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Clearing the Airwaves for Access

by Michael Botein

While the courts and the government grapple with the concepts and consequences of access, activist citizens press broadcasters to open the airwaves. In the resulting legal tangle, the effective means of securing access are essentially extralegal, while the legal means are essentially ineffective.

IN THE LAST FEW years there has emerged a new desire on the part of individuals to participate in government and its decision-making process. This desire is variously termed "new populism," "community control," "participatory democracy." Covering all shades of the political spectrum, its causes are unclear to psychologists, sociologists, and political scientists—as well as to lawyers. Nevertheless, more and more people are demanding a louder "say."

Sooner or later the trend had to reach broadcasting, simply because radio and television provide the best forum for making a "say" heard. In fact, the new activism in broadcasting is surprising only because it arrived later, not sooner. In the past disgruntled citizens were able to use radio and television indirectly, through coverage of their demonstrations, meetings, and demands. But now their acquiescence in broadcasting's version of their "say" has diminished. Dissident groups do not want interpretative reporting but direct access to the broadcast media.

As an academic concept, an enforceable right of access has been around for some time. Indeed, it represents only a logical extension of the First Amendment. The syllogism is simple: the goal of the First Amendment is an informed public; groups must have access in order to inform the public; therefore, the First Amendment requires access. The late Prof. Zechariah Chafee considered the question carefully in his report to the Hutchins commission, *Government and Mass Communications* (1947). And in 1967 Prof. Jerome A. Barron picked access up, dusted it off, and posited it as a new First Amendment right in his article, "Access to the Press—A New First Amendment Right," in 80 *Har-*

vard Law Review 1641. The fly in Professor Barron's ointment, however, is that he fails to propose means of implementation.

The obstacle to access is broadcasting's technological and economic structure. Technology restricts a broadcaster to one channel; economics forces him to maximize that channel's appeal. Advertisers pay for the number of warm viewing bodies rendered unto them; broadcasters, in seeking the largest possible audience, cater to the lowest common denominator. Time gained for access is advertising revenue lost to broadcasters, and the loss is compounded if access programming motivates viewers to switch channels. As a result, broadcasters cannot afford access.

Despite these deterrents, disgruntled citizens have developed effective, albeit non-doctrinal devices for gaining access. They have challenged license renewals in order to obtain leverage over stations; they have forced an expansion of the fairness doctrine; and they have begun to develop some bases for constitutional, statutory, and regulatory rights of paid access.

License Challenges Are Not Total Reform

Challenges to license renewals attract the most public attention because they produce dramatic results. Most challengers do not expect to knock a station off the air, of course, and probably would be aghast if they succeeded. Instead, they use renewal challenges to gain leverage. In negotiating their way out of challenges, many stations have promised more jobs and programs for minorities. A group of challengers recently withdrew its opposition to a multistation sale only after the principals had committed more than a million dollars to minority training and programming. And not so long ago the Federal Communications Commission felt constrained to warn a station that its promise to clear minority-oriented programming with a local citizens' group might violate its statutory responsibilities.

A strikingly small group of hardy and dedicated souls has pioneered renewal challenges. Their work has paralleled the general upsurge in civil rights and public interest law. When Everett Parker, head of the United Church of Christ's Office of Communication, helped some Mississippi viewers challenge the renewal of WLBT-TV, Jackson, he started a ground swell of renewal challenges. The commission held that WLBT-TV's viewers had no standing, a position for which it was resoundingly rebuked by then Judge Burger in *Office of Communica-*

tion of *United Church of Christ v. F.C.C.*, 359 F. 2d 994 (D.C. Cir. 1966). When the commission went on to renew the license, Judge Burger displayed some fine judicial wrath and revoked the station's license on the spot (425 F. 2d 543 (D.C. Cir. 1969)).

The commission has been less than receptive to license renewal challenges. Until 1969 it never refused to renew a license except for violations of its engineering and disclosure requirements. In dissenting from the WLBT-TV renewal, two commissioners commented that "the only way in which members of the public can prevent renewal of an unworthy station's license is to steal the document from the wall of the station's studio in the dead of the night."

At the end of 1969 an understrength commission did vote three to one not to renew the license of WHDH-TV, a Boston station. Broadcasters immediately ran for shelter to Capitol Hill, and under legislative pressure the commission, with a new chairman, issued its *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424 (1970), which required challengers to show as a precondition that a station had not rendered "substantial service." In what has become an all too familiar scenario, however, the United States Court of Appeals for the District of Columbia Circuit made a last-minute entrance, and in an opinion by Judge J. Skelly Wright held that the policy statement violated the Communications Act's "public interest" standard. *Citizens Communications Center v. F.C.C.*, 447 F. 2d 1201 (1971). The end of the story is not yet written. The commission is giving the F.C.C. opinion lip service but little else. Broadcasters are seeking new legislation.

The commission's approach may be right but for the wrong reasons. Although renewal challenges produce short-term gains for challengers, they may create long-term dangers. Challenges are essentially *ad hoc*. While they may bring a few stations at a time into line, they do little to reform the industry. More important, the challengers represent their own interest, not the "public interest"—vague as that concept may be. A settlement may win well-deserved rights for a minority, but a truly just decision must consider the majority, which, after all, is just a group of minorities. The commission has refrained from judging the quality of a station's programming, partly because of a lack of evaluative criteria and partly because of its concept of the First Amendment. But when these judgments need to be made—and indeed are being made daily—they should come from a body that is representative of the public's many different interests.

Fairness Doctrine Is Less Than Reliable

In theory, the fairness doctrine is simple and equitable. It provides only that broadcasters whose facilities are used to present one point of view on a controversial issue must provide reply time to representatives of the opposing view. In *Red Lion Broadcasting Company v.*

F.C.C., 395 U.S. 367 (1969), the Supreme Court held the doctrine, as well as the "personal attack" and "political editorial" regulations promulgated under it, constitutional. Fairness is different from and broader than the equal-time provisions for elections in Section 315(a) of the Communications Act.

In practice, the fairness doctrine has proved to be an administrative nightmare. Like any essentially natural law theory, it cannot be easily quantified or contained—a condition the commission has aggravated by failing to define adequately "point of view," "controversial issue," or "reply time." As a result, the doctrine is in a continuous state of flux.

Fairness's most important development is its recent extension to advertising. The current confusion began with *WCBS-TV*, 8 F.C.C. 2d 381 (1967), affirmed as *Banzhaf v. F.C.C.*, 405 F. 2d 1082 (D.C. Cir. 1968), in which the commission ruled that fairness required time to reply to cigarette commercials. The commission pointedly restricted the principle of the case to the federal government's legislative and administrative involvement with smoking. Nevertheless, this supposedly airtight ruling inevitably began to flow through to advertising for other products. The culmination came in *Friends of the Earth v. F.C.C.*, 449 F. 2d 1164 (D.C. Cir. 1971), which held that commercials for high-powered cars and high-octane gasoline were as much within the fairness doctrine as commercials for cigarettes. The court reasoned that federal environmental legislation made pollution as controversial an issue as smoking and that the advertisements implied that automotive exhausts were socially beneficial. It then followed its time-honored custom of dumping the issue of prescribing adequate reply time back into the commission's lap.

Friends of the Earth makes fine environmental but not administrative sense. First, it leaves the definition of a "controversial issue" even vaguer. Automotive exhaust pollution may be a major public concern in New York City, but not in Bisbee, Arizona. In fact, using that case's logic, the commission recently ruled that a United Fund campaign was controversial in a particular community because many local citizens preferred other charities. Second, commercials often lack a readily identifiable point of view. One for gasoline may emphasize low price, another the desirability of use. Finally, in order to determine the adequacy of reply time the commission must engage in what one F.C.C. official has termed "counting the minutes." Indeed, shortly before deciding *Friends of the Earth*, the District of Columbia Circuit held that military recruitment commercials did not require reply time, as "the undesirable features of military life have been displayed in virtually every living room in the country, frequently in living (or dying) color." *Green v. F.C.C.*, 447 F. 2d 323, 331 (D.C. Cir. 1971).

The parameters of *Friends of the Earth* are hazy. For example, one advertising executive recently posited a reply by the "Anti-Forest-Fire-Prevention-League." It was: "Don't believe that stupid bear. A little forest fire

can be fun. Help Keep America Brown. Jingle: Only You Can Start a Forest Fire."

The fairness doctrine is conceptually sound. Without it, broadcasters would be free to operate the "propaganda stations" that the early Federal Radio Commission worked so hard to suppress. Nevertheless, fairness's current status does little to promote broad access. The present confusion makes it a less than reliable legal tool. More important, fairness provides only a conditional right of access, since its requirement of reply time can be triggered only by a broadcaster's discretionary decision to air one side of a controversy. Often broadcasters avoid giving reply time simply by airing nothing controversial.

Paid Access? Its Glitter Requires Gold

Renewal challenges and the fairness doctrine provide free time, which is understandably attractive to low-budget citizen groups. Free time for all groups is not justified, however, and amounts to a low-visibility subsidy. Each group should receive time according to its needs and pay according to its means. The courts, the Congress, and the F.C.C. have been increasingly willing to recognize a right of paid access.

The most important step towards implementation of a First Amendment right of paid access came through the efforts of a group of antiwar businessmen and the Democratic National Committee. Although they differed in ideology, they shared a common grievance: both had been unable to buy television time to present their views. In another ground-breaking decision by Judge Wright, the District of Columbia Circuit came to their rescue by holding that a "flat ban on editorial advertising" violated the First Amendment. *Business Executives Move for Vietnam Peace v. F.C.C.*, 450 F. 2d 642 (D.C. Cir. 1971). Although the case is superficially attractive, the result is ambiguous and the court's reasoning circuitous.

The court did not hold that individuals have a right of paid access but rather that a station's "flat ban on editorial advertising" was unconstitutional—a vague position that creates difficulties. The court applied its holding only to time "relinquished by broadcasters to others." This overneat distinction might require stations to sell only commercials, not entire segments—a rather artificial result, since buying an entire program and buying a program's advertising time are pragmatically the same. Moreover, the "relinquishment" theory fails to specify when, if ever, a buyer is entitled to an entire program, since broadcasters sell time on both bases. The court also held that broadcasters were still free to exercise "reasonable regulation of the placement of advertisements" and merely instructed the commission to develop "reasonable procedures." The commission has taken this as a license to distinguish the case to death, either by denying requests for time outright or by invoking the "relinquishment" theory.

In reaching the result of *Business Executives*, Judge

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Wright refused to take the easy road of statutory construction but met the constitutional issues head-on. He reasoned that a broadcaster's intimate—perhaps even incestuous—involvement with the federal government constituted state action. He was following a "state aid" or "state acquiescence" approach similar to that used in the white primary and segregated facilities cases. He then took on the more difficult task of elevating access to the level of a First Amendment right, drawing heavily on *Red Lion*. But while the Supreme Court in that case did make some vague sounds about access, it was concerned mainly with listeners' rather than speakers' rights.

The District of Columbia Circuit actually may have been more interested in discouraging civil disobedience than in interpreting the First Amendment. It spoke approvingly of the plaintiffs' desire to pay for air time and noted that they did not use "newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations." On the one hand, the court may have been attempting to heed the warning of Martin Luther King, Jr., that "a riot is the language of the unheard." On the other hand, it may have been saying simply that money is the American way. In any event, its result is strikingly similar to the "Whitehead doctrine" announced by the director of the executive branch's Office of Telecommunications Policy, Clay Whitehead, which would do away with fairness and substitute an ill-defined right of paid access.

Business Executives is thus lovely to look at but impossible to live with. Access has First Amendment aspects, but a fifty-year-old industry cannot be restructured by judicial fiat.

What Time Can Candidates Buy?

The high cost of running for elective office has prompted many attempts at reform. In 1970 Congress passed the Political Broadcast Act (S. 3637), only to see it vetoed by President Nixon. By 1971, however, the reform movement was strong enough to bring about the Federal Elections Campaign Act of 1971 (Public Law 92-225), which took effect on April 7, 1972. Title I of that act, the Campaign Communications Reform Act, imposes limitations on both expenditures by candidates and charges by broadcasters. But, more important, Title I amends Section 312(a) of the Communications Act to provide that a station's license or construction permit may be revoked by the commission for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy."

The F.C.C., however, gave a narrow interpretation to

this provision in its public notice, "Use of Broadcast and Cablecast Facilities by Candidates for Public Office," which appeared in 37 *Federal Register* 5796. It construed the words "access" and "purchase" in the disjunctive, allowing a station to buy its way out of selling time through donating token free time. It explicitly provided that candidates have no right to purchase a whole program, as opposed to a commercial on a program, and that political organizations not supporting a particular candidate have no right to buy air time at all—an obvious attempt to avoid confrontation with some of the issues raised by *Business Executives*. Finally, and most important, neither the Congress nor the commission has provided any standards as to what time period a candidate has a right to buy. A broadcaster apparently may offer only those he chooses, even if they happen to fall after the late late show.

Like *Business Executives*, the Campaign Communication Reform Act represents a commendable aspiration. But, like that case, it cannot be fully effective without standards for allocating access time.

Will Cable TV Enhance Access?

The F.C.C.'s most strenuous efforts to implement access have focused on cable television, which does not have commercial television's technological and economic limitations. While broadcasters can operate only one channel, cable systems can offer many. Only 15 per cent of existing cable systems have more than twelve channels, but twenty and forty channel capacities are now technologically and economically feasible. Cable television can be free of the advertiser dominance under which broadcasting has labored for so long. With its huge channel capacity, cable can offer not only mass appeal but also specialized pay television programming from opera to motorcycle races to minority-group drama. Cable television can become an electronic analogue to the newspaper stand's wide range of materials.

The commission's most important moves in promoting access to cable television came in its recent *Cable Television Report and Order*, 37 *Federal Register* 3251 (1972). The new regulations require all urban cable systems not only to have a large capacity—a twenty-channel minimum—but also to build in the capability for two-way communications between subscribers and the system. The rules also provide that cable systems must maintain free "public access," "education access," and "local government access" channels and must lease all unused channel capacity on a "first-come nondiscriminatory" basis. This will guarantee citizens groups at least one forum, and independent producers a potential audience for pay television.

Although a better attempt at setting access standards than either *Business Executives* or the election expenditure reform act, the new rules do not resolve conflicts between competing applicants—for example, requests for the same time period from a small community housing group and the N.A.A.C.P. If the demand for access exceeds the supply of channels—a long-term and still questionable proposition—the regulations will prove inadequate. Creating standards to allocate access time is a frustrating and perhaps impossible task, as pointed out in my article "Access to Cable Television" in 57 *Cornell Law Review* 419 (1972). Nevertheless, without standards, access remains an attractive but academic concept.

Look Outside the Law for Access

Whether a movement, a trend, or merely a fad, access has won the public's heart and cannot be ignored. Unfortunately, too much enthusiasm and too little analysis have attended the concept of access. The effective means of securing access are essentially extralegal, while the legal means of securing access are essentially ineffective. Only hard study and a willingness to experiment by broadcasters, citizens groups, and governmental bodies can make access a reality.

Lawyers Included in 1972 Census of Selected Services

LAW FIRMS and individual lawyers engaged in private practice are among the different persons and business firms that will take part in the 1972 census of selected services conducted by the Bureau of the Census. The 1972 census is the latest in a series of business censuses commenced in 1929 and now conducted every five years covering the years ending in "2" and "7."

Questionnaires will be mailed by the Census Bureau in early January, 1973. Firms operating more than one place of business will receive a separate form for each location. Completion of the questionnaires is required under federal law (Title 13, U.S. Code). All answers on census questionnaires are confiden-

tial and are used only to prepare statistical summaries for the various business classifications and for different geographic areas.

While the due date for the return of the completed questionnaires is February 15, 1973, Census Bureau officials request that forms be returned earlier, if possible, in order to reduce the peak processing load and to speed publication of census results.

Individual lawyers or law firms engaged in private practice will use Census Form CB-81.

Questions in the 1972 census of selected services are similar to those asked in the census that covered operations during 1967. Questionnaires ask the location of the business, dollar

volume of receipts, first quarter and annual payroll, and number of employees in 1972. In addition to these basic questions, there will be other inquiries that will apply only to the kind of business category in which the establishment is classified.

This census is the major source of detailed information concerning services in the United States. Publications containing these statistics will be available for purchase at nominal cost in late 1973 and 1974. Copies of the reports will be available for reference at all Department of Commerce field offices, which are located in principal cities throughout the United States, and will be available at major public and college libraries.