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THE FCC'S RESTRICTIONS ON EMPLOYEES' PUBLICATIONS: A FAILURE OF COMMUNICATION?

MICHAEL BOTEIN*

INTRODUCTION

The Communications Act of 1934 provides that the Federal Communications Commission may not censor its licensees,¹ and the Commission often has repeated its hesitancy to pass judgment on program content.² Courts and commentators also have addressed themselves frequently to first amendment limitations on the Commission's powers.³ Ironically enough, however, there is little concern with the Commission's internal censorship—its restrictions on its own employees' rights to publish.

The hard truth of the matter is simply that the Commission exercises total censorship over its employees' publications. The Commission thus prevents its employees from publishing scholarly—as opposed to sensational—articles in professional journals. Section 19.735-203(c) of the Commission's Rules⁴ requires on

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¹ 47 U.S.C. § 326 (1972) provides that:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

² See, e.g., Hon. Harley O. Staggers, 30 FCC 2d 150 (1971), in which the Commission refused to review the accuracy of the controversial "Selling of the Pentagon" program.

³ See, e.g., Jaffe, *Program Control*, 14 Vill. L. Rev. 619 (1969); Note, *Regulation of Program Content by the FCC*, 77 Harv. L. Rev. 701 (1964); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁴ 47 C.F.R. § 19.735-203(c) (1974) provides that:

Employees of the Commission are encouraged to engage in teaching,

its face only that "articles written by the staff shall not identify the author with the Commission or the federal government unless prior approval has been obtained" from the Executive Director, the Chairman, or an individual Commissioner, depending upon the status of the employee. In theory, the rule thus appears to require clearance only if a Commission employee wishes to have an article reflect his status at the Commission. In practice, however, the Commission has given the rule a radically different interpretation. The Commission interprets the rule as requiring clearance of any publication which either identifies the author with the Commission *or* deals with communications law. Moreover, an employee's chance of securing clearance is virtually nil. In addition to denying permission outright, the Commission often delays a decision indefinitely—

lecturing, and writing that is not prohibited by law, the Executive Order, the Civil Service Regulations, or this chapter. However, an employee of the Commission shall not, either with or without compensation engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of the Civil Service Commission or Board of Examiners for the Foreign Service, that is dependent on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the Chairman gives written authorization for the use of nonpublic information on the basis that the use is in the public interest. Articles written by the staff shall not identify the author with the Commission or the Federal government unless prior approval has been obtained: In the case of employees generally, from the Executive Director upon the recommendation of the appropriate Bureau Chief; in the case of Heads of Offices and Bureaus, from the Chairman; and in the case of an employee in the immediate office of a Commissioner, from the individual Commissioner. Nor shall documents prepared in the course of official duties be used for private gain by any Commission employee. In addition, the Commissioners shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Commission, or which draws substantially on official data or ideas which have not become part of the body of public information.

thus killing the relevance of any publication which deals with an even vaguely topical subject.

It is difficult to estimate the subjects on which Commission employees might be interested in publishing, for the simple reason that employees never have been free to publish. Legal personnel, however, presumably might wish to write about the Commission's powers and responsibilities under the Communications Act of 1934, the Administrative Procedure Act, and various judicial doctrines. Similarly, engineers or economists might be interested in contributing to the numerous trade journals in their fields; indeed, a short mathematical equation or general theory often must hit print immediately, in order to be of any value to the public. In any event, it probably is safe to say that a Commission employee would have little interest in a shocking revelation or an exposé.

A Commission employee dare not treat the rule lightly, since a violation quite literally puts his or her job on the line. Other portions of the Commission's Rules provide that an employee's violation of any internal Commission rule may lead to reprimand, suspension, or removal.⁵ Accordingly, the mere existence of the rule has a chilling effect on any employee's desire to publish.

This combination of the rule's interpretation and the Commission's refusal to grant permission is simply that Commission employees are barred from publishing on the subjects about which they know the most. An employee presumably derives little consolation from the fact that he or she is perfectly free to

⁵ 47 C.F.R. § 19.735-107(a)(c)(v) (1974). Indeed, there may be some question as to whether removal of an employee for violating the rule is even within the Commission's statutory powers. The general provision governing discharge of federal employees, 5 U.S.C. § 7501(a) (1972) requires a finding of "cause," and publication of nonconfidential information might very well be held not to constitute such. As noted later, at 244 *infra*, the Supreme Court recently has supplied this statute with a more definite gloss. *Arnett v. Kennedy*, 42 U.S.L.W. 4513, 4520-21 (April 16, 1974).

write about the Rule in Shelley's Case or the holder in due course doctrine.

The Commission's interpretation and enforcement of the rule thus constitute bad and basically unreasoned policy; as will be noted,⁶ there appears to be little justification for the Commission's position. In addition, the Commission's application of the rule represents a very tangible inhibition on the first amendment rights of Commission employees. The rule thus is probably unconstitutional as well as unwise. Accordingly, the Commission should repeal the portion of the rule which requires prior clearance of articles.

LACK OF JUSTIFICATION FOR THE RULE

Attempting to discern the goal of the anti-publication rule is somewhat arduous, for the simple reason that the Commission never has bothered to define or explain the rule publicly. Accordingly, the only alternative is to make some hopefully educated guesses as to the possible justifications for the rule. There are five possible goals, none of which seems to justify the rule.

First, the Commission might be concerned with preventing the disclosure of confidential or classified information. But while this may be a constitutionally valid goal,⁷ the anti-publication rule is a highly questionable means of reaching it. Confidential information leaks out of the Commission in a steady stream, as perusal of any trade magazine indicates.⁸ In addition, federal statutes make the release of confidential information not only a federal crime, but also grounds for dismissal.⁹ Accordingly, the Commission has little need to prevent the publication of potentially confidential material, since it can take either disciplinary or criminal action after the fact.

⁶ See pp. 234-237 *infra*.

⁷ See pp. 244-245 *infra*.

⁸ Ironically enough, many Commission employees discover the contents of closed agenda meetings from trade magazines.

⁹ 18 U.S.C. § 789, 1905 (1972); 50 U.S.C. § 783 (1972).

A second possible justification for the rule might be to prevent the public from confusing private staff opinions with public Commission policies. This rationale seems somewhat questionable, however, in light of the fact that Commission employees are perfectly free to—and often do—give advisory opinions to the public.¹⁰ Since Commission employees' personal opinions are in continuous circulation, it actually would be preferable for employees to reduce them to print—a medium which is available to all and which can be challenged readily. Moreover, Commissioners may publish to their hearts' content;¹¹ many have done so. A Commissioner's statement presumably carries much more weight with the public than an employee's, even though one Commissioner cannot bind the agency. Accordingly, it is somewhat anomalous to invoke the rule against Commission employees, but not against Commissioners.

Third, the rule might be designed to prevent the Commission from embarrassment through publication of nonconfidential but unfavorable information—such as that uncovered by various

¹⁰A somewhat bizarre variation on this theme occurs when an organization makes a transcript of an employee's speech and then publishes it without his consent. In this case, the employee clearly is identified with the Commission and comments on matters before the Commission; nevertheless, the Commission obviously is powerless to enforce its internal personnel regulations against a third party. Even more convoluted conduct occurs if the publishing organization is conscientious enough to ask the employee's permission to publish his or her remarks; in that situation, the employee presumably must make a request for permission from the Commission, even though the employee did not initiate the publication.

¹¹The rule does not run against Commissioners for the simple reason that they are not employees of the Commission, but rather are accountable only to the executive and legislative branches. Congress could impose a similar anti-publication requirement upon Commissioners if it chose to, however, and its failure even to consider the issue indicates that it does not find that publication by Commissioners constitutes a threat to any national interest. Administrative law judges also are exempt from the rule, since the Administrative Procedure Act prevents an agency from exerting any control over their activities. 5 U.S.C. § 5335(a) (1972).

"Nader's Raiders" groups.¹² As noted before, however, the internal workings of the Commission are commonly known to at least the communications bar; accordingly, it does little real good to prevent an employee from publishing that a particular Commissioner seems to have a particular constituency. More importantly, Commission employees embarrass the Commission more severely by conduct than by publication; an inept handling of a regulatory issue or a public exhibition of drunkenness certainly hurts the Commission far more than an article criticizing the Commission's regulatory policies. This type of conduct, however, obviously is not subject to prior clearance. Finally, and perhaps most importantly, prevention of embarrassment is a rather tenuous interest at best; as will be noted later¹³ the courts have accorded it virtually no weight.

A fourth basis for the rule might be to prevent criticism of the Commission by its own employees. This justification is somewhat questionable at best, however, for several reasons. The Commission already is on the receiving end of brickbats of every size, shape, and variety. Courts, congressional committees, and commentators generally comment about the Commission in highly critical terms.¹⁴ Accordingly, potentially increased criticism by Commission employees would be comparatively small. And ironically enough, the antipublication rule prevents Commission personnel from replying to criticism of the Commission. For example, a recent article by former Commissioner Nicholas Johnson¹⁵ levied scores of criticisms against the Commission, which many employees thought were unfounded. The anti-publication rule prevented an employee from responding to John-

¹²For an example of this type of revelation, see R. Fellmeth, *The Interstate Commerce Omission* (1970).

¹³See pp. 242, *infra*.

¹⁴See, e.g., *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir. 1966); B. Schwartz, *The Professor and the Commissions* (1959).

¹⁵Johnson & Dystal, *A Day in the Life: The Federal Communications Commission*, 82 Yale L.J. 1575 (1973).

son, however, and thus deprived the Commission of a potentially spirited and effective defense. Finally, immunity from criticism has no higher social value than prevention of embarrassment.

The fifth and final possible justification for the rule might be to prevent Commission employees from abusing their status at the Commission to get their writings published. This rationale proceeds from the assumption that editors will accord deference to Commission employees, on the theory that their writings are particularly interesting, accurate, or meritorious. This possibility seems, however, comparatively remote. Most editors are not likely to be cowed by the fact that a writer works for the Commission, since legal publishers deal with high-powered lawyers on a daily basis. Moreover, it is somewhat unrealistic to assume that an author's position is never relevant to his or her ability to get published. It is a common—albeit perhaps unjust—fact of life that a Harvard University law professor generally receives more invitations to publish than a Podunk University law professor.

Accordingly, none of the possible justifications for the anti-publication rule appears to hold much water. Conversely, however, allowing Commission employees to publish freely may have a number of positive effects.

First, many Commission employees have good ideas about regulatory policy, but simply lack a forum in which to express them. As in any other bureaucracy, the Commission's hierarchical structure carefully filters the information which high-level personnel receive.¹⁶ Accordingly, a Commission employee often lacks any real forum in which to present potentially useful ideas. Removing the constraints on publication thus would allow employees to present their ideas both within and without the Commission.

¹⁶For an excellent general discussion of the means by which an agency controls the internal flow of information, see A. Downs, *Inside Bureaucracy* (1966).

Second, Commission employees often know more about a particular area of Commission policy than practitioners or commentators. Unlike "general" communications practitioners, Commission employees usually specialize in a comparatively narrow area at any given time. For example, most members of the communications bar deal with a mix of broadcasting, safety and special services, and cable television; a Commission employee is unlikely, however, to work in more than one of these areas at the same time. Accordingly, a Commission employee brings to his or her writing a greater understanding.

Third, Commission employees have far less of an economic dis-incentive against publishing than practitioners. Since Commission employees are not remunerated on a per-hour basis, they can afford more easily to devote their leisure time to writing. Accordingly, abolition of the anti-publication rule would increase significantly the amount of writing—and thus hopefully the amount of discussion—on issues of concern to the Commission.

Finally, the rule's muzzling effect makes many Commission employees feel like second-class citizens, in relation to their brethren at the private bar. Allowing Commission employees to publish thus not only would increase their morale, but also would place them in a better position vis-a-vis the private bar.

Accordingly, abolition of the anti-publication rule would have a number of highly desirable results. It would add significant and knowledgeable content to discussions of regulatory policy. Moreover, abolition of the rule would redound ultimately to the Commission's benefit, by improving the morale of its employees.

To be sure, total freedom to publish carries with it the potential risk of releasing confidential or classified information. As noted before, however,¹⁷ the Commission already has perfectly adequate disciplinary and criminal remedies for such situations. Indeed, if a Commission employee is intelligent

¹⁷ *Supra* at 234.

enough to write a publishable article, it seems unlikely that he or she would be stupid enough to use confidential or classified information.

The practices of other federal agencies merely reinforce this conclusion. Some agencies simply appear to have no restrictions at all, while others have very limited bans. Indeed, a number of agencies have rules which use the same language as the first two sentences in the Commission's rule, but which omit any ban on publication or any requirement of clearance.¹⁸ Since other agencies have made the considered judgment that they can do business on this basis, there seems to be little basis in fact for believing that the Commission can not.

The Commission's anti-publication rule thus represents an unwise—albeit largely inadvertent—policy choice. Moreover, and perhaps more important, it is a substantial inhibition on Commission employees' first amendment rights

VIOLATION OF THE FIRST AMENDMENT

Government employees today can blame much of the courts' initial hesitancy to recognize their first amendment rights on Mr. Justice Holmes. While still sitting on the Supreme Judicial Court of Massachusetts, Holmes handed down one of his exquisitely drafted opinions, holding that a city could discharge an employee who spoke on political issues. In the course of his opinion, Holmes gratuitously made an observation which remained viable until all too recently:

The plaintiff may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.¹⁹

¹⁸See, e.g., 10 C.F.R. § 0.735-40(d) (1971) (Atomic Energy Commission); 18 C.F.R. § 3.735-5(2) (1974) (Federal Power Commission); 29 C.F.R. § 1600.735-203(b) (1974) (Equal Employment Opportunity Commission).

¹⁹*McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892). John J. McAuliffe was an ordinary policeman who violated a department rule by helping his party to bring the vote in. The whole lawsuit appears to

Until the second half of the twentieth century, the rule in *McAuliffe's* case was alive and well. To be sure, the Supreme Court had held as early as 1926 that the government could not exact unconstitutional conditions—the famous “rock and whirlpool” imagery of Mr. Justice Sutherland.²⁰ Nevertheless, it did not quickly apply this reasoning to public employees’ first amendment rights; indeed, for a long time the Court’s test of an unconstitutional condition was whether the condition was reasonably related to the governmental privilege granted.²¹

The tone of this argument was set in *United Public Workers v. Mitchell*,²² where the Court upheld the constitutionality of the Hatch Act’s ban on all political activities by federal employees. Writing for a bare plurality of four, Mr. Justice Reed spoke only in terms of the government’s need for political purity in its workers; he never even raised the issue of an employee’s interest in maintaining his or her job. In several early loyalty oath cases, the Court thus used similar reasoning to uphold statutes which conditioned public employment upon execution of non-communist oaths and affidavits.²³ At the same time, however, the Court began to accept the notion of at least some vested interest in public employment. It thus noted that:

We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protec-

have been basically just a local political squabble between rival factions. Unfortunately, however, the report of the case reveals the party affiliation of neither *McAuliffe* nor his superiors.

²⁰*Frost v. Railroad Commission*, 271 U.S. 583, 593 (1926). The court went on to note that “the power of the state is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.” *Id.* at 593-94.

²¹*See, e.g., Hale, Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321, 325 (1935); Note, 73 Harv. L. Rev. 1595, 1597 (1960).

²²330 U.S. 75 (1947).

²³*See, e.g., Garner v. Board of Public Works*, 341 U.S. 716 (1951); *Adler v. Board of Education*, 342 U.S. 485 (1952).

tion does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory.²⁴

The Court took a major step toward changing this view of government employees in *Keyishian v. Board of Regents*.²⁵ The court there invalidated the same loyalty oath statute which a decade before it had upheld.²⁶ More importantly, however, the Court noted that it had modified its conception of a government employee's interest in his or her job.

The Court thus recognized that potential deprivation of a job was as serious a sanction as a potential civil or criminal proceeding. Accordingly, an agency cannot do indirectly by dismissal what it cannot do directly by prosecution. To be sure, different classes of federal employees have different expectancies concerning job security; a quasi-political Schedule C appointee does not envision tenure and knows that he or she can be fired by the agency at will. Nevertheless, dismissal represents a very real hardship for any class of employee; indeed, the Court has not drawn first amendment lines on the basis of an employee's status.²⁷

Accordingly, the Court has taken an increasingly dim view

²⁴*Wieman v. Updegraff*, 344 U.S. 185 (1952). The Court later picked up this more or less offhand comment and used it as the basis for invalidating a number of other indirect inhibitions on first amendment rights. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958); (conditioning of state tax benefits on non-communist oath); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (legislative investigations of alleged communists).

²⁵385 U.S. 589 (1966).

²⁶*Adler v. Board of Education*, 342 U.S. 485 (1952). While the *Adler* case had upheld the statute on its face, the *Keyishian* Court found that the interaction of numerous and complex statutes made the whole scheme void for vagueness. If the Court had considered the issue on a totally fresh basis, it thus presumably would have held flatly that the statute violated the First Amendment.

²⁷And even more recently, the Court has applied rigorous procedural due process requirements to the dismissal of even non-tenured personnel. *Compare Perry v. Sinderman*, 408 U.S. 593 (1972) *with* *Board of Regents v. Roth*, 408 U.S. 564 (1972).

of any inhibitions on the first amendment rights of government employees. The Commission's anti-publication rule thus runs afoul of the First Amendment for a number of reasons—its chilling effect on employees' speech, its operation as a prior restraint, and its discriminatory application.

Chilling Effect

The Supreme Court laid *McAuliffe* to a long overdue and well deserved rest in *Pickering v. Board of Education*²⁸. The Court there held that a school board could not fire a teacher because he had criticized the school's management in a letter to a local newspaper. Indeed, *Pickering* represented a far more aggravated situation than that at which the Commission's anti-publication rule is aimed; the Court there found that several of the statements in the teacher's letter were defamatory.²⁹

Although the Court held that it would not be "feasible to attempt to lay down a general standard . . .,"³⁰ it made quite clear that it viewed any muzzling of government employees with extreme suspicion. It thus rejected out of hand the school board's argument that it had some vague interest in restricting its employees' public statements. A governmental entity, the Court stated, had no particular immunity from criticism.³¹ Indeed, the Court noted that the operation of public schools was a matter of "legitimate public concern"³² and that government employees often were the best critics of government:

Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential

²⁸ 391 U.S. 563 (1968).

²⁹ *Id.* at 572-73. Moreover, the plaintiff's letter in *Pickering* was highly critical. It noted that "this shows their stop at 'nothing' attitude . . ." and pointed up "the kind of totalitarianism teachers live in at the high school, and your children go to school."

³⁰ *Id.* at 569.

³¹ *Id.* at 571.

³² *Id.*

that they be able to speak out freely on such questions without fear of retaliatory dismissal.³³

In fact, the Court indicated that an agency was justified in dismissing an employee for a public statement only if it created a very serious and tangible discipline problem within the government³⁴—a condition which is likely to be rare.³⁵

Pickering's reasoning should apply with even greater force to the Commission's anti-publication rule, which penalizes employees not for making defamatory public statements, but rather for making any public statements at all. The Commission certainly can not claim any greater immunity from criticism than a school board; indeed, it should be more open to criticism, because of its greater public interest responsibilities. Similarly, Commission actions are matters of "legitimate public concern" almost by definition, since the agency is under a statutory mandate to enforce the "public interest, convenience, any necessity."³⁶ And just as teachers are the best critics of school boards, Commission employees may be the best critics of the Commission—without using any classified or confidential information. As noted before,³⁷ Commission employees have an almost unique ability to develop expertise in specialized areas and to transfer that expertise into useful publications.

To be sure, the scope and vitality of *Pickering* may be

³³*Id.* at 572.

³⁴*Id.* at 570.

³⁵One lower federal court found that a government employee's public statements were sufficiently serious to create a discipline problem. *Moore v. Board of Education*, 452 F. 2d 726 (5th Cir. 1971). Most other federal courts have looked at such governmental claims, however, somewhat suspiciously. *See, e.g., Donahue v. Staunton*, 471 F. 2d 475 (7th Cir. 1972); *Commonwealth ex. rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (E.D. Pa. 1973).

³⁶47 U.S.C. § 309(a) (1972). Thus a school board arguably might concern itself only with a limited constituency—*e.g.*, school-age children—while the Commission must consider the whole panoply of differing and often conflicting public interests.

³⁷*Supra* at 238.

marginally suspect. In *Arnett v. Kennedy*,³⁸ the Court upheld the dismissal of an OEO employee who had accused a higher official of misusing government funds. But though the result in *Arnett* certainly was diametrically opposed to that in *Pickering*, the reasoning was not. The only first amendment issue before the court was the constitutionality of the statute which authorized plaintiff's discharge; and the plurality held only that the statute was not void for vagueness. Indeed, the plurality cited *Pickering* only once,³⁹ and did not discuss the case at all. The Court's very inability to muster a majority as well as the cloudy nature of the plurality opinion thus make the case almost useless as precedent.

Moreover, the Court has gone to great lengths in protecting government employees' rights to criticize their subordinates. In *Barr v. Matteo*,⁴⁰ the Court held that former employees could not recover damages in a libel action against their former supervisor, who had issued a defamatory press release concerning them. In thus conferring an absolute privilege upon government officials, the Court reasoned that employees needed to pursue their notions of the public interest freely. The court noted that:

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental services and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.⁴¹

To be sure, the Court did not extend the principle to all government employees at all levels; indeed, it indicated that the privilege might attach only to employees with policy-making

³⁸42 U.S.L.W. 4513 (April 16, 1974). The case definitely had some strange overtones to it, since the plaintiff's statement was that his supervisor had offered \$100,000 to a local agency to sign a statement accusing the plaintiff of wrong-doing.

³⁹*Id.* at 4522.

⁴⁰360 U.S. 564 (1959).

⁴¹*Id.* at 571.

functions. At the same time, however, the Court made clear that though the scope of the privilege might vary from official to official, almost any professional employee would receive some protection.⁴² Moreover, the Court later extended the principle to a Navy captain,⁴³ and the lower federal courts have applied the *Barr* doctrine to comparatively low-level employees.⁴⁴

The converse of the *Barr* principle is that government employees should be free to criticize their employers. Indeed, it would be somewhat anomalous to permit agency employees to defame their subordinates, and yet not allow a right of reply.⁴⁵ Moreover, *Barr* establishes the principle that government employees should be free to speak out on issues which they consider important to the public.

Finally, at least one court has shown a willingness to curtail agency censorship of employees' publications. In *United States v. Marchetti*,⁴⁶ the Fourth Circuit enjoined a former employee of the Central Intelligence Agency from publishing a book which discussed his experiences with the CIA, on the ground that he had signed a valid agreement to clear all publications with the agency. The court was careful to restrict the grounds of its decision, however, to situations involving classified information and national security. The court thus refused to enforce the contract "to the extent that it purports to prevent unclassified information, for, to that extent, the oath would be in contravention of his [the plaintiff's] First Amendment rights."⁴⁷ Moreover, in considering the specific deletions which

⁴²*Id.* at 573-74.

⁴³*Howard v. Lyons*, 360 U.S. 593 (1959).

⁴⁴For an excellent discussion of these cases, see W. Gellhorn & C. Byse, *Cases and Materials on Administrative Law* 309-314 (5th Ed. 1970).

⁴⁵Indeed, the Commission's own fairness doctrine and regulations create a right of reply. 47 C.F.R. § 73.123 (1974).

⁴⁶466 F. 2d 1309 (4th Cir. 1972), *cert. den.* 409 U.S. 1063 (1973).

⁴⁷*Id.* at 1317 (footnote omitted). Ironically enough, the CIA's action backfired, by giving the book tremendous free publicity. In its ultimately censored form, it sold quite well. This type of backlash thus indicates that agencies profit little from playing the role of censor.

the CIA had made, the District Court later rejected several hundred of them—thus indicating that its view of classified information was rather different from the CIA's.⁴⁸

The Commission's anti-publication rule thus seems to fly in the face of the First Amendment, to the extent that it constitutes a flat ban on publication by employees. The rule represents a type of thinking which may have had some validity fifty years ago, but which now has lost its vitality.

Prior Restraint

Although censorship was a common and accepted practice during colonial days, in recent times the Court has condemned prior restraints in all but the most compelling situations.⁴⁹ Moreover, the Court has been particularly chary about "administrative restraints"⁵⁰ and about censors with too much discretion.⁵¹ In addition, the Court has recognized that informal pressure may constitute a very tangible prior restraint⁵² and that threats can be as inhibiting as action.⁵³

The Commission's anti-publication rule thus does not seem to fall within the narrow scope of allowable prior restraints. Enforcement of the rule obviously involves "administrative restraints," since it rests in the hands of administrative officials. Moreover, calling the rule vague goes far by way of understatement.

⁴⁸ *Alfred E. Knopf, Inc. v. Colby*, (Civ. No. 540-73-A, E.D. Va., 1974). And even more recently, the Third Circuit held that a housing authority could not discipline employees for taking public positions on a referendum which the agency was conducting. *Aldermen v. Philadelphia Housing Authority*, 42 U.S.L.W. 2574 (3rd Cir., April 16, 1974).

⁴⁹ *Near v. Minnesota*, 283 U.S. 697 (1931). The Court indicated that it would uphold prior restraints only to prevent publication of obscenity or interference with the national security.

⁵⁰ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) struck down a Rhode Island statutory scheme whereby state officials would "advise" book dealers that sale of a particular book might lead to criminal liability.

⁵¹ In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) the Court found that a statutory standard of "sacreligious" was too vague.

⁵² *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

⁵³ *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946).

ment; as noted before,⁵⁴ on its face the rule prohibits only identification of an author as a Commission employee. Finally, the rule represents a very tangible threat to every Commission employee, since a violation can lead to dismissal.

Moreover, even if the substance of the rule met the Court's increasingly stringent standards, the enforcement procedure would not. In the extremely narrow range of permissible prior restraints, the Court has conditioned the use of prior restraints upon a high degree of procedural due process. In *Freedman v. Maryland*,⁵⁵ the Court thus struck down a Maryland statute which provided for prior administrative review of motion pictures. Although the Court previously had recognized obscenity as one of the few areas in which a prior restraint was appropriate,⁵⁶ it held that the Maryland statutory scheme failed to provide adequate procedural due process. The Court thus held that any form of prior restraint had to place the burden of proof upon the censor and provide for speedy judicial review of the censor's decision.⁵⁷

The Commission's anti-publication rule fails to meet either test. Neither the rule nor its interpretation places the burden of proof upon the Commission. And the Commission is under no duty at all to secure a speedy judicial determination as to the validity of its restraint. Indeed, it is somewhat questionable as to whether an employee could secure judicial review at all, since the Commission's failure to grant permission hardly represents a final order—let alone any order at all.

The anti-publication rule thus violates the First Amend-

⁵⁴ *Supra* at 232-233.

⁵⁵ 380 U.S. 51 (1965).

⁵⁶ *Supra* note 49.

⁵⁷ The Court thus noted that:

First, the burden of proving that the film is unprotected expression must rest on the censor. . . . Second . . . only a proceeding requiring a judicial determination suffices to impose a valid final restraint To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing of the film. 380 U.S. at 58-59.

ment's ban on prior restraints both substantively and procedurally. Indeed, it is doubtful whether the Commission could draft any rule which would meet the Court's restrictions.

Discrimination

The Supreme Court consistently has held under both the First and Fourteenth Amendments that a government may not discriminate in granting first amendment rights.⁵⁸ The rule discriminates quite overtly, however, by allowing only selected Commission personnel to publish. Thus a Commissioner or administrative law judge is perfectly free to publish, while a staff employee is totally barred. As noted before,⁵⁹ there are perfectly valid legal reasons for exempting these two groups from the rule. In practical terms, however, a Commissioner or a judge carries much more weight with the public and thus has a much greater ability to bring about the very evils at which the rule appears to be directed.⁶⁰

Accordingly, the Commission has chosen the wrong way of remedying its legal inability to prohibit publication by Commissioners and judges. Instead of promulgating a discriminatory rule, it simply should have adopted no rule at all.

Private Law Analogy

Although labor unions generally are not subject to the Fourteenth Amendment, both state courts and Congress⁶¹ have imposed limitations on unions' power to expel members for criticizing either officials or policy. The cases in this area often involved conduct which went beyond the boundaries of criticism; the courts frequently were reviewing a bitter internal

⁵⁸ See, e.g., *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946) and *Public Clearing House v. Coyne*, 194 U.S. 497 (1904), where the Court held that the Post Office could not deny mailing privileges to disapproved literature.

⁵⁹ *Supra* note 11. As indicated there, both Commissioners and judges have statutory independence from the Commission's rules.

⁶⁰ For an analysis of the supposed evils, see pp. 234-237, *supra*.

⁶¹ 29 U.S.C. § 411(a)(2) (1972).

power struggle—a situation not likely to arise from Commission employee's publishing an article.

The courts have justified their intervention in this area on a number of bases. Very often they have invalidated expulsions from unions under the guise of a failure of procedural due process or through an overly narrow construction of the union's constitution.⁶² A few courts have invoked the free speech guarantees of their state constitutions,⁶³ and one based its decision on the federal Constitution without explaining how state action was present.⁶⁴ A New York and a California court came to exactly the same conclusion, however, merely on the grounds of public policy.⁶⁵

The case for government employees should be even more compelling than that for union members. On the one hand, expulsion from a union does not constitute deprivation of a livelihood; indeed, a member may well not lose his or her job, unless he or she works in a closed shop.⁶⁶ On the other hand, a union needs discipline more than a government agency; the union must present a unified front in a bargaining situation, while an agency requires only enough unity to preserve efficiency. Accordingly, it is somewhat ironic that Commission employees receive more limited first amendment rights than union members.

CONCLUSION

The Commission's anti-publication rule thus represents an attempt to reach rather questionable ends through even more

⁶²Summers, *Legal Limitation on Union Discipline*, 64 Harv. L. Rev. 1049 (1951); Summers, *The Law of Union Discipline*, 70 Yale L. J. 175, 193-94 (1960).

⁶³Harrison v. Brotherhood of Railway and SS. Clerks, 271 S.W. 2d 852 (Ct. App. Ky., 1954); Spayd v. Running Rock Lodge, 270 Pa. 67, 112 A. 70 (1921).

⁶⁴Crossen v. Duffy, 90 Ohio App. 252, 103 N.E. 2d 769 (1951).

⁶⁵Madden v. Atkins, 4 N.Y. 2d 283, 174 N.Y.S. 2d 653, 151 N.E. 2d 73 (1958); Mitchell v. International Ass'n of Machinists, 16 Cal. Rptr. 813 (Dist Ct. App. 1961).

⁶⁶Summers, *The Law of Union Discipline*, 70 Yale L. J. 175, 179 (1960).

questionable means; as noted before,⁶⁷ it is almost impossible to ascertain the purpose of the rule, let alone its meaning. Moreover, the rule infringes on Commission employees' first amendment rights to a degree which a court probably would not tolerate.

Accordingly, the Commission simply should repeal the clearance requirement of the rule. To be sure, a total lack of any procedure might redound to Commission employees' detriment, by encouraging their superiors to exercise covert "lifted eyebrow" regulation. This type of suppression is just as possible under the existing rule, however, and few Commission employees are intellectually dishonest enough to suppress their inferiors' dissident viewpoints.

In the past, the Commission has gone to great lengths to protect the first amendment rights of its licensees and the public. It now should do the same for its own personnel.

⁶⁷*Supra* at 234.