received when they total \$70 to \$90 million, 45 percent when they total \$90 to \$100 million, and 50 percent when the total reaches \$100 million. S. 3825, 93d Cong., 2d Sess. § 1 (1974). The recipient stations are expressly permitted to use the funds to produce or otherwise acquire programs. *Id.*

³⁰² See text accompanying notes 181-213 *supra*. As Senator Baker put it at the recent Senate Hearings: "[T]here is nothing that says that the Congress that giveth cannot taketh away. And it can. And it can at anytime." 1974 Senate Hearings, *supra* note 11, at 15. The possibility will no doubt shape the thinking of the system's managers.

³⁰³ S. 3825, 93d Cong., 2d Sess. § 3 (1973).

³⁰⁴ See text accompanying notes 94-100 *supra*.

³⁰⁵ See note 301 and accompanying text *supra*.

to exercise a choice reflecting local interests³⁰⁶ nor would local stations get enough money to afford the technical equipment needed to free them from dependence on the PBS schedule.³⁰⁷ Finally, the bill in no way resolves the problem of editorial control of the interconnection by PBS and CPB.

VI. THE PUBLIC FORUM ALTERNATIVE APPROACH IN RELATION TO THE PUBLIC BROADCASTING ACT OF 1967

One of the conclusions of this article is that legislative imposition of the public forum doctrine on CPB and PBS is desirable.³⁰⁸ This recommended reform is not inconsistent with the Act as originally adopted. Although the intent of Congress was that the local stations should themselves control the content and scheduling of their programming,³⁰⁹ this has to some degree been frustrated by the CPB-PBS control over program funding³¹⁰ and the interconnection.³¹¹ As has been demonstrated, there are alternatives to the present system under which CPB and PBS would be prevented from exercising control over program content.³¹² In fairness to the architects of the system currently in use, however, it must be admitted that in several ways their design is more expedient than the suggested decentralized plan.³¹³

To begin with, the limited funds available for program production would mean that some programs, and especially a series of programs, would be

³⁰⁶ Representatives of ptv claim that the funds to be provided under the Public Broadcasting Act of 1974 will be grossly insufficient. See *1974 Senate Hearings, supra* note 11, at 71-84.

³⁰⁷ *Id.* See also statement of Joseph Hughes, *id.* at 60, in which Congress is urged to make an additional expenditure for capital improvements.

³⁰⁸ See text accompanying note 343 *infra*.

³⁰⁹ Congressional desire that the local ptv stations were to exercise primary authority over public broadcasting was expressed most directly in 47 U.S.C. § 396(g)(1)(D) (1970), which required CPB to

carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the non-commercial educational television or radio broadcast systems and local stations from interference with or control of program content or other activities.

See also 47 U.S.C. §§ 396(a)(2)-(4), 396(g)(1)(B), 396(g)(2)(C)-(G), 396(g)(3) (1970). See also text accompanying notes 78-93 *supra*.

³¹⁰ See text accompanying notes 116-28 *supra*.

³¹¹ See text accompanying notes 129-60 *supra*. In 1972 PBS "basic scheduled service" consisted of twenty-five hours of programming per week transmitted on a schedule which allowed the stations to broadcast it as received. In addition, special programs were also transmitted. Public Broadcasting Service, *1973 Hearings, supra* note 110, at 412-13.

³¹² See text accompanying notes 268-69 *supra*.

³¹³ Hartford N. Gunn, Jr., PBS President, has made a detailed presentation of program-funding alternatives which would transfer control over program selection to the ptv stations. See Gunn, *Public Television Program Financing*, appendix to *1973 Hearings, supra* note 110, at 442. The article does not, however, suggest means for decentralizing control over distribution, although it discusses the problems which might be caused by decentralizing the program selection process. The article also mentions loss of concentrated purchasing power, possible loss of local financial support as federal funds increase, and a loss of creativity due to the need to reach compromise decisions. *Id.* at 451-53.

beyond the reach of any individual station. Unless a pooling system were developed, which would, however, be expensive both in time and money, some important series may not be able to be produced. The Station Program Cooperative is proof that fund-pooling systems are a realistic alternative, but is also proof that the alternatives may be complex.³¹⁴ Second, any system which requires that the ptv stations tape programs in advance (which they would have to do if PBS could no longer edit content) would involve several new expenses. There would be the cost of the video-tape itself, the added costs due to staff expansion needed for program monitoring, and the capital investment for recording equipment. Since each of these costs must be borne by every station the total burden on the national system could be considerably above the current ptv funding level.³¹⁵

The fiscal advantages of the present system do not necessarily establish its appropriateness but there is evidence of an effort to conserve limited resources, an effort which is also arguably supported by the Act's concern with quality programming.³¹⁶ Since money spent on administration is not available for program production, the quality of the latter may suffer. The pull of these conflicting goals on the system colors each facet of our discussion of statutory amendment.

A. Content-Based Allocation of Program Production Funds by CPB

The problem of CPB's control over programming funds calls for the resolution of a related but more complex conflict within the Act itself. There is a tension between those provisions which apparently grant CPB authority to decide how to distribute program production funds and those provisions which require CPB to protect the independence of the local stations. This tension has been stretched to the breaking point by fund shortages which dictate local station acceptance of CPB-chosen programming.³¹⁷

CPB has a specific grant of authority to fund program production by grants to individual producers, production entities, or ptv stations.³¹⁸ Additionally, one of the purposes for which CPB was created was to "facilitate the full development of educational broadcasting in which programs of high quality will be made available . . . with strict adherence to

³¹⁴ *Id.*

³¹⁵ The cost of the necessary technical equipment has been estimated at \$17 million. AUTHORIZATION FOR PUBLIC BROADCASTING, S. REP. NO. 123, 93d Cong., 1st Sess. 9 (1973). Hartford N. Gunn, Jr., PBS President, estimated the cost at \$20-25 million. 1973 *Hearings*, *supra* note 110, at 136. Gunn estimated the added annual (noncapital) cost as \$20-30 million. *Id.*

³¹⁶ Congress intended public broadcasting to "constitute an expression of diversity and excellence." 47 U.S.C. § 396(a)(4) (1970). Further, it intended that programs of "high quality" be produced by the ptv system. 47 U.S.C. § 396(g)(1)(A) (1970).

³¹⁷ See text accompanying notes 130-33 *supra*.

³¹⁸ 47 U.S.C. §§ 396(g)(2)(B)-(C) (1970).

objectivity and balance. . . .³¹⁹ Together these sections arguably imply, though they do not specifically grant, the power to choose programs according to CPB's judgment as to type and quality—the power to make content-based decisions. The opposite inference may be drawn, however, from those sections designed to promote localism, particularly the general limit placed on CPB to “assure the maximum freedom of the . . . local stations from interference with or control of program content or other activities.”³²⁰

The problem is complicated by the fact that most stations must, as a practical matter, broadcast that which CPB has chosen.³²¹ Due to overall monetary limitations the stations do not enjoy freedom of choice.³²² Currently only one program is transmitted over the interconnection to the ptv stations for each time slot and unless the station has other programming available to it, which is as a general rule unlikely, the only choice is to use the CPB program or to go off the air. The limitation on local station freedom is all the more serious because they cannot, in most cases, preview the programs prior to transmittal.

Loss of control over production funds would not deprive CPB of all means of promoting quality programs. Quality control can be achieved by such indirect means as serving as a clearinghouse for producers with proposed projects, by publicizing within the ptv system those programs which are especially successful, and by maintaining an effectively operated library of programs. In short, CPB could provide leadership without assuming dictatorship, benevolent or otherwise. Arguably, loss of content control also would impair CPB's power to enforce the objectivity and balance requirement. This should not concern Congress if, as seems likely, its purpose in enacting the requirement was to protect the local stations from domination by an ideological CPB.³²³ By making CPB's politics irrelevant to program selection, the forum approach performs the same task better. If the purpose

³¹⁹ 47 U.S.C. § 396(g)(1)(A) (1970).

³²⁰ 47 U.S.C. § 396(g)(1)(D) (1970).

³²¹ The legislative history indicates that Congress did not anticipate the degree of control that CPB's program funding power would give it because the assumption in 1967 was that there would eventually be enough programs produced to ensure free choice on the part of each station. The Senate Commerce Committee Report, for example, states,

[t]he Corporation will assist in making programs available to stations, but the determination of what programs will be broadcast remains with the stations themselves. Individual stations, therefore, retain the responsibility to assess community needs and determine what programs will best meet those needs. . . . Local autonomy of stations and diversity of program sources will provide operational safeguards to assure the democratic functioning of the system.

S. REP. NO. 222, *supra* note 52, at 1778-79. Diverse program choice was also one of the goals the Carnegie Commission set for ptv. See text accompanying note 33 *supra*. Leaders of the PBS system testified in the 1973 ptv hearings that genuine local control could not be realized without a large increase in the number of programs available and the means to choose among them. See 1973 Hearings, *supra* note 110, at 122-36.

³²² See text accompanying note 342 *infra*.

³²³ See text accompanying note 88 *supra*.

was to protect the public against the ideology of any given ptv station, the fairness doctrine will serve as well. These facts argue strongly that the Act's basic purposes do not require the vesting of power over content in CPB.

B. Program Distribution and Editing

As with program financing, central control of program distribution facilitates and even invites government attempts to influence program content.³²⁴ By eliminating the CPB-PBS powers which contribute to central control the forum doctrine would again further the congressional quest for local control.

CPB is prohibited from owning or operating any ptv "station, system or network . . ." ³²⁵ This provision was intended to prevent CPB from exercising "operative authority over . . . interconnection facilities . . ." ³²⁶ and it thus contributes to the localist structure of the Act. The outside observer cannot know whether CPB uses its funds to control PBS policies, but the observer can analyze the CPB-PBS partnership agreement under which the two corporations share the power to develop a schedule³²⁷ and to bar programs from the interconnection.³²⁸

Under the terms of the agreement CPB only shares power and has no right to veto PBS decisions.³²⁹ However, because CPB is the source of funds which PBS uses to operate the interconnections its voice may prove more equal than its partner's.³³⁰ Thus, to insulate the interconnection from central control it would be necessary to limit CPB's management.

Removing governance of the CPB from the interconnection would limit government intrusion but could not totally insulate program content so long as PBS itself could control it, because PBS is also subject to federal influence.³³¹

Congressional authorization for the establishment of an interconnection³³² indicates that it has chosen the development of the interconnection as the most efficient means for the distribution of the available programs.³³³ However, Congress has also recognized the danger that a mechanical system of distribution might become an instrument of control. To foreclose

³²⁴ See notes 129-60 and accompanying text *supra*.

³²⁵ 47 U.S.C. § 396(g)(3) (1970).

³²⁶ H.R. REP. NO. 572, *supra* note 52, at 1809. See also S. REP. NO. 222, *supra* note 52, at 1782.

³²⁷ *Joint Resolution*, *supra* note 109.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ The views of Senators Baker, Cotten, and Griffin are: "CPB calls many of the tunes when it pays the PBS piper." S. REP. NO. 92-892, 92d Cong., 2d Sess. 20 (1972).

³³¹ See text accompanying notes 165-81 *supra*. Although PBS is an entity composed of the local stations and largely governed by them, this conclusion is not affected by that because the localism requirement cannot be satisfied by a delegation of authority to PBS management.

³³² 47 U.S.C. § 396(g)(1)(B) (1970).

³³³ This view had earlier been expressed by the Carnegie Commission. See note 41 *supra*.

this possibility the statutory language itself insists on local control over the materials actually broadcast. CPB was authorized to

assist in the . . . establishment . . . of one or more systems of interconnection to be used for the distribution of educational television . . . programs so that all [ptv] stations that wish to may broadcast the programs at times chosen by the stations.³³⁴

As has been noted, the local stations are theoretically but not in reality free to choose whether and when to broadcast.³³⁵ Rather than promoting their responsibility to serve their communities, the current system of interconnection promotes a national orientation.

As PBS administers the interconnection, the programs chosen and edited by both PBS and CPB are transmitted on a fixed schedule and organized with the expectation that the ptv stations will broadcast the programs directly as they are received.³³⁶ Were programs transmitted on a schedule not reflecting expected broadcast schedules, the local station would be forced to preview each program in order to make its own schedule and could realistically accept responsibility for what it chose to broadcast.³³⁷ Yet, many local stations apparently approve of the present structure,³³⁸ and one congressional committee, after a review of the ptv system, voiced approval.³³⁹ A similar reason may be the foundation of the approval by both: a shortage of funds.

Through most of the Act's history the legislators most enthusiastic about ptv have been confronted with executive and congressional resistance to substantial increments in funding.³⁴⁰ Unable to provide money necessary to operate a truly localized system, Congress has been in no position to insist

³³⁴ 47 U.S.C. § 396(g)(1)(B) (1970). According to the House Report, this language

emphasizes a fundamental concept that runs throughout title II—localism: local stations shall retain both the opportunity and responsibility for broadcasting programs they feel best serve their communities. . . . Even with respect to live simultaneous broadcasts, local stations will have the discretion to decide if such programs will be carried at the time the Corporation has arranged for their transmission, at some other time, or not at all.

H.R. REP. NO. 572, *supra* note 52, at 1808.

³³⁵ See text accompanying note 131 *supra* and note 342 *infra*. See also 1973 Hearings, *supra* note 110, at 123.

³³⁶ See text accompanying note 131 *supra*. See also note 311 *supra*.

³³⁷ Of course, if the only programs transmitted were those chosen by CPB the local station would still have only a Hobson's choice. See testimony of Hartford N. Gunn, Jr., 1973 Hearings, *supra* note 110, at 136-37.

³³⁸ See testimony of William Harley, Chairman, National Association of Educational Broadcasters, 1973 Hearings, *supra* note 110, at 126.

³³⁹ S. REP. NO. 93-123, 93d Cong., 1st Sess. 12 (1973).

³⁴⁰ This is a matter of interpretation. Clay T. Whitehead, then Director of the Office of Telecommunications Policy, pointed out in 1973 that the Nixon administration supported an increase in funding from \$5 million in 1969 to \$45 million requested for 1974. 1973 Hearings, *supra* note 110, at 86. Yet at that hearing he was, as the administration spokesman, opposed to the amounts sought in S. 1090, which were \$55 million for fiscal 1974 and \$75 million for fiscal 1975. He argued that \$45 million would be sufficient and that any authorization should be limited to one year. *Id.* at 85-93.

on one. Furthermore, to urge an overhaul at a time when popular programs are themselves threatened or eliminated due to lack of funds would be politically difficult.³⁴¹ The ptv stations are in a similar bind. How can they assert need for independence when they lack the means to pay for the costs it would entail? Until the money is available for the equipment and personnel necessary to enable them to tape, preview, and rebroadcast all transmitted programs, they will continue to desire a fixed schedule interconnection.³⁴² The problem of the stations and of Congress in part reflects the conflict between program quality and principles of localism with which our statutory discussion began. One solution which suggests itself is a legislative mandate to reorganize coupled with an increase in funding intended to make the changes more palatable to the system's managers.

Congress should face its fiscal responsibilities to its creation at the same time that it insists on ptv ordering its own house. Each requirement relies to some extent upon the achievement of the other. If ptv were to order its own house it may well facilitate adequate funding since it would allay the fears of those who see in ptv the Orwellian spectre. However, to provide the funds without achieving the reorganization here outlined would scarcely provide the dreams of freedom in broadcasting in which the system originated.

VII. CONCLUSION

This article has resisted the temptation to evaluate the editorial content of the ptv system, as it has been the system itself which was of concern. Nonetheless, the content, and the potential future content, of the medium admittedly contributes substantially to one basic conclusion: federally funded television deserves our encouragement as well as our critical

³⁴¹ 1973 *Hearings*, *supra* note 110, at 14, 25, 35.

³⁴² The problem was pinpointed during the testimony of Ralph B. Rogers, Chairman of the PBS Board of Governors, at the 1973 Senate hearings on public broadcasting:

Senator Cook: And the original intention, then, as I understand it, . . . was that the interconnection was to be used somewhere in the nature of a library service, that you could continue to feed programming, you could continue to feed things to stations, you could set up a schedule, so to speak, if a station wanted to pick you up on the interconnection for a particular program, it could; if it didn't want that program, then it didn't have to video tape and utilize it at a later date, but it was to be like a wire service, it could be five paragraphs long, but you could take two sentences out of it for a 5-minute news program. Was that the intent of the interconnection?

Mr. Rogers: Yes, it was. What we have today is we have the situation where there are perhaps 25 percent of the stations in the country who can use the interconnection service in the way in which it was originally intended and we have 75 percent who can't.

But we must be realistic, we live in the real world, and the fact is that it is a lot cheaper to tape programs, let us say, like "Sesame Street" and "The Electric Company" and transmit as if it were a network than it is to do it any other way. . . . I submit to you that we should recognize the real facts of life and that we should keep in mind what we want in the way of an interconnection service until we can afford it.

1973 *Hearings*, *supra* note 110, at 126.

watchfulness. Although it has often been indistinguishable from its commercial competitors, ptv has more than occasionally given us television of value which would hardly have come to pass without it. Unless pay tv or other new systems develop, the alternative to government financed and influenced television will continue to be commercially financed and dominated television. If the one has limits, so too has the other. In part, ptv has value because it marches to a different drummer. Yet to ignore the reality of government influence on the ptv system scarcely serves the interests of viewers and system alike.

If the influence of government cannot be eliminated it can and should be minimized. The introduction of the Public Broadcasting Financing Act of 1974 represents a modest advance along these lines. Despite its limitations and even if the amendments suggested below are not adopted, the bill, if reintroduced, should be enacted because of the insulation from the government that it adds to the public broadcasting structure. That insulation would further be improved if the bill were amended along the following lines: (1) All power over program selection should be placed in the hands of public broadcasting licensees, who should, however, remain free to combine their resources and fund programs jointly so long as they do not delegate that function to any central body; (2) PBS or any successor manager of the interconnection should be prohibited from selecting or editing programs; (3) the amounts authorized and appropriated should be increased substantially.³⁴³

By decentralizing the ptv system Congress will be reducing its own power to influence ptv programming. To ask Congress to give up power at the same time it provides increased funds may seem impolitic, but that goes to the core of our approach. The normal principle of government under which responsibility to Congress flows from the use of federal funds has little place with regard to ptv programming. This does not mean that ptv stations will be accountable to no one. As are all television stations they are accountable to the FCC³⁴⁴ and the communities they serve.³⁴⁵ Given the increasing reliance on public fund-raising,³⁴⁶ ptv community accountability will be greater than that of commercial stations. Rather than insisting on primary accountability to itself, Congress should encourage ptv's accountability to its consumers, the viewers. A recent amendment to the Freedom of Information Act may be a good beginning if, as it appears to do, it makes

³⁴³ Conflicting estimates of the cost of decentralizing the ptv system are difficult for an observer to reconcile. *See, e.g.*, note 315 *supra*. Thus no dollar figures can be stated here.

³⁴⁴ Licenses for ptv stations, like all other tv licenses, are renewable only by the FCC. 47 U.S.C. § 301 (1970).

³⁴⁵ Licenses may be renewed only if "public convenience, interest, or necessity will be served thereby. . . ." 47 U.S.C. § 307(a) (1970). The Commission recently decided not to renew the license of the Alabama Educational Television System, which operates eight ptv stations, because of racially discriminatory hiring and programming. Alabama Television Commission, 28 P & F RADIO REG. 2d 271 (1973), *designated for hearing*, 23 P & F RADIO REG. 2d 800, 33 F.C.C. 2d 495, FCC 74-1385, 29210, N.Y. Times, Sept. 20, 1974, at 1, col. 8. (not officially reported).

³⁴⁶ *See* note 290 *supra*.

that Act applicable to CPB.³⁴⁷ More fundamentally, an adoption of those provisions already described which would decentralize the ptv structure would do much to subject it to viewer control, for by shifting the focus of power from a large nationally oriented bureaucracy (which must be perceived as largely unreachable by individuals) to smaller, local entities, Congress would encourage the participation of the people in the governance of their medium.

³⁴⁷ Pursuant to Act of Nov. 21, 1974, Pub. L. No. 93-502, § 3(e), — Stat. —, amending 5 U.S.C. § 552 (1970), “any . . . Government controlled corporation . . .” is now subject to the provisions of the Freedom of Information Act. According to H.R. REP. NO. 93-876, 93d Cong., 2d Sess. (1974), printed in 1974 U.S. CODE CONG. & AD. NEWS 6203, the quoted language includes CPB. The S. CONF. REP. NO. 93-1200, 93d Cong., 2d Sess. (1974), however, states that CPB is not intended to be included. 1974 U.S. CODE CONG. & AD. NEWS 6221, 6229. If the Freedom of Information Act does apply to CPB and PBS it would require them to publish in the Federal Register, *inter alia*, their substantive and procedural rules and all amendments thereto. 5 U.S.C. §§ 552(a)(1)(C)-(E). Policy statements, administrative manuals, and staff instructions would be available for public inspection. 5 U.S.C. §§ 552(a)(2)(B)-(C) (1970). The public would then be able to keep informed as to procedures or policies which might affect free speech aspects of ptv programming.