FREEDOM OF SPEECH

by radio and television

ELMER E. SMEAD

PUBLIC AFFAIRS PRESS WASHINGTON, D.C.

In calling attention to the significance of this book Morris L. Ernst, one of the nation's leading experts on freedom of communication, states in his introduction:

"Above all, this stimulating volume gives the story so that the reader can think and think and think. This is a book not for those who want passive education—that is, education only for retention. It is quietly provocative and if enough readers buy the book and think through to their own solutions the standards of taste can some day be restored . . .

"At some time probably every adult would like to own a mike to broadcast his prejudices, but since there are not enough air waves to allow such individual privileges without utter chaos, someone—that is the federal government—must screen and select the lucky few. From this ineluctable conclusion of a mathematical nature it is apparent that standards must be established for selection and renewal of the lucky broadcasters.

"This volume deals with these standards and tells the history of the powers used . . ."

Professor of Government at Dartmouth College, Dr. Elmer E. Smead is a specialist in the field of governmental regulation of business. For the past ten years he has concentrated on the broadcasting industry, doing much interviewing of radio and television executives in order to acquire an appreciation of their attitudes toward regulation and their practical problems.

He holds the degrees of A.B. (University of Akron), A.M. and Ph.D. (Princeton), A.M. (Hon., Dartmouth). His publications include the co-authorship of two textbooks on social science and a number of articles in law journals.

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Freedom of Speech by Radio and Television

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INTRODUCTION BY MORRIS L. ERNST

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Freedom of Speech by Radio and Television

INTRODUCTION

A violent revolution in the folkway of our Republic has taken place with comparatively little thoughtful appraisal. I refer to the matrix of this volume—communication by radio and television, those fabulous new instruments of mass media. Many grumble about the content of programs; early in the development of radio, newspapers agreed that no news should be supplied by the regular news services; advertising agencies have grown rich by developing techniques of persuasion by repetition—the antithesis of rational man.

What we needed was a simple but comprehensive picture of the relation of the government to the licensees who receive monopoly grants to operate for the public interest in the mass distribution of education and entertainment over the air. Here is a volume written by a scholar but without the mysteries of vernacular that usually exude from the pens of the experts.

At some time probably every adult would like to own a mike to broadcast his prejudices, but since there are not enough air waves to allow such individual privileges without utter chaos, someone—that is the federal government—must screen and select the lucky few. From this ineluctable conclusion of a mathematical nature it is apparent that standards must be established for selection and renewal of the lucky broadcasters.

This volume deals with these standards and tells the history of the powers used, useable or not used with respect to such standards. Hence the subject matter to which the author addresses himself is offensive programs, lotteries, give-aways, gambling, libel, amounts of advertising, proportion of public affairs content, limits of permissible controversy, division between commercial and sustaining time, and the question of news on the air as compared to other sources for news in the market place of thought.

I have been most intrigued by the debate carried on dealing with government regulation versus self-regulation, and how and where we draw this difficult line. That there are conflicting desires in our

culture between public and private-profit interests makes the problem of radio and television assume a high preference in the list of issues facing our people. The race is on between quantity and quality. Must women's breasts and guns hold forever the highest prestige rungs on the communication ladder? Must the interests of licensees and commodity sellers drive us to the lowest common denominator of taste, that is, the most popular programming?

Above all, this stimulating volume gives the story so that the reader can think and think and think. This is a book not for those who want passive education—that is, education only for retention. It is quietly provocative and if enough readers buy the book and think through to their own solutions the standards of taste can some day be restored. My own starting point for reappraisals is: Should the licensees and the networks rightfully have the power to determine our mores on the French revolutionary thesis—"we follow the mob because we lead it"?

MORRIS L. ERNST

New York City

PREFACE

As is increasingly evident, governmental control of radio and television programs and the allocation to broadcasting stations of frequencies in the spectrum are raising many complex problems.

In the field of program regulation, old controversies over freedom of speech and censorship are still being debated. Indeed, a number of current problems may flare into major conflicts: the FCC is giving warnings that some stations are broadcasting "editorials" against pay-TV without giving its supporters adequate opportunities to "editorialize" in its defense; broadcasters are looking forward to a Supreme Court decision on whether the statutory denial of their right to censor the speeches of candidates in political campaigns gives them immunity from liability under state laws against defamation; and newspapers are protesting the decisions of the FCC denying them licenses.

In the regulation of the spectrum, many current problems are seriously complicated by the mixture of economics and engineering. Most pressing are the needs for a solution of the economic problems of television stations in the ultra high frequencies and for a determination of the scientific characteristics of these frequencies. These problems are calling for decisions on what is the best place in the spectrum for TV and on what can be done to find enough frequencies in this part of the spectrum to permit the development of a more competitive television industry. Other problems which are just as important to the public but which are not getting as much publicity are those involved in the duplication of stations on clear channels, the granting of higher power for some clear channel and some local stations, the extension of the hours of daytime stations, and the increase in the number of stations in those areas which may become or which may already be too crowded to permit economic survival for all.

Much work is being done. The FCC is making decisions; a number of cases are going through the courts; Congressional committees are holding hearings and issuing reports; the industry's engineers are making studies and recommendations; special groups of scientists,

economists and lawyers are trying to help the government and the industry.

This book describes the long history behind these problems—their origins and development—and the current difficulties involved in their solution. It shows the variety of interests that are affected by what is done or not done and the incidence of help and injury which the conflicts in interest create. This study also demonstrates the complexity of the inter-relations of Congress, FCC, courts and broadcasters which are unavoidable in the attempt to solve each problem. Conflicting ideas of what is good or bad for the public interest make these inter-relationships still more complex.

It can be safely predicted that all of these problems will not be definitively solved in the immediate future. Since they are continuing problems both the government and the industry will undoubtedly be struggling with them for many years to come.

ELMER E. SMEAD

Hanover, New Hampshire

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I

PROGRAM REGULATION

Within a few years after the first radio stations made their debut on the air, the federal government began to evince concern over what some of them were doing. Secretary of Commerce Herbert Hoover, who was licensing the broadcasters under an old statute of 1912, and Congressional committees, frequently found it necessary to dicuss programming practices with representatives of the infant industry.[1]

While the Department of Commerce took a general *laissez-faire* position, in the 1920's, it did not ignore programming entirely. Secretary Hoover urged improvements. Moreover, the first regulatory step was taken. Although nobody was kept or put off the air on programming grounds, one of the requirements for high power was that the licensee be "willing to put on original programs" instead of devoting all his time on the air to the playing of phonograph records.[2] As early as 1923 governmental coercion, though in a mild form, was beginning to emerge.

With the enactment of the Radio Control Act in 1927, program regulation acquired most of its present characteristics, both as to the contents of the rules and the methods used. Congress imposed restrictions by statute. In addition, the Federal Radio Commission, the regulatory body created to enforce the statute, was directed to grant licenses in the "public interest, convenience and necessity." In its first year, the Commission held that this mandate imposed upon it a duty to pass upon program plans and practices.[3] It believed that public interest meant more than spectrum and engineering regulation. Even though a station obeyed such rules strictly, it could still offend the public interest by the kind of material it put on the air. Satisfactory programming was therefore made a qualification for getting and holding a license.

The first thing the FRC did was to call for information on programs in its application forms.[4] In its second year, it issued the first general pronouncement concerning the kind of program

performance that would meet the public service requirement.[5] In these early years, the Commission also began the practice of establishing standards of good and bad programming in its decisions granting or denying licenses.

Congress made only slight changes in the law when it replaced the 1927 statute by the Communications Act of 1934. Moreover, more recent legislation has not seriously disturbed the general pattern of regulation. In effect, FRC procedures have been continued to this day by the new regulatory agency, the Federal Communications Commission. Most of the present day standards of programming can also be traced back to these early days.

Newcomers, whether applicants for new stations or for the purchase of existing stations, must show in their applications an intention to observe the standards of the FCC. Ignorance, indifference or defiance are fatal. Promises of future performance and the records of the past weigh most heavily in cases of competing applications. For example, two or more applicants may ask for stations in a locality where there is room for only one. In fact, there have been numerous instances when the number of parties in the same city were greater than the number of frequencies which the Commission could make available because of the statutory requirement of geographical distribution. Another kind of conflict occurs where two or more applicants in different localities want new stations or increases in power, but all cannot be accommodated because of the resulting interference. The same problem has been presented where a number of stations which have been sharing time on the same frequency want full time. In all these conflicts the Commission must make a choice, and prospective programming or past performance provides grounds upon which it can do so. If the parties are equally competent upon all other grounds—for example, in the observance of engineering regulations—programming may offer the only guide.

After a license has been granted, the Commission has numerous opportunities to check on performance. All stations must keep program logs and make annual reports of the programs put on the air during specified days of the year. Also, the Commission may at any time call for any additional information it may want. The most important time for an FCC check comes with the application for a renewal of the license. The statutes leave the length of the license period up to the discretion of the Commission, setting a maximum of three years.[6A] At the end of the term, the broadcasters

must ask for renewals and in their applications must answer searching questions on their past programming activities. If the Commission believes that a station has failed to maintain satisfactory standards, a renewal may be denied thus ending the broadcaster's business career.

While the FCC can act on its own initiative, it is usually stimulated by complaints which are sent to its offices. Broadcasters and telecasters cannot please everybody and there is always somebody who is likely to carry his protest to the government. Also, Congressmen sometimes demand regulation, either on their own initiative or in response to the requests of constituents.

Most complaints are merely sent to the stations involved. Where the charges are more serious, the scripts of the programs which are being criticised may be examined. If it is clear that the regulations were violated, warnings may be issued. By letter or personal conference, licensees are reminded of their duty to conform to the statutory and administrative requirements. Most cases do not go any farther. In the few that do, the next step is to set the license down for a hearing. This is more serious because it makes trouble, expense and bad publicity for the accused station. Most hearings, however, result in renewals. The offense may be considered insufficient to justify a denial—for example, there are only occasional lapses or the rest of program service is held to be of so high a quality as to overbalance the defects. The "death sentence", in fact, has been invoked only in those cases in which the Commission thought that the stations were guilty of extensive and extreme disregard of the public interest. Even in many extreme cases, stations have avoided destruction by showing that they had already taken steps to terminate the criticised programs or by promising that they would do so in the future. As FCC Chairman Paul Porter expressed it: "Stations always get a renewal of their franchises unless somebody complains about it with great vigor and then they usually get it anyway."[6] As a result, the extreme penalty has been invoked in only a few instances over the entire history of the industry.[7]

Another procedure has been to put stations on temporary licenses. That is, instead of the full statutory period of three years, the FCC may extend a license for short periods, usually ninety days, thus requiring the station to account for its activities at more frequent intervals. A full-time renewal is granted when the FCC is convinced that the station is complying with the regulations. This method of procedure has been frequently used and has proved to be very effective in many specific cases.

FCC regulatory activities have waxed and waned. At some times the Commission has been aggressive and at other times it has been quiescent. Moreover, even when it has been the most vigorous it has been more inclined to coerce by threat than by termination of licenses. Throughout the history of the broadcasting industry, Commissioners have made speeches and written articles in which threats of punishment for various programming practices were made. While this procedure has never constituted regulation in any formal or legal sense, it has often been coercive—and therefore regulatory—in its consequences.

From the very beginning, governmental regulation has gone hand-in-hand with self regulation. Broadcasters have always created standards of good and bad programming for their own guidance in the formulation of their program schedules.

II

PROGRAMMING IN THE PUBLIC INTEREST

Some of the regulations of the Federal Communications Commission are negative in form. They state and prohibit program practices which are considered contrary to the public interest.

Offensive Content

Programs are held to offend the public interest when they violate the conventional moral code. Federal statutes prohibit the use of "any obscene, indecent, or profane language" on the air.[1] As well as being grounds for denial of a license by the FCC, the use of such words is a federal crime punishable in the federal courts by fine and imprisonment.

In the case of KVEP of Portland, Oregon, the licensee permitted the use of his station for about two hours daily by Robert C. Duncan, who called himself the "Oregon Wildcat", to attack individuals and corporations, some of which he believed to be responsible for his defeat in a political campaign. The language was extreme and in the opinion of the Commission violated the statutory prohibition. As a result, the station was dropped from the air and, subsequently, Duncan was prosecuted and convicted for the criminal offense.

This case raised the interesting question of what, at law, is "obscene, indecent or profane." On appeal from the conviction, the U.S. Court of Appeals held that some of the words—for example, "grafting thief"; "doggoned thieving, lying, plundering, doggoned corrupt crook"; "lowest, dirtiest, vilest, grave robber"—were "abusive" but not obscene or indecent because they had "no tendency to excite libidinous thoughts on the part of the hearers." The conviction was sustained, however, on the grounds that Duncan had been profane when he used the expressions: "damn scoundrel", "by God", "I'll put on the mantle of the Lord and call down the curse of God on you."[2] According to the Court, profanity is any language which expresses irreverence and contempt for God, or for things holy and sacred, or

which calls down divine vengeance and condemnation on the heads of other people.

As this case shows, the legal definition of "indecent, obscene and profane" is narrower than that held by many overly-sensitive people. In view of the vagueness of the definition, cases may, of course, fall on the border line. As a result, on many occasions complaints and demands for regulation have been counteracted by doubt.

An interesting illustration is the case of KWKH, Shreveport, Louisiana, when it was still under the management of its original owner in 1929. The licensee used his station to air his prejudices toward people and organizations. One of his pet dislikes was the chain stores, which he frequently attacked. One story has it that he once declared his purpose in operating a radio station to be "for the greater glory of God and the damnation of chain stores."[3] The use of such words as "damn" and "hell" brought listener complaints to the desks of Commissioners and Congressmen. Chain stores asked the Commission to stop the offenses, but no action resulted. Subsequently, FRC Chairman Ira E. Robinson was critically quizzed by members of the Senate Committee on Interstate Commerce for the failure of the Commission to take any punitive action. In the discussion there was considerable speculation about what constituted the prohibited language and, while there are some court decisions holding the above words to be profane, opinion in the Committee was divided. Very clearly, the FRC was reluctant to act and some of the Senators were convinced that it should do so. The pressure was finally successful; the Commission sent the case to the Department of Justice. This step toward invoking the criminal penalty was enough for the licensee. He promised to be good and the case was therefore dropped.[4]

Another case in point is that of KTNT, Muscatine, Iowa. The licensee claimed to have a cure for cancer and used the station to advertise this cure and to urge patients to patronize his hospital in which the cure was practiced. Although the reliability of his claims and methods of treatment were not made grounds for the FRC's decision, the courts subsequently held them fraudulent.[5] Opposed by the established medical authorities, he made attacks on the state board of health and the medical societies. Other targets were local newspapers, public utilities and the state Attorney General. The FRC held that he was going to extremes, being bitter and abusive in his attacks, riding personal prejudices and using questionable language.[6] The Commissioners thought that his language was "vulgar, if not indeed indecent."

An interesting question arises in the broadcasting and telecasting of plays which have established a reputation in the legitimate theatre. On the one hand, this kind of programming has been held to be meritorious, educational and in the public interest. On the other hand, radio and TV are not accorded as much freedom of expression as is permitted to the stage. The conflict between these two standards can create a serious and difficult problem for both the industry and its regulators, as the broadcasting of Eugene O'Neill's Pulitzer Prize play, Beyond the Horizon, has clearly demonstrated. The expressions "hell", "damnation", and "for God's sake" went out over the air and brought reaction. The FCC set a license down for hearing but then granted a renewal without hearing in response to a vigorous and widespread protest. Even though this case showed a greater support for realistic dramatizations of high artistic quality than for individual sensitivities, the fact is that radio and TV must follow the example of the movie industry which has traditionally maintained the illusion that people never swear.

Governmental regulation has not been the only control. Self regulation has made the problem of offensive content only a minor one; violations of the regulations are only occasional occurrences. Broadcasters have accepted the responsibility, which the Commission has frequently emphasized, of exercising control over their programs. In addition to the constant fear of governmental punishment, they know that offensive practices are not good business. Audience loyalty is a valuable asset for both the industry and the advertisers. A desire not to offend, therefore, permeates the whole industry.

It has been impossible, however, to avoid all trouble. The sensitivities of people are so varied that complaints must always be expected. In audience participation programs, questionable language is difficult to prevent because the master of ceremonies can never be sure what his interviewees are going to say. It is sometimes very difficult to prevent speakers from departing from their prepared scripts. Listeners can feel offended even though bad words are not used, and the broadcasters cannot always anticipate the implications which individual listeners think they can discern. Innuendo and tone of voice may be enough, as shown by the complaints generated by a Bergen-McCarthy program on which Mae West appeared as a guest artist. Strict conventional morality has had a particular significance for television. Audience sensitivities can be infringed through the eyes as well as the ears. This fact has had two effects. There have been more opportunities to create

offense and the impact of the offenses has been greatly enhanced.

The infant industry quickly learned about the pitfalls hidden in the public's judgement of "good" and "bad." By early 1951, criticism of TV programs was being carried to the telecasters, Congressmen and the Commission. Chairman Wayne Coy announced that an analysis of the FCC's mail over a 75 day period showed that of 1,000 complaints slightly less than 25 per cent were directed at "indecency, obscenity or profanity."[7] TV shows were said to be "suggestive" in a number of respects. By ad-libbing, pantomime, and facial expressions, comedians broadcast "off-color innuendos." Decency in costuming was violated by plunging necklines, scanty clothing in variety and musical shows, and camera angles. Decorum in action suffered in disrobing scenes and dancing. The advertising fraternity carried its emphasis on sex from the printed page to the video screen. "Cheesecake" was used in commercial displays even though it had no relation to the commodities being plugged.

Criticism was accompanied by demands for regulation. The FCC, however, adopted a lenient policy. Costs were very high in comparison with radio and, in these early days, the telecasters were operating in the red. Television was in its infancy and the Commission was afraid that if it were to bear down strictly it might stunt a growth which it wanted to foster. Moreover, the FCC had confidence that the industry could and would cure many of the defects which were due primarily to the newness of the medium and its need for mass audiences. As a result, no punitive processes were invoked. Instead, warnings were issued and reforms urged.

Congressmen also got into the pressure picture. In the summer of 1952 a sub-committee of the House Committee on Interstate Commerce conducted an investigation into the morals of the industry.[8] Complainants were given a forum. Again, the government decided to leave regulation to the industry.[9] The Committee felt that the publicity given to the cries of the critics would constitute a pressure on the industry to undertake the task and that this solution was preferable to the enactment of new legislation. At the same time, a club was held over the heads of the TV people; if they couldn't regulate themselves, the government would do it for them. Even before the attack went this far, the industry started to move. A television code was drawn up and adopted in 1951, and put into effect on March 1, 1952 by the National Association of Broadcasters.[9A] The TV Code, therefore, goes into considerable detail in defining the "Acceptability of Program Material" and in promoting "Decency

and Decorum in Production." Self regulation was accepted by both the industry and the government and has survived to the present time.

Administrative regulation has gone farther than the express commands of the statutes. Offensive content is broader than mere words which are considered inherently evil. Notions of bad taste and service in the public interest have invoked interdictions against the waging of private vendettas which stir up dissention and unrest in the community in which the station is doing business. The case which gave birth to this regulation appeared at the very beginnings of governmental regulation. The license of WCOT, Providence, Rhode Island, was terminated on the grounds that the owner went on the air to campaign for political office, to attack "his personal enemies", and to express his personal opinions on all kinds of questions in which he was interested. "False statements and defamatory language" was charged by the FRC but the report is silent about obscene or profane words.[10]

The *cause celebre* is the case of KGEF, Los Angeles, which was licensed to the Trinity Methodist Church, South. The minister, Robert Shuler, employed it "to make it hard for the bad man to do wrong in the community."[11] Accordingly, he used his microphone to make frequent and uninhibited attacks on "evil", as he saw it, whether official or private. "Not satisfied with attacking the judges of the courts in cases then pending before them, [he] attacked the bar association for its activites in recommending judges, charging it with ulterior and sinister purposes. With no more justification, he charged particular judges with sundry immoral acts. He made defamatory statements against the board of health. He charged that the labor temple in Los Angeles was a bootlegging and gambling joint. In none of these matters, when called on to explain or justify his statements, was he able to do more than declare that the statements expressed his own sentiments. On one occasion he announced over the radio that he had certain damaging information against a prominent unnamed man which, unless a contribution (presumably to the church) of a hundred dollars was forthcoming, he would disclose." Sex was a frequent subject of his radio sermons. "He alluded slightingly to the Jews as a race, and made frequent and bitter attacks on the Roman Catholic religion and its relations to government."

The case was clearly one of violation of the principle laid down by the Commission in the WCOT case. As a result, the FRC

deleted the station from the ether on the grounds that it was being used to create turmoil and strife in the community. On appeal, the United States Court of Appeals for the District of Columbia sustained the Commission and, in doing so, expressly approved of its regulation. "If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests." [12]

The broadcasts of Father Charles E. Coughlin raised a similar problem of offensive content. He was charged with using religion as a cloak under which to make bitter personal attacks on President Roosevelt and other prominent governmental officials, to take sides on the controversial political and economic issues of the day, and to taint American Jewry with the smear of communism. [13] Protests were many and vigorous. It was said that the Father was arousing prejudice and dissention. Demands for FCC action produced no result. On the other hand, the industry did act. In the first place, the networks denied him access to their facilities. Thereupon he arranged his own chain by buying time from a number of stations and leasing wire connections for his weekly broadcasts. [14] As protests mounted, the National Association of Broadcasters entered the fray; its President, Neville Miller, issued a public statement declaring that speeches "plainly calculated or likely to rouse religious or racial hatred and stir up strife" are "an evil not to be tolerated" and suggested they should be rejected by all broadcasters. [15]

If the FCC thinks that a newcomer will operate his station in the fashion of the Shulers and the Coughlins the application for a license will be denied. Anticipation of the future is based on the reputation and past activities of the applicant. For example, AM and FM licenses in Knoxville, Tennessee, were denied to a company in which controlling interest was held by the Reverend J. Harold Smith and his wife. The FCC found that the Reverend "had used intemperate language in his writings, sermons and broadcasts; that he had a constant habit of attacking the honesty and sincerity

of those individuals and groups who did not agree with him; and that he had attempted to institute economic boycotts of persons and groups who did not cooperate with him as he demanded; and that he had constantly solicited funds on the basis of statements of urgent need which were contrary to fact." Again, the FCC was sustained when its decision was appealed to the courts.[36]

One element in most of these cases against feuding is the making of attacks on religion. Shuler, for example, was anti-Catholic and Coughlin was anti-Semitic. Another rule on offensive content was therefore involved.

Early in its history, the industry determined, with governmental support and approval, that it would not grant time for attacks against churches or religious beliefs. The immediate cause was the preaching of Judge J. J. Rutherford, leader of the Jehovah's Witnesses. His tirades against Catholic, Protestant and Jewish churches are illustrated by the following excerpts from his sermons:

"The Catholic clergymen have no weapon of defense except a gag and a bludgeon. . . The fact that a man occupies the office of Pope of the Catholic organization is no evidence that he speaks with divine authority or that he has the approval of God and of Christ . . . The Catholics have no faith in the Protestants or the Jews; the Protestants have no confidence in the Catholics or the Jews; and the Jews have no faith in either the Catholics or Protestants. . . . The clergy of the church rejected Christ. . . There are many honest persons in the ranks of the Catholic organization who have been held there because they had no opportunitly to hear and to learn the truth . . . . For keeping the people in ignorance in this manner the pastors and clergymen and priests and their allies are held liable, and God gives His word and He will punish them for their wrong doing . . . The clergy serves the Devil and not Christ Jesus."[37]

The resentment of the churches led them to demand that the airways be denied to the Jehovahs. The first success was achieved when the networks revoked time which had already been granted. The Jehovahs immediately fought back. When they went to the FRC, all it did was to call for copies of the sermons. Attention was then directed to Congress. The first objective was to get pressure on the networks to grant the desired time. Failing this, a demand was made for coercive legislation.

Through it all, the Jehovahs did not get a sympathetic response. Broadcasters, Congressmen and Commissioners possessed the pre-

vailing attitude of most Americans: religion is a personal matter and attacks upon the religious beliefs of others are in bad taste. In addition, their position was supported by the more powerful of the two contending parties. The big established churches were a more formidable influence in American politics than the little Jehovahs.

The conclusion was inevitable. A rule against permitting the making of attacks against churches and religious beliefs was generally adopted by the industry and was subsequently incorporated in radio and television codes. In practice, the rule has been extensively, if not unanimously, observed. As a result, over the years self regulation has effectively handled this kind of offensive content.

Codes cite numerous other unwanted subjects: advice to the love-lorn, fortune-telling, astrology, phrenology, palm-reading and numerology. The Radio Commission helped the industry to avoid the unethical practice of medicine over the air in the famous Brinkley Case. Station KFKB, Milford, Kansas, was used by a doctor to advertise his hospital and to prescribe for patients, sight unseen. Listeners sent him letters describing their pains and he answered them over the air, diagnosing their ills and advising them to buy from him certain of his prepared medicines. For example, one script ran: "Probably he has gall stones. No, I don't mean that, I mean kidney stones. My advice to you is to put him on Prescription No. 80 and 50 for men, also 64. I think that he will be a whole lot better. Also, drink a lot of water." When the Commission terminated the license Brinkley appealed to the courts but, again, the judges sustained governmental regulation of programs.[28] Since then, the industry has restrained the broadcasting of advice by any professional person — medical, legal or other — in accord with the ethical standards of the particular profession.

The general notion of good taste and social desirability has also been expressed in a positive way. The codes demand that respect for law, marriage, religion, government and conventional morality be fostered. This means that crime, suicide, sex, drug addiction, drunkenness, cruelty and greed, gambling, and murder should be given unsympathetic treatment.

At various times over the years, there has been some discussion in governmental and industry circles of children's programs. The subject has also been injected into state and Congressional investigations on the general problem of juvenile delinquency. In the search for the causes of delinquency, some people have tended to

place responsibility upon the broadcasters along with such media as moving pictures and comic books. The charge has been that too many radio and TV shows are devoted to such subjects as crime and violence. As well as giving adolescents anti-social ideas, the shows create tensions and morbidity.

No governmental action has resulted. The evidence has never been impressive; much of the criticism has been subjective and emotional. Even where the "experts" have appeared as witnessess, they have been refuted by other "experts." The industry, nevertheless, has developed a number of regulations and controls. One common practice is to employ professional educators, psychologists and psychiatrists to advise on children's programs. Secondly, the subject is given considerable attention in the codes. They declare that programs should present the postive, conventional values which are sketched above; shows should teach that bad conduct is followed by retribution; programs which are suitable only for adults should not be broadcast during the hours which are popular to children.

Lotteries and Give-Aways

Gambling has always been popular with a large number of Americans. As a result, radio and television programs which offer the opportunity to win money have had high audience appeal, off and on, over the years. Because of their effectiveness in creating a public following, such programs have also been popular with many stations and sponsors. On the other side of the coin is the conventional taboo against gambling. The popularity of these programs, therefore, has been counteracted by frequent criticism on the grounds of their offensive content.

In early years, the Federal Radio Commission frequently considered proposals to regulate. There was much discussion. Occasionally, programs were called in for examination and warnings were issued. Despite all this wrestling with the problem, the FRC did not invoke any formal processes. One restraint was a serious doubt of its statutory authority. The Radio Control Act of 1927 was silent on gambling, lotteries, and the giving of prizes on programs being broadcast over the air. Also strongly inhibiting was a reluctance to undertake the disagreeable task.

It was apparent that nothing would be done until Congress established a policy by law. Beginning in 1929, bills started to appear in both chambers and soon won considerable support. The FRC approved the enactment of a statutory prohibition. A strong

pressure was exerted by the American Newpaper Publishers' Association. Already subject to similar legal restraints on their own businesses, the publishers wanted their radio competitors to be given the same treatment.[19] Finally, no opposition to legislation was expressed by the broadcasters. Many of them, in fact, took a positive stand in favor of it. They believed that gambling in programs was bad practice and by 1934 a large number had discontinued it voluntarily.[20] As a result, Section 316 of the Communications Act of 1934 prohibited the broadcasting of "any advertisement of or information concerning any lottery, gift enterpraise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." The offense was made a crime. Punishment by prosecution in the courts, as well as by loss of license, was therefore provided.

From 1936 to 1938 the FCC held a number of programs to be in violation of this provision.[21] In these cases, the defect was found to be in the advertising, which gave information of lotteries being run by the sponsors. The lotteries were not part of the program content. In the attempt to sell their goods, the sponsors of these programs had developed various sales schemes and bought radio time to induce potential customers to participate. Most common were the "jack-pot" drawings in which participants held numbers—received upon the purchase of goods or tickets—and the winning numbers were chosen by lot. Lucky winners were paid in money or goods. In its decisions, the FCC also laid down the general principle that any scheme which is banned by the Post Office, the Federal Trade Commission, or by the laws of a state in which a station is located could not be advertised over the air. In these instances, the Commission would not make its own independent determinations of the legality of the programs.

The Commission had a much more difficult decision where the giving of prizes was made a part of the program itself. For a number of years there was considerable doubt that give-away programs possessed all the elements which the courts held essential to constitute a lottery. There was no disagreement as to one characteristic, namely the giving of prizes. In fact, the specific purpose of give-aways is to give money or goods to some participants and not to others. The element of luck, or chance, was clearer in some instances than in others. Claims of a contest of skill could be made

where contestants on a quiz program were required to answer correctly the questions asked. Frequently, however, the element of chance was only thinly disguised. Quiz questions were often handled in such a way that some contestants could not miss — the clear objective being to distribute some prizes on each program. Pure luck was still clearer in those quiz programs where a telephone number was selected by lot and the lucky winner was required to be at home and listening to the program as well as able to answer the prize question. In many instances, there was no pretense of skill. Recipients were frankly chosen by lot.

Even if a program was guilty of these two elements–prize and luck — it was not necessarily a lottery. The third element specified by the courts — consideration — created most of the doubt over legality. If contestants were required to purchase tickets or goods, the consideration was clearly present. Such requirements, however, were not a common feature of radio's give-aways. Would the fact that winners were required to do something—answer the telephone, listen to the program, write a letter, know the correct answer to some question, act like a clown for the amusement of the audience — constitute "consideration"? The courts had not said so.

Prior to World War II, this legal uncertainty prevented the FCC from taking any formal action on give-aways. At the same time, some of the Commissioners felt that the problem could not be ignored. An increase in the number of give-aways, accompanied by complaints and demands for regulation, made some kind of action seem necessary. As a result, in 1940 the FCC referred seven programs to the Department of Justice for prosecution. Among them was the popular "Pot O' Gold". Typical of most give-aways, luck played an undisguised, major role in this program. A telephone number was selected by lot and a prize was granted to the person called if he answered the phone and was listening to the program at the time. This attack failed. The Attorney General refused to prosecute. In the opinion of his lawyers the reported programs were not in violation of the law. Despite this set-back, a number of Commissioners still pressed for action. The next step, therefore, was to ask Congress for new legislation making it clear that such programs were to be banned, and a letter to this effect was sent to the Senate Committee on Interstate Commerce. Again, the FCC was frustrated when Congress did not respond.

After a wartime hiatus, give-aways again became rampant. The "incurable urge to grab a fast buck" attracted many listeners

despite the conventional condemnation of gambling. Audience ratings tended to run high. Advertisers were quick to take advantage of the popularity and broadcasters went along. In the summer of 1948, the *Broadcasting* magazine estimated the "year's ether give-aways" at approximately $10,000,000. "The booty increases week by week as sponsors seek to outdo their competitors." Programs of high quality suffered. A classic case was that of Fred Allen, whose listeners "deserted him in droves in eager fervor to get in on loot offered by a give-away program." His program on NBC, which had enjoyed a very high rating in the Hooper surveys, dropped to the thirty-eighth place. At the same time an ABC give-away—"Stop the Music" — soared up to the number two spot.

But, give-aways did not meet with universal approval. Again, listeners sent complaints to the FCC. Congressmen and Commissioners were critical. Many broadcasters branded the growing practice as bad programing, even though they went along with the trend. The influential *Broadcasting* magazine added its voice to the rising volume of protest. According to its editorial writers, give-aways make for bad public relations, divert talent and money from the development of good programs, and constitute bad busniness. Audiences are built only through "artificial stimulation" and broadcasters and sponsors would some day wake up to the fact, like the movies before them, that they did not have a reliable public. Instead of learning regular and loyal listening habits, the dial-twisters were being taught to hop from give-away to give-away. "The cycle is bound to run out" and, when it did, stations would find it difficult "to return to normal, ethical pursuit of listeners through good programming." Meanwhile, the business side of broadcasting was being hurt. It was a common practice to give manufacturers "free rides" by publicity for their products which were given as prizes—automobiles, electrical appliances, clothing, and the like — on programs whose high cost was being borne by the sponsor. "These accounts will be lost to radio as long as they can get air credits on full networks, regional nets and individual stations. It is rate-cutting in its most exaggerated form."[22]

In 1946, the FCC was again moved to act. The application of WWDC, Washington, for an FM license was set down for denial, in a proposed decision, due partly to the station's plan to duplicate on FM a give-away of "questionable legality" being carried on its AM facilities. Rumors were immediately set loose in industry circles: the Commission was going to proceed through its licensing

power against give-aways in which pure chance played a major role. When the FCC reached the point of making its final decision, however, WWDC's application was granted.

At the same time, the Commission announced that it was going to study the problem in preparation for the issuance of general, industry-wide rules. The rule-making procedure was thought to offer many advantages over the licensing procedure. A multiplicity of cases could be avoided. Individual stations and programs would not be singled out for punitive treatment. Once the industry was given a standard, management could make the neccesary adjustments. General rules were therefore promulgated. At a meeting of four Commissioners (the minimum necessary for a quorum) and by a vote of three to one, the FCC banned any give-away program on which the winner of a prize is selected by chance if he is required (1) to furnish any money or thing of value, or to have in his possession any product which the sponsor is providing, (2) to be tuned in to the program, (3) to answer a question which any program on the station answers or aids in answering, (4) to answer the telephone or write a letter and his response, either verbatim or in substance, is broadcast.[23]

The announcement of the proposed regulations brought forth expressions of approval and disapproval from the industry. "Since the FCC began openly brooding about the legality of give-away shows, a remarkable number of highly-placed broadcasters have let it be known that their aversion to that sort of program antedates the FCC's."[24] Some broadcasters welcomed action by the Commission on the grounds that it would clarify the meaning of the statute, thus ending the doubts which had plagued them for years. Dislike of give-aways, however, did not always lead to approval of FCC regulation. In many instances, broadcasters thought the solution rested in self regulation. Hence, the NAB's new, post-war code mildly declared that programs "designed to buy the radio audience, by requiring it to listen in hope of reward rather than for the quality of entertainment, should be avoided." Subsequently, this provision was re-stated in the TV code. Diehards, however, frankly defended these lucrative shows and did not want them eliminated either by governmental or by self regulation.

The FCC's legal authority was attacked on two grounds. First, many radio lawyers argued that Congress, by removing Section 316 from the Communications Act[25] and incorporating it into the United States Criminal Code,[26] had intended to take power over lotteries

away from the FCC and give it to the Department of Justice. Enforcement, therefore, could be only by way of criminal prosecution in the courts.[27] One Commissioner, Frieda B. Hennock, agreed.

While this question of law was pending before the Commission, Frank T. Bow, General Counsel of a House of Representatives Select Committee to Investigate the FCC, challenged the Commission's authority.[28] The FCC was not intimidated. It immediately issued an opinion holding its authority to rest upon the statutory duty to pass on licenses in the public interest. Lotteries were contrary to the public interest and repeal of Section 316 had not denied this. In fact, Congress was reiterating its previous declaration to this effect by re-enacting its prohibition against lotteries in the Criminal Code. The fact that the prohibition was not formally a part of the Communications Act was immaterial because in defining public interest the FCC was bound to observe Congressional declarations of public policy in whatever statutes they were made. Furthermore, the FCC did not have to wait for criminal prosecution and conviction for violation of the anti-lottery law before it could act. It had authority under the Communications Act to make rules in the definition of the public interest and this included the power to define the kinds of programs which constitute violations of the prohibition against lotteries in the Criminal Code.[29]

A second ground for the legal attack was the FCC's interpretation of "consideration." By extending it from the payment of money to such acts as listening to a program, writing a letter, or answering the telephone, the Commission was guilty of making it too broad.

These two arguments were taken to the courts. ABC, NBC, and CBS asked a special, three-judge, Federal District Court for the Southern District of New York to issue an injunction restraining enforcement of the new rules. When a temporary restraining order was issued, the FCC announced that it would not enforce its rules until after final adjudication.

The Court sustained the FCC in part and overruled it in part. The broad power of the Commission to enforce the prohibition of the Criminal Code, even though it is not part of the radio laws, was unanimously upheld. The FCC was therefore correct when it held that anyone who violates the anti-lottery law is disqualified from holding a broadcast license. By a vote of two to one, on the other hand, the Court held that the Commission's interpretation of "consideration" was too broad. As a result, programs in which

winners are required to do such things as tune in, answer questions, write letters, or answer the phone, are valid, and enforcement of the FCC's rules against them was enjoined. The Court sustained the FCC's rule against programs in which winners are required to furnish money or other thing of value or to have in their possession any product which the sponsor is providing. Subsequently, the decision was affirmed by the United States Supreme Court.[80] As a result, the industry is permitted to broadcast most, but not all, kinds of give-aways.

Within a few years such programs were again booming. This time the favorite medium was television. Again, the networks vied with each other in the development of lush prizes and soon TV was exceeding the most profligate days of radio.

Even "bingo" was added to the give-away epidemic. An illustration of the new fever was a program called "Play Marco", which was conceived by an advertising agency. In order to avoid the charge of corrupting youth, the programs were scheduled for late hours. In order to avoid the charge of conducting lotteries, the cards were distributed free by program sponsors. TV viewers played the game on the cards as the numbers were called on the sponsors' programs. As a result, prizes were given to winners who were selected solely by luck, but a controversy over whether there was any consideration soon developed between the advertising agency and the FCC. The Commission held that the necessity for a player to go to a retail store which carries the sponsor's product in order to get a card brought Play Marco within the Court's decision that there is consideration where a winner is required to have in his possession a product which a sponsor is providing. The Court of Appeals for the District of Columbia, however, overruled the Commission, with one Judge dissenting.[81]

Horse Races

Programs on horse racing have raised a regulatory problem similar to that of give-aways. On the one hand, public interest in sporting events of all kinds has made information on races as legitimate as news reports on other sports. On the other hand, the tie-in between horse racing and gambling has always been close.

Programs on races may be so designed as to be of primary interest to the gambling fraternity and hence provide a special service for them. Even if not so intended, pre-race information can be used by betters and bookies as valuable aids in deciding upon their

wagers. Examples of such information are: entering horses, scratches, identification of jockies, weights, post-time, condition of the tracks and weather, post-positions, and betting odds. When the winning horses are announced within a short time after the race has been run, bookies are provided information necessary to the settlement of their bets. Inasmuch as off-the-track gambling is illegal in most states, programs which make these aids available have been criticised as contrary to the public interest on the grounds that they provide a service for law-breakers.

In the first postwar years, the FCC frequently expressed concern about the practices of some broadcasters but took no formal action on its own initiative. In the summer of 1947, however, regulation was precipitated by a complaint filed with the Federal Trade Commission by WWDC, Washington, charging a competing station, WGAY, Silver Spring, Maryland, with unfair competition by its broadcasts of news of horse races and asking for a cease and desist order against WGAY's programs. When the FTC denied that it had jurisdiction over the issue, WWDC asked the FCC for a declaratory ruling recognizing its right to carry such programs so long as they are carried by its competitors. WWDC felt that it would have to follow suit in order to prevent a loss of audiences, sponsors and advertising revenue, and wanted FCC assurance that its license would not be jeopardized.

The FCC did not rule all programs on horse races off the air but did insist that they must be surrounded by controls. Specifically, the WWDC Case laid down the following regulations: (1) Sponsors must have no connection with gambling. (2) There must be an interval (a minimum of 10 to 15 minutes was approved) between the end of a race and the broadcasting of the results so as to deprive the news of usefulness to book-makers. (3) The information must not be presented "with such urgency or in such detail as to suggest that it is primarily to be of assistance to those who may be engaged in betting or gambling on horse races, which is illegal."[22]

A general summary of the racing news at the end of the day is legitimate news under this decision. Results at the race tracks can also be included as part of regularly scheduled programs devoted to sports in general. The freedom permitted the industry is even greater than this. Even though technically a violation of the "conditions" stated in the WWDC Case, stations are permitted to carry running accounts of occasional races and particularly of such "feature" races as the Kentucky Derby and the Preakness. A broadcast

of an occasional race does not provide a sufficiently regular or extensive service to be of value to gamblers, and feature races possess such a high degree of public interest as to cure the taint.

Reports of abuses soon began to appear. It became apparent that the FCC either had to enforce its regulations by using its coercive processes or let them atrophy by neglect. It chose the former. An investigation of WTUX, Wilmington, Delaware, was initiated by complaints from the police of that city, and the application of WMEX, Boston, for a renewal of its license was set down for a hearing. In both cases, the FCC orders were based on charges of violation of the principles laid down in the WWDC Case.

The WMEX license was renewed. The FCC found a violation of one principle in the WWDC Case—the sponsor was Armstrong Daily Sports, Inc., publisher of a daily scratch sheet devoted to horse racing information and widely used by bettors—but not of the other two. The programs were not broadcast so soon after races were run and did not go into such detail as to show that WMEX was aiding, or trying to aid, illegal betting.[33]

In the WTUX Case, on the other hand, the Commission found a violation of all three of the principles in the WWDC Case and a renewal of the license was denied. Armstrong Daily Sports, Inc., was the sponsor. Furthermore, the programs were characterized by detail and immediacy. Pre-race news included: names of horses that were scratched, track conditions, off-times, post-times, jockey changes and insertions. On the average, race results and mutual prices paid to winning bettors at the tracks were broadcast "between four and six minutes after the conclusion of a race, and in some instances, within one or two minutes." The Commission found this program service to be of "particular and peculiar utility to bookmakers." People interested in racing solely as a sport have no use for the above details or for such timely reporting.[34]

Despite the severity of the punishment, some broadcasters continued to violate the FCC's regulations. Information of specific offenses was received from a number of sources; one was WTUX. After the Commission's decision, the station asked for a re-consideration. As well as alleging police persecution and false testimony against it, the Station declared that it was being treated unfairly because other stations were broadcasting the same kinds of programs and going scot free. The petition expressly named a number of alleged offenders. Secondly, returns from a searching questionnaire, which the FCC sent to the entire industry for the purpose

of checking up on racing programs, showed offensive practices by approximately 32 radio and 5 TV stations.

Additional procedures were indicated. Accordingly, WTUX was put on temporary license pending FCC consideration of what to do about the over-all picture. Next, the licenses of 16 stations, 3 of them TV stations, were set down for a hearing. Two things were obvious in these steps. The Commission was not going to discriminate against WTUX and offenders were told to make a choice between obedience or destruction.

As pointed out, reforms and promises to reform have saved many a station's business. On the subject of horse racing, the FCC did not deviate from this pattern. As a result, in the spring of 1952 all licenses, including that of WTUX, were given regular renewals. The accused stations had discontinued the objectionable features of their previous broadcasts.

While the FCC was struggling with this problem, its hand was strengthened by political support. Hearings by the Senate Committee on Interstate and Foreign Commerce and a special Committee to Investigate Organized Crime in Interstate Commerce stirred up strong sentiment, both within and outside Congress, for more stringent controls. Also, numerous bills [85] began appearing in the Senate for the purpose of restricting or prohibiting the interstate transmission of gambling information by all the instruments of communication.

Since then the Commission has had an occasional case involving charges of violations of its rules on horse racing and a number of these cases have gone into license hearings. Outstanding, is the case of WWBZ, Vineland, New Jersey. In 1955, the FCC denied renewal of the license. Subsequently, the decision was rescinded and the license set down for further hearings. Finally, in 1957, a hearing examiner held that the station had eliminated the offenses and a regular renewal of the license was granted.

Defamation

Early in the history of radio regulation, defamation over the air was held to be offensive programming. General pronouncements of the FRC condemned the broadcasting of defamatory statements as contrary to the public interest. In a few instances, the extreme penalty of termination of the license was imposed.[86] Regulation also took the form of making broadcasters liable in suits for damages

under the law of many states, some treating the offense as slander and others as libel.

Partially due to this governmental coercion and the notion that it is good business to avoid giving offense, self regulation in the form of station censorship became a common industry practice. A speaker who refused to submit to a request for a script prior to air-time and to accept deletions by a station was usually denied access to the microphone. Slanderous statements made in the course of a speech frequently resulted in speakers being cut off the air. While exceptions to these practices were sometimes made for the speeches of politicians campaigning for office, they were not given a blanket exemption. Moreover, they were censored despite the words of Section 315 of the Communications Act which declares that a "licensee shall have no power of censorship over the material broadcast" by "any person who is a legally qualified candidate for any public office."

Because of this statutory prohibition, censorship of campaign speeches was often discussed in governmental circles over a period of many years. Neither Congressional Committees nor the FCC could decided whether anything should be done about it. The cause of the inhibition was a doubt over the interpretation of the statute. Did it apply to censorship of defamatory statements? On the one hand, there were those who argued that Congress did not intend to give politicians the opportunity to slander each other over the air. What Congress really meant was that the industry could not censor legitimate material, such as political issues, ideas and points of view. On the other hand, there were those who argued that the statute did apply because its words were general and all inclusive. It therefore prohibited deletion of anything, including defamation, from the campaign speeches of candidates. Secondly, the regulators did not want to hurt the broadcasters. If they were forbidden to blue-pencil slander, would they still be liable under their state laws? Again, the legal lights differed. As a result, the practice of censorship was left undisturbed for many years and the FCC avoided the issue when it arose in license cases.[87]

In the summer of 1948 the Commission gave life to the words of the law. WHLS, Port Huron, Michigan, was held guilty of violating the Communications Act by censoring the campaign speeches of candidates for municipal office. "We are of the opinion that the prohibition of Section 315 against any censorship by licensees of political speeches by candidates for office is absolute, and no

exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages."

This ruling, of course, meant that a broadcaster could not prevent political candidates from slandering their opponents over his facilities. Did the FCC hoist him on the horns of a dilemma? Would he be liable in suits for damages under state laws against defamation even though he could not delete defamatory statements? The FCC said "No!" By its prohibition Congress had given the broadcasters immunity from state law. Only the speaker could be sued.[38] The decision did not settle the problem. To the contrary, it converted what had been a minor subject of discussion into a major controversy.

The FCC was charged with erroneously interpreting the law. Many radio lawyers and broadcasters reiterated the old argument that Congress had not intended to forbid censorship of defamatory material. They also defined censorship to mean the deletion of something which one has a legal right to say. Because defamation is prohibited by law, therefore, a station which blue-pencils such statements from a speech is not censoring. The FCC was also charged with error on the second point. The Communications Act did not give the industry any protection from liability under state laws. For example, the Attorney General of Texas belligerently wrote the Commission that "Texas libel laws are still in effect" and that "radio stations carrying libelous matter will be subject to state laws."[39] Some antagonists even went so far as to describe the WHLS decision as contrary to the United States Constitution.

Inevitably, the controversy was taken to the courts. In 1948, KPRC, Houston, Texas, asked a special, three-judge Federal District Court for an injunction forbidding the Commission to enforce its decision. The judges refused. In dismissing the case for lack of jurisdiction, the Court held that the Commission had merely stated its opinion of the meaning of the statute and its decision was not an order having the force of law. The opinion of the Court, however, included some very critical *dicta*: "We think it doubtful that the Commission would have power to lay down a binding rule or regulation of the nature of that expressed in its opinion."[40]

Several years later another U. S. District Court took the opposite view of the FCC's authority when the Judge for the Eastern District of Pennsylvania declared that the "power of censorship was denied to the defendant" station. It was therefore without fault and could not be held liable under Pennsylvania law which declared "that a broadcasting station cannot be held for damages

for remarks in a broadcast, made by others than its own agents or employees, unless there is fault of some kind upon its part."[41] Subsequently, the decision was reversed on appeal, but only on the grounds that the statutory prohibition against censorship was limited to the campaign speeches of candidates and the speaker in this case was not running for office.[42]

As these cases show, judicial review has been inconclusive. While the courts have not upset the decision of the FCC, neither have they expressly sustained it.

Congress has also failed to settle the controversy. The original Senate version of the Act of 1927 granted immunity from liability,[43] but the provision was deleted in conference committee. No reason was given in the committee's report.[44] During the 1940's, the question again received the attention of the Senate Committee on Interstate Commerce. The discussion showed a strong sentiment in favor of granting immunity from liability under state law. In general it was thought unfair to force the broadcasters to proceed at their peril. There was a difference of opinion, however, as to whether Section 315 of the Communications Act provided the desired immunity. Some thought it did and others thought it did not. As a result, a proposal was made to legislate the immunity in express terms. Again doubt was expressed. Did Congress have the authority to countermand state law? The legal staff of the FCC was asked to render an opinion on this question and the lawyers responded by holding that such a Congressional statute would be constitutional.[45] Accordingly, in 1944 the Wheeler-White Bill was reported out of Committee with the clause: "Licensees shall not be liable for any libel, slander, invasion of right of privacy, or any similar liability imposed by any state, federal, or territorial or local law for any statement made in any broadcast under the provisions of this section, except as to statements made by the licensee or persons under his control." The same proviso appeared again in the White Bill a few years later.[46] Neither became law.

After the Commission made its decision in the WHLS Case, the need for Congressional clarification of the law was greatly enhanced. The industry demanded release from uncertainty and fear, and the desirability of new legislation was frankly recognized in governmental circles. As a result, in 1952 two bills, proposing different solutions, appeared in the House of Representatives. The O'Hara Bill[47] expressly granted the right to censor defamatory material. The Horan Bill[48] incorporated the decision in the WHLS Case: censorship

of defamatory statements was forbidden and stations would not be liable if candidates took advantage of this freedom from station control. Candidates would be personally liable.

The FCC and the NAB backed the Horan Bill. The House of Representatives was of the same opinion. On a floor vote, this Bill was passed and the O'Hara Bill defeated. Despite this strong backing, however, the Horan Bill did not become law. Its provisions were deleted in conference committee* on the grounds that the Bill was a hasty and snap solution to a problem which is complex and should therefore be given a more thorough consideration. Since then similar bills have been appearing in Congress.

In 1953 the NAB changed its position. The 1952 political campaigns were over and the pressure for immediate legislation diminished. The trade association therefore announced the initiation of an organized effort to get Congressional deletion of the "no censorship" provision from the Communications Law. The broadcasters and telecasters wanted to get control of what goes out over the air on their facilities. In the first place, they argued, the radio law places upon them the duty to serve the public interest and they cannot do this if they cannot prevent defamation. Power should be commensurate with duty. Secondly, they are responsible people and can be trusted not to abuse this power. Despite these arguments, the NAB frankly recognized that it was undertaking a long, uphill struggle. Congressmen could not be converted from opposition to approval of station censorship of their campaign speeches over night.

The Association also set a second, long-time goal; it urged the broadcasters to press for legislation in their states which would limit their liability. The suggestion met with a favorable response and considerable success has been achieved. While some state laws impose a comprehensive liability, about three-fourths restrict it in various ways. For example, a few give stations complete exemption for defamation in political campaign speeches. More common are those laws which relieve stations of liability if they have exercised due care in preventing the offense. In some states this limitation is so protective that a plaintiff must prove a station negligent before he can recover damages. A few laws require the plaintiff to prove actual malice. In all cases the speaker is personally liable for his defamatory statements.

In the meanwhile the FCC was the target of much criticism. Many broadcasters thought that all it had accomplished in the

WHLS Case was "confusion, coercion, fear and stark amazement." *Broadcasting* magazine editorially advised the industry to "do as you have done. Accept no speech that is even borderline libel. If possible, get candidates to agree in advance to protect you from damage suits. Act in good faith. Let the FCC sweat it out."[50] A special investigating committee of the House of Representatives joined in the attack. Under the leadership of a general counsel who showed strong prejudices against the FCC, the Commission was criticised for doing its duty in carrying out a law which Congress itself had put on the books.[51]

A few critics reacted belligerently and defiantly. They said that the industry should protect itself by keeping candidates completely off the air if it could not protect itself by censoring their speeches. This proposal was made on the grounds that the Communications Act expressly permits the exclusion of candidates so long as it is done to all. An impartial discussion of election issues and candidates could be provided by speakers who are not running for office. These speeches can be censored.

The authors of this notion were pointing an empty gun; no one took the threat seriously. In fact, the sophisticated broadcasters knew that they could not adopt the proposal even if the law did say that they could. In the first place, the industry had established, by practice over the years, the tradition that its duty to the public interest required it to broadcast the campaign oratory of political candidates. Behind this custom was a governmental pressure which lost no effectiveness from its lack of legal formality. On a number of occasions the FCC has hinted that speeches by politicians are part of a station's public service.[52] Also, a suppression of politicians would stir up antagonism. Congressmen have come to rely upon radio and television in their own campaigns and only the most naive of people could imagine them meekly surrendering the opportunity to use these media of influence. As a result, many broadcasters recognized the proposal as a dangerous invitation to new, and possibly more distasteful, regulation.[53]

For a few years after it had issued the WHLS decision, the FCC followed a lenient policy. It did so in response to the request of a committee of the House of Representatives that the Commission keep the *status quo* until the courts had had an opportunity to pass upon the legal issue and Congress had had an opportunity to enact new legislation. Chairman Coy assured the Congressmen that a licensee who used common sense, who did not act capriciously,

and who gave no advantage to one candidate or party over another would not lose his license even if he did censor defaming statements.[54] Subsequently, this promise was observed. WGOV, Valdosta, Georgia, was charged with preventing a candidate using such epithets as "pistol totin' criminals", "fugitive from justice", "jail bird", and "big slew-footed ox." The license was set for a hearing but a renewal was granted.

As already shown, neither Congress[55] nor the courts countermanded the Commission's decision during these years. As a result, in the fall of 1951 the FCC decided that it had waited long enough. It therefore annouced that in the future it would enforce the law. "Hereafter we will not accept the plea of doubt and uncertainty in the state of the law as a reason for not administering the law as we read it. Nor will we accept the argument that state statutes or common law on the subject of libel in some way supplant or modify the unqualified pronouncement of Congress on the use of the interstate facilities of radio by candidates in making political broadcasts."[56]

In response, the industry has tried to work out new patterns of procedure. It has become common practice for stations to ask candidates for scripts of their speeches in advance of air time. The scripts are then examined. Offensive and doubtful language is called to the attention of the candidates and changes urged. Discussion and persuasion, not coercion, have become the broadcasters' tools. In this way, the industry is complying with the FCC's interpretation of the Communications Act in the WHLS Case and, at the same time, protecting itself from liability for defamation in the majority of the states.

Advertising Continuity

Concern over radio advertising has raised another problem of program content. As early as 1922, the First Annual Radio Conference expressed disapproval of "direct" advertising—that is, commerical messages which go into detail about the characteristics and prices of a sponsor's products, analogous to the kind of information given in mail-order catalogues, and which solicit orders. The broadcasters called for regulation, recommending that "direct advertising in radio broadcasting service be absolutely prohibited and that indirect advertising be limited to the announcements of the call letters of the station and of the name of the concern responsible for the matter

broadcast, subject to such regulations as the Secretary of Commerce may impose." [57]

Two years later the industry changed its position. The Fourth Conference declared that there was no need for regulation. [58] Everybody, however, did not agree with the broadcasters. The extensive and detailed plugs permitted by many stations brought protests. To complaints from listeners were added charges of unfair competition from business men whose competitors resorted to direct advertising. Inevitably, the subject attracted the attention of Congressmen, being discussed repeatedly in Committee Hearings from 1928 through 1930. Commissioners were frequently criticised for their failure to stop this kind of advertising.

The FCC at no time issued a general ban. While individual Commissioners told Congressmen that this policy was necessitated by the statutory prohibition against censorship, [59] the fact was that they did not believe that direct advertising was always contrary to the public interest. "The Commission is not fully convinced that it has heard both sides of the matter, but is willing to concede that in some localities the quoting of direct merchandise prices may serve as a sort of local market, and in that community a service may thus be rendered. That such is not the case generally, however, the Commission knows from thousands and thousands of letters which it has had from all over the country complaining of such practices." [60]

The result was that the broadcasting of direct advertising was made the grounds for reducing the power of stations—but only in some instances. [61] While the Commission claimed that its decisions were motivated by its legal duty to protect the public interest, the fact was that criticism of this kind of advertising provided a convenient ground upon which it could select stations for reductions of power where such action was necessary in order to stop the interference between stations which the failure of regulation in the middle 1920's had produced.

In the early 1930's criticism of direct advertising began to disappear, and in 1946 the FCC placed upon it a stamp of official approval: "Informative advertising which gives reliable factual data concerning available goods and services is itself of direct benefit to the listener in his role as consumer. Consumer knowledge of the new and improved products which contribute to a higher standard of living is one of the steps toward achieving that higher standard of living." [62] Ideas of what constitute "public interest" had changed.

Charges of the broadcasting of false and misleading advertising

has also attracted attention, off and on, over the years. In general, critics have asserted that most of the industry has been guiltless and have directed their complaints at the minority. At various times, reputable broadcasters have expressed fears that some of their brethren were hurting the whole industry.

Criticism and demands for governmental regulation have come from many quarters outside the industry. Complainants have been both consumers and businessmen: Chambers of Commerce, Better Business Bureaus, educators, Parent-Teacher Associations, child welfare organizations, medical associations, ministers, women's clubs, and newspapers. Both the FRC and the FCC have reported the receipt of many such complaints.

Sponsors, many of them untrained in the ways of effective advertising, have often insisted on going too far in making claims for their products. In the immediate postwar years, for example, advertisers were anxious to tap the pool of purchasing power which had been created by wartime restraints on spending. During the depression of the 1930s, many tried to increase the volume of their sales and in their urgency stretched the accuracy of their plugs. Some stations accepted accounts that would have been rejected in better times; they were not always able to prevent sponsors from making exaggerated claims nor to deny time to those who were promoting dubious enterprises. The pressure of the advertisers was too strong for some stations and particularly for the financially weak. Both the FRC and the FCC were reluctant to invoke the harsh procedure of the death sentence. For the most part, therefore, they used the informal processes of consultation and conference. Their reports declare that these milder methods achieved the desired results.[63]

In a few cases, however, licenses were set for hearing and subsequently terminated. The Brinkley and Baker cases, previously discussed, are in point. They used their stations to advertise false medical cures in defraud of the public. Another illustration is the case in 1936 in which KMA, Shenandoah, Iowa, and KGBZ, York, Nebraska, applied for full time on the frequency on which they had been sharing time. The competing applications meant that the FCC could not grant both. Due to a record of false advertising, in addition to a finding of financial incompetence, the FCC deleted KGBZ and gave KMA the frequency full time. The evidence showed long and repetitious plugs for Texas Crystals and Van Nae Herb Tea. Claims were made of impressive cures of an extensive list of human ailments from overweight to high and low blood pressure, from chronic gall

bladder disturbances to "that tired, run-down feeling." The President of the station personally solicited investments in various corporations and enterprises in which he was interested. The FCC found the claims for the medical cures false and the enterprises in bankruptcy or worthless.[64]

By the early 1940's, numerous spokesmen for the radio industry were protesting against FCC regulation through its control of their licenses. They argued that they should be treated like their competitors, the publishers, who were not subject to the death sentence. If a magazine or newspaper publishes false advertising it cannot be ordered out of business by any governmental agency. To treat the two media differently was said to be unfair discrimination. Accordingly, the cry became: "As Free as the Press."

The Commissioners were sympathetic. As a result, the FCC adopted the policy of leaving the problem of false advertising by air to the Federal Trade Commission. Accordingly, in recent years the FCC has been reporting to the FTC those cases it discovers. Coercive action is then left to the FTC. That is, the FTC proceeds against the sponsor who makes the false claims for his products and not against the radio and television stations. This procedure treats broadcasting like the other media. The Wheeler-Lea Act[65] expressly exempts the advertising media—publishers, broadcasters and advertising agencies —from the jurisdiction of the FTC. The media are viewed as mere providers of facilities, mere salesmen of space or time; they make no claims, of their own knowledge or on their own responsibility, for a client's products. Two exceptions are possible: the media are guilty of violating the statute if they refuse to disclose, in response to the request of the Commission, the name and address of an advertiser who has used their facilities; they are guilty if they, themselves, make any false claims over their own facilities.

The authority of the FTC is extensive. In general terms, the Wheeler-Lea Act makes false advertising subject to a cease-and-desist order merely on the grounds that it is false. Special provisions are made for false advertising of foods, drugs, cosmetics and therapeutic devices. Deceptive silence is prohibited as well as deceptive words, signs or sounds. Where health is at stake, the FTC is authorized to require advertisers to warn consumers of danger in the use of their products—for example, that a drug may be injurious under some circumstances or that it should be taken only under the supervision of a physician. As well as the cease-and-desist order, the Commission is given the right to ask the courts for injunctions against offenders.

Criminal penalties are also possible; sponsors who falsely advertise, whether intentionally or not, a product which is dangerous to health or who intentionally use deception, whether it is injurious to health or not, may be fined and imprisoned, with the punishment becoming more severe after the first offense.

The FTC also settles cases by "stipulation." This means that accused sponsors voluntarily sign the statements of charges made against them and agree to stop using the disapproved continuities. The use of stipulations, however, depends upon the discretion of the FTC, and it has been refusing to permit this method of settlement where the defendant deliberately and intentionally makes false claims for his products; where foods, drugs, cosmetics and therapeutic devices which are dangerous to health are falsely advertised—whether the deception is intentional or not; and where the defendant cannot be relied upon to carry out an agreement to discontinue the deception. In these cases, the Commission insists upon the coercive procedures.

The FTC's sources of information are many. In addition to reports from the FCC, complaints are sent in from consumers, competing business men, Better Business Bureaus, and so on. The FTC also takes the initiative. It maintains a continuous inspection of radio and television continuities. Calls are sent out periodically for copies. They are then examined. While most are set aside as proper, a small proportion are given more serious examination. Only a small percentage of these are found defective. Most of such copy is corrected by stipulation. In only a small number of offenses are the coercive procedures invoked.

In 1956, the FTC decided to undertake a more thorough check on radio and TV commercials. In addition to the supervision described above, a new practice was initiated—namely a sample monitoring of programs by branch offices scattered over the country.

Monitoring has resulted in only a small number of cases; they have included visual, as well as verbal, misrepresentation. An interesting objective of the Commission has been to stop the use of "scare tactics"—that is, the broadcasting of advertising which falsely disparages a competitor's product as distinguished from misrepresentation of the sponsor's product. For example, in one of the cases resulting from monitoring the commercial tried to attract customers from competing shampoos by showing them burning the hair of users.

This change also initiated a new relationship between the FTC and the FCC. While the FTC still proceeds against sponsors, it also reports cases of alleged offenses to the FCC which informs the stations

carrying the continuities. Under this procedure, the FCC has continued to abstain from proceeding against licenses and still leaves the question of whether advertising is false or not up to the FTC instead of making its own independent determination. In fact, the FCC takes the position that the correction of offenses should be undertaken by the stations and that its reports are solely for the purpose of giving them the necessary information. Despite this fact, many people in the industry see the FCC reports as implicitly coercive; in effect, stations are told to drop the advertising in these FTC cases. Going still farther, some broadcasters are expressing a fear that the FCC might, in the future, start considering FTC accusations of offensive advertising in passing on the renewal of licenses, thus reestablishing direct regulation. In either procedure, it is said, FCC coercion follows a mere accusation; in a subsequent hearing in any case, the FTC may hold that a cited commercial is not illegal. Where this should happen, the FCC would be left in a position of coercing a station to drop advertising which it had a legal right to broadcast.

It is clear from the foregoing that the FTC has become the dominant regulatory agency. In addition, Federal statutes[66] and local laws also control advertising by making fraudulent practices punishable as criminal offenses. As a result of this governmental regulation of sponsors, broadcasters are relieved of many of the problems that sponsors might otherwise present.

Governmental regulation of sponsors has also strengthened the industry's self regulation. Over the years, broadcasters have expressed the fear that the offenses of some stations would stimulate drastic and disagreeable governmental regulation of the good operators along with the bad ones. As a result, codes adopted by the NAB, by the networks, and by individual stations declare that no false, fraudulent, exaggerated or deceptive advertising should be broadcast. There is general agreement that while some broadcasters, sponsors and advertising agencies have resisted control, the industry's efforts at self regulation have been widely effective in keeping false advertising off the air.

The control of new postwar "fashions in fraud" by self regulation provides interesting illustrations of this conclusion. One was the "bait and switch" technique. Customers were offered products (for example, sewing machines) at startingly low prices but when they attempted to buy they found that it was almost impossible to do so at the price advertised. Sponsors resisted such sales and used strenuous efforts to sell higher-priced models or, in some instances, did not even

have any of the low-priced products in stock. The technique was thought by most broadcasters to be fraudulent and they refused to take such accounts; the NAB and Better Business Bureaus over the country cooperated in the condemnation of such practices. Inevitably, of course, a few individual sponsors and broadcasters ignored these efforts at self regulation. As a result, some of the Commissioners issued warnings, and there were a few cases in which advertisers were prosecuted by their state or municipal governments. While these governmental activities were undoubtedly helpful, the self regulation was generally credited in industry circles with keeping offenses to negligible proportions.

Regulation has not been limited to the offense of false advertising. Many other practices used in radio and TV commercials have been subject to a governmental pressure and indirect coercion from which the other media have been immune. At times, for example, Congressmen and Commissioners have threatened to make new regulations and to proceed coercively against various kinds of advertising practices. It seems clear that these threats have influenced the conduct of some stations. This means that the government was regulating in a non-legal and informal manner. In other words, it should be understood that the government can coerce business by criticism and threat as well as by law. At the same time, it should also be pointed out that threats are not always coercive. At various periods, the Commission has criticised advertising practices, but its talk was not followed by formal regulation and was subsequently ignored. Many examples of this informal kind of relationship between government and industry, in so far as advertising is concerned, can be cited.

Advertising has been considered objectionable because of the nature of the product. That is, the product itself creates the offense so that no plug for it could be satisfactory.[87] No definitive list of the objectionable products has been collected by an authoritative agency. Frequent criticism condemns plugs treating of "bodily functions" and prescribes the use of "good taste." Cathartics and deordorants have been those most commonly singled out. Sometimes the critics have condemned all patent medicines. The NBC Code lists: hard liquor, cathartics, reducing agents, speculative finance, fortune-telling, professional people, cemeteries and morticians, hair dyes, and fire-arms. Cigarettes have never been included in this category. For a number of years there was a mild criticism of such accounts but the critics accomplished no more than the introduction of a few bills in Congress to prohibit such sponsorship.

The advertising of liquor has been a more bitterly contested battle. The "drys" have been vigorous and persistent. There was no difficulty in the days of prohibition, but repeal of the Eighteenth Amendment brought the problem to the fore. CBS was the first to refuse to sell time to hard-liquor sponsors and the rest of the industry soon followed along. At various times rumors have circulated in industry circles to the effect that programs advertising whiskey and gin were being planned and contracts for air-time being negotiated. Such rumors produced threats of new legislation and extinction from the air waves for guilty stations. Furthermore, many distillers have taken a stand against the use of radio and television advertising. That the prohibition forces are still strong has been recognized. Hence, it has been believed that the use of radio, by bringing plugs for liquor right into the homes of the country, would create a reaction which might lead to a renewal of prohibition. Consequently, it has been reported that only a small per cent of the stations in the country carry such accounts; codes generally prohibit them. Programs advertising beer and wine, on the other hand, have been common.

"Drys" have not been satisfied with this solution. They have decided to work for governmental prohibition of all liquor advertising. Hence, in recent years their attacks have been directed at the beer and wine sponsors. They have argued that the use of television makes such advertising more offensive than it is over radio because beer and wine are brought right into the living room, young people are being misled by being taught that drinking is a desirable social practice, and too much air-time is devoted to this kind of advertising. In the pursuit of their objective, prohibitionists have intervened in a number of license cases, petitioning the FCC to deny renewals. Meeting failure, pressure groups have turned to Congress. Bills prohibiting such advertising have been hardy perennials in both houses and a number of Congressional committee investigations have been made. These developments have induced the industry to be cautious in the control of such advertising to the satisfaction of most of the country.

The sponsorship of patent medicines, drugs and cosmetics has also produced criticism of the industry. Complaints have been made of an excessive number of programs dealing with ills, pains and body functions. Many felt that in effect radio was one long parade of headaches, coughs, aching muscles, stained teeth, gastric hyperacidity, and various ailments.

The volume of criticism frightened the drug industry. In 1946, the Proprietary Association urged sponsors to be more careful and asked

the radio people to clamp down on those who tried to broadcast objectionable copy. The Journal of the American Pharmaceutical Association urged the drug people to clean up their commercials. Strong fears were expressed that the offenses would lead to governmental regulation. The FCC added its warning: "The increasing identification of radio as a purveyor of patent medicines and proprietary remedies raises serious problems which warrant careful consideration by the broadcasting industry." [68]

World War II produced commercials which were offensively saturated with patriotic appeals. It was not uncommon for the patent medicine people, for example, to assert that the use of their products would help users to carry the extra burdens imposed upon them by the national, all-out war effort. Such plugs attracted administrative frowns: "To misuse the listener's deepest patriotic feelings for the sale of commercial products over the air is a violation of a public trust." [69]

How much time in a program should the sponsor be permitted to devote to plugging his products? How many consecutive plugs should be broadcast at any particular time? The problem of "excessive advertising" has been another one which the industry has been forced to face from its very beginnings. As early as 1922, Herbert Hoover told the First Annual Radio Conference: "It is inconceivable that we should allow so great a possibility for service, for news, for entertainment, for education and for vital commercial purposes to be drowned in advertising chatter." [70] The subject was discussed in Congressional committee hearings and in industry circles. The result was the formulation by the FRC in 1928 of a general policy which has survived to the present day: "Advertising should be only incidental to some real service rendered to the public, and not the main object of a program." [71] The exercise of coercive authority to see that radio advertising was limited "in amount" as well as "in character" was promised. [72] The amount of advertising, therefore, was another ground upon which stations were selected for reductions in power and time where such action was necessary to the control of interference.

During the depression charges of the piling of commercial upon commercial increased. It was during these years that the spot announcement was developed into a fine advertising art. Short plugs were inserted in the brief break between programs. Many advertisers went in for them because the cost was low, the time being short and there being no program to pay for. Broadcasters also reaped a revenue by selling time which would otherwise be non-productive. Many

independent stations found the added income vital to their survival.

During the war the piling of plugs diminished. The reason was the excellent record of American industry in serving the war effort. A considerable amount of commercial time was given over to announcements urging civilians to do such important things as buying bonds or donating blood. High quality programs, particularly those of the informational type, were popularly received and praised. Also, sponsors in many instances had no goods to sell—their businesses having been converted to war production—and bought time solely for "good will" advertising to keep their names before the public. Criticism trickled to a whisper. The industry, its critics and regulators, were preoccupied with the war.

At the end of hostilities, critics again became articulate. Charges were made that the amount of advertising was on the increase. Inevitably the FCC turned its attention to the problem. It warned: "The listener who has heard one program and wants to hear another has come to expect a commercial plug to intervene. Conversely, the listener who has heard one or more commercial announcements may reasonably expect a program to intervene."[78]

No governmental agency has ever placed any specific limits on the amount of time which can be devoted to advertising in commercial programs. Controls are left to the industry, which uses two methods. Some stations fix the number of words which can be used in any commercial message. Another method is to fix the maximum amount of program time which is to be used. For example, the TV Code *suggests as a guide*: from 2 to 3 minutes in a 15-minute period and 6 to 7 minutes in a 1-hour period. Provision is made for exceptions; stations may broadcast some programs which are deliberately designed to provide shopping information and in which advertising is therefore an essential and primary part of the service.

The Commission has also thought that listeners should be protected from the injection of an advertisement into a program when they are not expecting it. For example, at one time Gabriel Heatter would shift from a discussion of the news to praise of a hair tonic or a cigar without giving notice of the change, or modifying his emphasis, or adopting a less unctuous manner of speaking; comedians Edgar Bergen and Jack Benny have peddled the products of their sponsors by plugs which had been written into the humor of their scripts. Advertisers and advertising agencies have often favored such practices because of the belief that the most effective time to influence potential customers is while they are in an uncritical frame of mind and the

bars of sales resistance are down. The FCC, however, has disapproved: "A listener is entitled to know when the program ends and the advertisement begins." [74]

This principle would ban "sub-liminal" advertising; that is, the flashing of short commercial plugs on the television screen with such split-second timing that they are below the level of consciousness. Viewers, therefore, are not aware that they are being importuned. The technique has recently been under discussion but has created little concern. Some broadcasters have refused to have anything to do with it, but if it should prove to have the effectiveness which its creators have claimed for it, and therefore become prevalent in practice, the FCC would have a ready-made principle which could be invoked.

III

OTHER PUBLIC INTEREST PROBLEMS

Regulation of programs has been more extensive than the mere prohibition of offensive content. It has also been positive in nature. From the earliest days, the regulators have told the broadcasters what they *must* do as well as what they must *not* do. This has been done by laying down a number of general standards which over-all program schedules must meet.

Diversity and Balance

Both the FRC and the FCC have frequently asserted that different kinds of programs should be broadcast and that each kind should be apportioned that amount of time which would make over-all schedules "balanced" or "well-rounded." When the FRC first adopted this rule, it was merely placing an official stamp of approval upon an idea already recognized by progressive broadcasters. As early as 1926, W. E. Harkness of AT&T—then the licensee of WEAF, New York—told a Senate Committee: "Remember we have to balance our programs. You could not put on a dance for a full evening. So you vary programs to give each group something they would like to hear. . . . It is a great deal like a vaudeville in that respect. You have to have variety to your performance."[1] Subsequently, the NAB identified programming for "every type of listener" with service in the public interest,[2] and the broadcasters accepted the principle as an ideal toward which they should aim.

In 1927 the FRC began the practice of asking in renewal applications for "average amount of time weekly devoted to the following services: entertainment, religious, commercial, educational, agricultural, fraternal."[3] Responses to this question were used as partial evidence in determining whether stations were performing a public service and, hence, whether they were eligible for renewals of their licenses.

In the next year, the Commission incorporated the principle in one of its license cases. "The entire listening public within the service

area of a station, or of a group of stations in one community, is entitled to service from that station or stations. If, therefore, all the programs transmitted are intended for, and interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against. This does not mean that every individual is entitled to his exact preference in program items. It does mean, in the opinion of the Commission, that the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place." [4]

The FCC accepted this principle [5] but not without a change. "In metropolitan areas where the listener has his choice of several stations, balanced service to listeners can be achieved either by means of a balanced program structure for each station or by means of a number of comparatively specialized stations which, considered together, offer a balanced service to the community. In New York City, a considerable degree of specialization on the part of particular stations has already arisen — one station featuring a preponderance of classical music, another a preponderance of dance music, etc. . . . such specialization may arise in other cities. To make possible this development on a sound community basis, the Commission" will ask applicants "whether they propose a balanced structure or special emphasis on program service of particular type or types." [6]

Detailed regulations, specifying the hours or minutes during which one kind of program, or another, must be broadcast, have never been made. At times, Congressional committees have discussed such notions as giving religious programs the right of way over all others on Sunday, stating specific time periods for the discussion of public affairs, and fixing a proportion of sustaining to commerical programs. The Commission has consistently opposed the suggestion that it be given this authority. [7] Both Congressmen and Commissioners have recognized the extreme difficulty of making such detailed regulations for the schedules of several thousand AM, FM and TV stations whose service areas are scattered over the country and, hence, require different kinds of programming. As a result, no legislation has been enacted and the scheduling of specific programs at specific periods has been left to the discretion of management.

(*a*) *Local-Network*

"If a man is truly to call himself a 'broadcaster' he would, I should think, want to originate some programs of his own so that the community he is licensed to serve will have an outlet for the discussion of its local problems and for the development of its local talent and resources. A true broadcaster will not content himself simply with plugging his transmitter into a network or a turntable and going off to Florida for the winter. Unless there is to be some organization of local live programs we don't need radio stations in the various communities; all we require are unattended boosters." [8] So declared Charles R. Denny, Acting Chairman of FCC, in October 1946.

Very early in the history of the industry, the rapid growth of network operation brought complaints to the effect that too many stations were duplicating the same programs and hence depriving listeners of a choice. To a large extent the protests were due to an unbalanced sectional distribution of stations. Southern and Western Congressmen declared that their constituents were objecting to the domination of the air by programs originating in the East. The demand was that listeners should be given service by stations located in their own areas. In addition, agricultural organizations expressed the fear that the concentration of stations in the large cities would result in programming for urban people to the disregard of the farmers.

As a result of the criticism and discontent expressed in Congressional committees, the FRC issued Order No. 43 in 1928. It proposed to forbid, with some exceptions, two or more stations, within 300 miles of each other, broadcasting the same programs for more than one hour between seven and twelve p.m. [9] Subsequently, the Commission repeatedly postponed enforcement on the grounds that "the very drastic effect of the order soon became apparent from the storm of protect from the listening public". Finally, on December 20, 1929 the FRC dropped the whole thing "in order to assure the uninterrupted broadcasting of high-class chain programs for the benefit of the general public." [10] Network service had proved too popular to permit a restraint on network coverage.

That a local service must be provided, however, was established. As a result, FCC regulations require stations affiliated with networks to devote a fair proportion of their time to programs dealing with local affairs and interests. Questions to this effect are included

on application forms, and findings of public interest have been made in numerous cases where the applicants have shown local service. A significant case in point is the denial in 1947 of the application of WADC, Akron, for a boost in power to 50 kw on 1220 kc in favor of WGAR, Cleveland, which was asking for the same facilities. The loser had proposed to carry 100% CBS programs after eight a.m. The FCC held that such a schedule meant an abdication of the station's duty to control its own programming and to do so with the particular needs and interests of its service area in mind. WADC tried to upset this decision in the courts, but failed.[11]

The Commission has not always been satisfied with the record of performance. For example, in 1946 it found a "blackout" of non-network programs during the best listening hours on many affiliated stations.[12] No harsh, punitive action was taken, however. The Commission was content with a reiteration of the principle that a station must produce some of the programs it broadcasts.

In the middle 1950's, an exception to this general rule made its appearance. The FCC decided to license "satellite" television stations which could re-broadcast the programs of their "parent" stations. The two might be under the same or different ownership. The specific purpose of the new policy was to foster the development of TV. The Commissioners and the industry thought that the expansion of coverage which would result from the use of "satellites" would help stations, particularly those in the UHF, which were in very poor financial straits. The public would benefit by being given a service which would otherwise be unavailable. So far as programming is concerned, however, the result, if not the purpose, of the new policy would be to create this exception.

(*b*) *Live-Canned*

In the early days of the industry, many stations relied exclusively upon recordings for program material. The extensiveness of the practice caused concern to the Department of Commerce. As a result, the broadcasting of live programs was made a prerequisite to a grant of the most desirable license terms.

The FRC accepted the notion that canned programs were inferior. "The Commission cannot close its eyes to the fact that the real purpose of the use of phonograph records in most communities is to provide a cheaper method of advertising for advertisers who are thereby saved the expense of providing an original program."[13] There was no absolute prohibition, however. The Commission

recognized that in many communities local resources would be inadequate and could not provide as much live program material as in others. It therefore declared that it would be guided by evidence to this effect in determining whether a licensee was relying excessively on canned material. As a result, the FRC did use this ground for reductions in the power and time of some stations.

The FCC has not accepted such a narrow view of the quality of recorded programs. It has pointed out that records might provide a number of public services. The skill and labor of talent could be preserved and not be dissipated by one performance. "Permanent archives" could be compiled, enabling "good programs of timeless interest" to be repeated. Where affiliated stations find that good network programs come at inconvenient times, they could be recorded and hence offered at other periods. The four different time belts across the country, plus summer-time conflicts between standard and daylight-saving time, emphasize the need for recordings. Transcriptions make it possible for non-network stations to get good programs developed by other stations, which are often willing to grant permission. Platters, tape and films can be used to make for more technical perfection. Errors can be corrected, and material recorded at different times and places can be blended into a single continuous program. Finally, by recording events as they occur — for example, the actual battle front experiences recorded during the war — listeners can be given a superior account to that provided by a mere word description or dramatic re-creation.[14]

At the same time, the FCC has not always approved the broadcasting of records exclusively. Applicants for new local AM stations have for many years been required to show that they will satisfy a need for new local service by putting on the air live programs of local interest and talent. The Reports are full of cases in which favorable decisions turned upon the showing of promises to broadcast such programs as local music, local sports and news; activities of the schools, churches and civic organizations; programs dealing with local political controversies and civic developments; information for the farmers on crops, markets and pertinent scientific discoveries. Testimony of business men, educators, clergy, fraternal and civic leaders, and governmental officials that they would use a station has carried great weight in the granting of licenses. Familiarity of the applicant with local affairs and his interest in providing time for local interests have also been influential. In

cases of competing applications, therefore, local parties have been preferred over absentee owners, where all other qualifying prerequisites were satisfactory.

Reliance on recorded materials has become a common practice. With some stations, recordings make up the major proportion of their program schedules. Classical and popular music, for example, is often transcribed. Some broadcasters have found that it is difficult to build good local programs because of lack of adequate talent and have declared that their audiences preferred the big name entertainers to local neophytes. It has also been argued that the public interest did not mean that the industry should try to serve people who desire to use its microphones for the purpose of airing their ideas on local affairs, of promoting their predilections and prejudices on civic and political controversies, or of achieving an ambition to become radio personalities. At the same time, many broadcasters have reaped financial profits and enhanced prestige from the live programs which they created. Some have made secure places for themselves as local businesses in their communities.

The national networks have emphasized live programs and their leadership in the development of live talent has been recognized. At one time, they refused to broadcast any recorded materials. Even here, however, change has occurred. Canned programming has made inroads.[15]

Film quickly became a major source of program material in television. The high cost of live programs (much greater than in radio) and the lack of enough live programs to fill schedules were major causes. By the middle of the 1950's a new major industry had developed: the production of filmed programs exclusively for the use of TV stations.

(*c*) *Soap Operas*

The broadcasting of an "excessive" number of serial dramas (called by the critics: "soap operas" or "washboard weepers") at one time created a problem of balanced programming for the networks. While they have often been praised for the development of new kinds of programs and for providing a varied service for the public, in this instance they were under attack.

The storm of criticism reached its peak in the early 1940's. Magazines published disapproving articles on the subject and it was discussed in hearings before the Senate Committee on Interstate Commerce in 1941 and 1943. Senators and individual Commissioners

were critical. Finally in 1946 the FCC put its disapproval into an official public statement. "In January, 1940, the four networks provided listeners with 59½ daytime hours of sponsored programs weekly. Of these, 55 hours were devoted to soap operas. *Only 4½ sponsored daytime hours a week on the four networks were devoted to any other type of program.* Advertisers, in short, were permitted to destroy overall program balance by concentration on one type of program. The number of soap operas subsequently increased, reaching in April, 1941, a total of some fifty commercially sponsored network soap operas a day." [16]

Most of the criticism was severe. The nets were charged with abdicating control over their programs to the advertisers and their agencies. Serials were popular with sponsors because they were cheap to produce and were effective in selling products. It was also charged that the chains were neglecting a large potential audience. Alleging that a big percentage of listeners who were at home in the daytime had silent sets, critics thought that many of them would tune in if they could get the kinds of programs they wanted. [17] In addition to the imbalance, soap operas were castigated for their poor quality.

The networks defended themselves. They refuted the surveys and statistics of the critics by their own surveys and statistics. [18] Serials were said to be popular. Claims of service in the public interest were made on the grounds that radio was giving a large number of listeners the kind of program they wanted. The networks also denied charges of imbalance. Even if soaps dominated the offerings of a particular station, listeners still had a variety because they had a choice of stations, all of which did not carry serials at the same time.

By the late 1940s, a decline in the volume and severity of the criticism was noticeable; it had flared up and was already dying down. In recent times, stations have been emphasizing local service programs. Also, surveys have reported a growing popularity of musical programs among daytime audiences. It is extremely doubtful, however, that this trend is due to the governmental attack on soap operas; more likely, there has been a change in audience tastes.

Public Affairs and Controversial Issues

A duty to broadcast discussions of current political, economic and social issues has frequently been asserted by governmental

officials and broadcasters alike. In 1929 the FRC listed "public questions" as one type of program necessary for diversity and public service,[19] and the FCC, in 1946, emphasized that such programs were mandatory. "But the public interest clearly requires that an adequate amount of time be made available for the discussion of public issues; and the Commission, in determining whether a station has served the public interest, will take into consideration" its performance in this respect.[20] In the summer of 1951, Chairman Coy emphasized that this regulation applies to TV as well as to radio.[21]

Basic to this regulation is the notion that radio and television should not be instruments solely for advertising and popular entertainment. They should also perform an educational function. People should be made aware of what is going on around them and should be stimulated to take an interest. In this way, the broadcasters can make a positive contribution to democracy.

In general, the industry has agreed. Evidence to this effect is expressed in the codes and in the testimony of many broadcasters who appeared before Congressional committees over the years. For example, the TV Code asserts "an affirmative responsibility" to provide a coverage of public events "consonant with the ends of an informed and enlightened citizenry."

Experience, however, has shown that to state the proposition and to carry it out have been two different things. The problems have been numerous and difficult. If the industry were to try to serve all those who would like to express their ideas on the myriad controversies of our complex society, the air would be filled with a babel of tongues. Also, the ideal of diversity and balance would be destroyed and public interest would dwindle. Speeches have not attracted large audiences, as a general rule. While the President of the United States has fared well, most other speakers achieve low audience ratings. Being aware of these facts, the broadcasters very early asserted a necessity to control this kind of program. The general principle which they worked out is expressed in the codes: "such time shall be allotted with due regard to all other elements of a balanced program schedule and to the degree of public interest in the questions to be presented."

Dial-twisters are not always indifferent or disinterested. Frequently, they are offended. Ideas are challenging and people do not always believe in freedom of speech for another person—particularly when he is advocating something to which they object or

which they fear. As a result, the broadcasters have found themselves in a dilemma. As business men, they want to build audiences by pleasing people and, as servitors of the public interest, they find that they have a duty to drive some of these people away.

These problems have been recognized by governmental officials. On numerous occasions, sympathy for program managers has been shown. At the same time, the difficulties have not been accepted as sufficiently serious to excuse failure to obey. In the first place, no serious economic injury has resulted. The regulation calls merely for *some* programs and no quantity is specified. Even if listeners are resentful, they are not permanently driven away because most programs are still those with wide appeal. As to popular indifference, it has always been held that the industry owes some service for minority interests. Hence, the people who do want to hear speeches on controversial issues should be given some opportunities to do so. Finally, the public interest can not be satisfied merely by innocuous programming. "Never to offend anyone may be good salesmanship. But is it good radio?"[22] In other words, the public interest requires the industry to offend some people at times, provided the offense results merely from a dislike of ideas.

From the beginning of the 1920s, members of Congress have shown an interest in this kind of programming. Over the years, they have questioned the Commissioners and broadcasters about the industry's practices. Committee hearings report both praise and criticism. In general, the networks have been credited with a meritorious performance. The record of the individual stations over the country has been said to be spotty, some doing better than others. Charges were frequently made that many were not measuring up to their duty to the public interest or their commitments under the codes. Instead of facing the difficulties, they were taking the easy way.

Outstanding among the critics have been those people who wanted to speak over the air but were denied the opportunities they desired. These frustrated interests have not been slow to carry their complaints to Congressmen and Commissioners and to urge governmental coercion. At times, the pressure has been great. As a result, the demands of the pressure groups — as well as the public interest concept — constitute a real cause for this regulation of programming.

Labor's battle was long, vigorous and effective. In the late 1920s, the Chicago Federation of Labor, supported by the AFL,

based its demand for a labor station partially on the ground that only through its own station could it be sure to have adequate opportunities to reach the public. When asked why the union did not use the facilities of commercial stations, instead of trying to build one of its own, a spokesman said: "If it were a matter of law so that we would know it would be done or could be done on any proper occasion, I am quite sure that organized labor would not be worried about having its own station."[28] After the Chicago Federation was given its station (WCFL), with the power it wanted, this attack ceased.

In the 1940s, the fight again flared up. This time, the leadership was provided by the United Automobile Workers and the CIO. The NAB Code of 1939 was the immediate cause. "Time for the presentation of controversial issues shall not be sold, except for political broadcasts." If the radio people had been deliberately seeking governmental regulation they could not have done any better than they did when they indiscriminately lumped labor programs into this restriction. "Discussion — or dramatization — of labor problems on the air is almost always of a controversial nature. Even the so-called facts about labor, such as the American Federation of Labor's audited membership figures, are usually challenged." The Code writers failed to give adequate consideration to the inevitable reverberations. Moreover, as if dissatisfied with the amount of trouble they had already invited, they expanded the Code in 1943 to say: "Solicitations of memberships . . . are deemed to be unacceptable under the basic theory of the code, and therefore time should be neither given nor sold for this purpose", except for insurance companies and charitable organizations like the Red Cross.

UAW and CIO leaders saw in these restrictions a bias against labor unions and a desire to please advertisers. The Code Manual — that is, the NAB's explanation of Code provisions — naively fed this belief by the statement that "employers, as a rule, won't discuss their labor problems on the air and are inclined to frown on those stations, especially in smaller communities, which open their facilities to labor leaders." It is not surprising, therefore, that the allegations of an anti-labor prejudice were accepted as true in some FCC quarters. "I think we are warranted in accepting with some degree of skepticism the assurance that this attitude on the part of employers, who may also happen to be advertisers, has nothing whatsoever to do with the amount of free time made

available for the discussion of union problems or with the policy against the sale of time for such purposes."[24]

The NAB denied any bias and justified the restrictions on three grounds. "First, it is a public duty of broadcasters to bring such discussions to the radio audience, regardless of the willingness of others to pay for it. Secondly, should time he sold for the discussion of controversial issues, it would have to be sold, in fairness, to all with the ability and desire to buy at any given time. Consequently, all possibility of regulating the amount of discussion on the air in proportion to other elements of properly balanced programming or of allotting the available periods with due regard to listener interest in the topics to be discussed would be surrendered. Third, and by far the most important, should time be sold for the discussion of controversial public issues and for the propagation of the views of the individuals or groups, a powerful public forum would inevitably gravitate almost wholly into the hands of those with the greater means to buy it."

Whatever the merits of these two points of view may have been, the UAW and the CIO fought. The fact was that the rule stated in the Code deprived these unions of as much time on the air as they wanted and for which they were able to pay. Even though they were not satisfied with their treatment by the national networks, they declared that these companies had given them more favorable consideration than many stations. These varied considerably. Some sold time in disregard of the NAB Code and some did not belong to that organization. On the other hand, Labor charged, some stations, regardless of the Code, were too weak financially to resist the anti-labor prejudices of the advertisers upon whom they depended for revenues. Union leaders also thought that some station owners, being business men themselves, discriminated against unions solely out of their dislike of the labor position on economic and political issues, and used the Code merely to rationalize their denials of time. Newspaper-owned stations, for example, were charged with carrying an editorial antagonism into their station programming.

The specific demand was for the right to buy time. It was argued that only through sponsorship could labor get desirable facilities. In the first place, sustaining time often came at the bad hours — for example, late at night — because the stations tended to reserve most of the valuable periods for commercial programs. Hence, only by buying the time could the unions go on the air

while large numbers of people were listening. Secondly, the amount of sustaining time was limited, the stations being required to sell the major portion of time in order to meet costs and make a profit, and not many of the few free periods were available to labor because the demands of other interests had to be met. As a result, the unions argued that they could get more time only if they were permitted to buy it.

Finally, when sustaining time was granted by the networks, the coverage was thought to be too limited. Many affiliated stations did not carry such programs because they received no compensation from their chains. Instead, the stations preferred to schedule local commercial or local sustaining programs. Another advantage in buying time, therefore, was an expectation of broader coverage.

When the UAW and the CIO took their demands to the Commission, it pointed out that it had no legal power to require any station to put any specific program or any particular speaker on the air. The only recourse for the complainants was to challenge the right of some station to hold a license on the general grounds that by refusing to sell time for the discussion of controversial issues it had violated its duty to broadcast such programs and therefore had failed to serve the public interest.

In 1944, the UAW intervened in the application of WHKC, Columbus, Ohio, for the renewal of its license. Before a decision was reached in the case, the station stipulated that it would provide both sustaining and commercial time for the discussion of controversial issues without discrimination between business concerns and nonprofit organizations and that the latter would be given a right to buy time for solicitation of members. The FCC approved the station's new policy and the license was renewed. "No single or exact rule of thumb for providing time, on a nondiscriminatory basis, can be stated for application to all situations which may arise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations."[25] Immediately following this case, there was an increase of discussion programs — on other issues as well as on labor controversies — on the air.[26]

In its early years, the infant television industry was also charged

with making a poor showing. Critics declared that the telecasters were devoting too much time to entertainment in which sports and crime shows bulked heavily. The FCC found that many stations were ignoring the regulations entirely and that many were carrying too few discussion programs. As a result, telecasters were warned to measure up to their duties. In the attempt to ward off this threatened governmental coercion, the TV Code of 1952 reiterated the old obligation in strong terms.

In both radio and television, therefore, governmental regulation and self regulation have been combined. Whether they have produced any extensive changes in programming, however, is statistically uncertain. Nevertheless, whatever the cause, the critics have not been as vocal in recent years as they were at times in the past.

The duty of the industry to inform the public about current affairs has been seriously restricted by the suppression of information in governmental agencies. For many years, the radio industry has been demanding free access to this information. With the advent of television a new dimension was added. Why shouldn't the industry perform part of its public service duty to inform its audiences about public affairs by bringing committee hearings, debates in legislative chambers, and court trials right into the home? The great popularity of telecasts of national political conventions and of a number of Senate committee hearings produced a liking for this kind of program among the telecasters.

The industry met with resistance, however. Witnesses and parties appearing before governmental agencies objected to being televised; debate *pro* and *con* appeared in the press and over the air. A difference of opinion was expressed by governmental officials. For example, resolutions were introduced into the United States Congress to permit [27] and to ban [28] telecasts of committee hearings. In the 82nd Congress, the Democratic Speaker of the House of Representatives, Sam Rayburn, banned coverage of all committee hearings, but in the 83rd Congress the Republican Speaker, Joseph W. Martin, Jr., left the question to the decision of each committee. In more recent years the industry has made some converts, but the controversy continues.

In the final analysis, the most that can be said is that coverage has been spotty. In local, state and national governments, various agencies have followed different practices; while some have admitted the TV cameras, others have excluded them. When telecasting

is permitted, it is common practice to turn the cameras away from witnesses who object to being televised.

The Both Sides Rule

On all public issues there are varied points of view. Therefore, in order to prevent the broadcasting media of the country being used for personal feuds and one-sided propaganda, another regulation has been invoked by the government and accepted by the industry. The TV Code provides a typical expression of this regulation: "The television broadcaster should seek out and develop with accountable individuals and organizations, programs relating to controversial public issues of import to his fellow citizens; and to give fair representation to opposing sides of issues which materially affect the life or welfare of a substanial segment of the public."

It is not enough for stations to be passively willing and ready to provide access to their microphones in response to requests which might be made. The FCC has said that they must take positive measures on their own initiative to find people who have different points of view to express. One way of meeting this obligation in common practice is to schedule forum-type programs. On the other hand, a station cannot deny time for the presentation of one point of view merely because the opposition refuses to defend its position—for example, a union cannot be kept off the air in a labor dispute merely on the grounds that the employer will not answer.

As soon as Congressional committees began to consider radio legislation, and before any was enacted, the both sides notion attracted attention. Congressmen expressed a fear that broadcasters would permit the propagation of particular ideas to the suppression of others.[29] This fear was fed by the fact that some broadcasters of the 1920s viewed their facilities as outlets for the exclusive expression of their own personal predilections. When it came to legislation, however, the primary concern of the Congressmen was more personal. They wanted to be sure that their opponents would not be given an advantage in the use of radio during their election campaigns. As a result, the Act of 1927 required equal opportunities for candidates campaigning for elective offices. Subsequently, the provision was re-enacted as Section 315 of the Communications Act of 1934.[30]

The making of a regulation requiring both sides on other controversial questions was thereby left to the Commission. This came early. In 1929, the FRC formulated a broad both sides rule and gave

it its first official expression and rationalization. "There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether. If franchises are extended to some it gives them an unfair advantage over others, and results in a corresponding cutting down of general public-service stations. It favors the interests and desires of a portion of the listening public at the expense of the rest. Propaganda stations (a term which is here used for the sake of convenience and not in a derogatory sense) are not consistent with the most beneficial sort of discussion of public questions. As a general rule, postulated on the laws of nature as well as on the standard of public interest, convenience, or necessity, particular doctrines, creeds, and beliefs must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public the microphone will undoubtedly be available. If it is not, a well-founded complaint will receive the careful consideration of the commission in its future action with reference to the station complained of." [11]

Before long, the both sides principle began to receive new attention from Congress. Pressure groups began coming to the committees with complaints of discrimination and with demands for a right to go on the air. Also, Congressmen began to see that they had an interest in using the radio for more than political campaigns. It was important for them to be able to explain to their constituents the stands they were taking on various issues in order to keep popular support for future elections. In addition to elections, Congressmen desired to be able to publicize their ideas on governmental policy and, hence, to influence public opinion.

Proposals to legislate were raised anew. Commissioners and broadcasters were asked whether they thought it necessary or advisable to expand the statute to impose a general both sides rule. In 1929 and 1930, the question was raised by a group of Senators, many of them Republicans in revolt against President Hoover's leadership of the party. Calling themselves Progressives, they were afraid that the radio people would favor the Hoover administration. Moreover, a feeling that all broadcasters could not be trusted to carry out an impartial policy began to creep into the picture.

At about the same time, a religious sect commonly called Jehovah's Witnesses carried to Congress a demand for radio time to preach its doctrines after NBC had withdrawn its facilities because of the intemperate attacks which the Jehovahs had made on other churches.

Having failed to get the desired regulation from the FRC, this group asked for new legislation. As a result, a bill was introduced into the House of Representatives expanding the political both sides requirement to include religious and educational speeches.[82] A proposal to require equality for all points of view on all subjects, "so far as possible," was made in a Senate bill.[83]

Controversies produced by the New Deal reforms intensified the drive for new legislation. President Roosevelt personally and his administration in general used radio to a much greater extent than their predecessors. They found the medium advantageous both for the purpose of building popular support and for the purpose of informing the people of governmental activities. In addition, many business sponsors used some of their commercial time to plug specific agencies. For example, in the early years this was done for the NRA. Subsequently, companies in the building trades—like Johns-Manville, General Electric and Sherwin Williams—advertised the Federal Housing Administration.[84] As a result, New Deal opponents protested that the radio people were leaning over backwards to favor the Administration point of view.

The outbreak of war in Europe concentrated the conflicts on questions of foreign policy. While there was considerable agreement on the desire to stay out of the war, the controversy as to whether the Roosevelt policies were accomplishing this objective was keen. Again, his opponents charged that they were not being given equal and fair opportunities to defend and popularize their points of view.

Into this highly charged environment stepped the UAW-CIO. One argument in the fight for more and better radio time, described above, was that many broadcasters were violating the both sides rule by keeping labor unions off the air while giving employers a broad freedom of expression. It was charged that business men were permitted to sponsor news programs which were frequently slanted to the business point of view and to publicize their side of controversial issues on commercial time which was sold for the purpose of advertising their goods and services, while labor was denied sponsorship of any programs. Sometimes, commercial advertising was obvious propaganda for the sponsor's predilections and sometimes this objective was accomplished by "skillful wording." So-called good will advertising was said by union spokesmen to indoctrinate people with attitudes favorable to employers. In some instances, the time allotted for commercial messages was taken up by homilies which preached the sponsor's ideas on all kinds of subjects.[85] Needless to say, many

of these ideas, values and points of view were contrary to those held by labor leaders. As a result, the unions demanded that the government force the industry to give labor equal treatment with business men.

The net result of this accumulated pressure was the writing of a very extreme both sides requirement into the Wheeler-White Bill by the Senate Committee on Interstate Commerce in 1943.[86] A few years later, the same provisions were reiterated with negligible change in the White Bill.[87] Subsequently, similar bills were introduced in succeeding Congresses.

None of these attempts at legislation were successful. The reasons for their failure are numerous. One was the opposition of the industry. It argued, in the first place, that legislation was unnecessary. As early as 1924 and 1926, such leaders as Harkness of AT&T and Sarnoff of RCA had accepted the idea that radio should not become the mouthpiece of any particular interests.[88] Subsequently, the idea that the both sides principle is essential to the public interest permeated the industry's own program standards and was incorporated into both the radio and television codes. In addition, broadcasters have insisted that the industry has, on the whole, done a good job.

The second ground for the industry's opposition was the fact that controversies are many-sided and broadcasters were afraid that a legislative rule would be interpreted to require *all comers* with different ideas to be accommodated. Chaos would result. "When you consider all phases of questions, Senator, and when you consider the thousands of letters that I get and verbal applications from any number of people to go on the air, representing various shades of opinion—why, there is not time in the day."[89] The mere necessity to make repeated changes in schedules would cause so much work that program managers would have little time for anything else. Furthermore, the disruption of popular programs would produce a reaction from the public. Hence, broadcasters have always held that they had to turn some would-be speakers away. The practice has been to schedule only a few speakers on any one controversy; subjects are selected on grounds of their importance to the public interest and their appeal to audiences. Just because a person differs with a point of view already expressed does not justify an allotment of time which is already in great demand. Only speakers for a substantial body of opinion are brought under the both sides rule. "The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling

for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated." [40]

The broadcasters have also argued that equality would often be impossible. For example, suppose there were a speech followed by an answer. The latter might not necessarily meet the first squarely but might raise other issues which other speakers would want to answer. The resulting "chain reaction" could reach that stage where nothing less than the mental competence of a divine being could determine what had happened to "equality." This problem can be illustrated by an interesting specific incident. In November, 1953, the TV and radio networks gave ex-President Harry Truman a half-hour, during which he made a passing reference of less than a minute to "McCarthyism." Senator Joseph R. McCarthy, Republican of Wisconsin, claiming to be attacked, demanded and received, free, from the same networks a full half-hour for an answer. As well as denouncing "Trumanism" in his speech, the Senator criticised the Eisenhower Administration and made accusations questioning the loyalty to the United States of numerous persons, most of whom were appointees of previous Democratic administrations. The networks were greatly disturbed. Anticipating a snow-balling of new demands for half-hour periods from all such persons, they announced that they would decide each request upon its own merits. Fortunately, these people created no difficulties; only the Communist Party paper, the *Daily Worker*, made a demand and it was easily ignored.

Coverage also presents difficulties. For example, suppose one hundred affiliated stations took a speech scheduled by their network. A subsequent, opposing speaker might get a hook-up of a smaller or larger number of stations, or of different stations, depending upon their willingness or ability to take the speech. In such eventualities, there would be no equality and, at the same time, very little that either the nets or the stations could do about it. In the absence of any specific legislation, no requirement of absolute or mathematical equality has prevailed. The FCC has merely insisted upon "fairness" to varied points of view and has not tried to measure coverage and value of time. Extensive discretion is left to management.

Another reason for failure of legislation has been the lukewarm support of most Congressmen. They have said that FCC power under the existing statutes is adequate. They also thought that vigorous and lively discussions of the subject in committee hearings were enough, that an indirect regulation or coercion by pressure has

resulted. In other words, advocacy of the both sides idea by Congressmen and by strong pressure groups has induced broadcasters to make diligent and conscientious efforts to observe the principle.

Finally, no new laws have been enacted because of the opposition of the Commission. Both the FRC and the FCC have maintained that the statute already establishes the both sides rule by making service in the public interest a prerequisite to a license; new legislation is therefore unnecessary. Chairman James L. Fly also emphasized the practical side. Under the existing system of administrative regulation, most of the specific problems fall on the shoulders of the broadcasters and it was felt that a definite statutory requirement would bring all these problems down on the heads of the Commissioners. "Certainly I do not care to have to settle these squabbles. I do not want to get into them." Fly preferred to let them remain where they were—"isn't this why management talent comes high?" [41]

The conclusion has been to leave regulation in the hands of the Commission under the general statutory directive to grant licenses only in the public interest. In carrying out this duty, the FCC has followed in the footsteps of its predecessor, the FRC. Controls have been left mostly to the industry. In only a few instances have formal proceedings been invoked. The most famous one is the Mayflower Case. Station WAAB, Boston, was found guilty of one-sided propagandizing and, while the license was renewed on the ground that the station had reformed, the FCC's decision gave public warning that the regulation was still in effect and would be enforced. "Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation. And while the day to day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission." [42] This case was subsequently used as a precedent in the WHKC Case, which reiterated the both sides rule. [43]

The day-to-day tasks of the industry's program managers have not been without their difficulties. For example, should advertising be

considered as advocacy, hence giving rise to a right to answer? This problem has arisen over the sponsorship of cigarettes and beer. Anti-tobacconists and prohibitionists have demanded time to preach the evils of these products. Even where time has been granted, there has been dissatisfaction because it was not equal to the time used by the advertisers of these commodities. While most of the pressure has been negligible, the "drys" have been particularly strong, aggressive and persistent. As well as trying to ban all liquor advertising by law, they have challenged the licenses of some broadcasters. When the FCC refused to terminate any licenses, the fight was carried to the courts. This also came to naught. The fact is that an acceptance of the notion that time should be granted to answer advertising would create such chaos in program schedules that neither the Commission nor the industry could enforce it.

The most volatile issues have been those of politics and religion. As already shown, it has not been difficult for politicians to think that their opponents have been favored. Congressmen have charged unfair treatment because of the broadcasting of the speeches of opposing Congressmen. A perennial problem has been created by the speeches of the President of the United States. It has become common practice to give him omni-network coverage. Such programs have frequently stimulated demands from the party-out-of-power for equal time and coverage. Where time to answer was given by some, but not all, of the networks which carried a President's speech, the unequal coverage has produced charges of unfairness. Even the President's messages to Congress on the State of the Union have brought demands for an opportunity to answer. Just when is a governmental official acting in an "official" or "political" capacity? Just when is he merely "reporting" to the public on the affairs of the day or "advocating" one side of a controversial issue? While problems like these have often created difficulties for management, the industry has been widely praised for the way it has handled them; discontents have occasionally flared up but quickly died down.

While the general both sides rule establishes a broad and vague standard of "fair" treatment, Section 315 of the Communications Act *requires equal opportunities* for candidates in election campaigns. This does not mean that all must actually *receive equal treatment*; it means merely that the industry must provide it if the candidates request it. Difficulties presented by this Section have induced the FCC to ask Congress to give the United States District Courts jurisdiction to de-

cide all complaints of denial of equal treatment and thereby relieve the FCC of this task.

In the meanwhile, the FCC has the duty to carry out this provision of the law and, in doing so, has laid down some basic rulings. A candidate is any person for whom the voters can legally vote according to Federal, state and local law and includes both primaries and elections. As a result, a person whose name is not on a ballot may be protected, as where local law makes provision for "write-in" candidates. In previous years, candidates of the Communist Party were included within this provision of the statute as well as those of the Republican and Democratic parties. In 1954, however, Congress deprived Communist candidates of this right.[45] Since then, there have been attempts to extend the prohibition to all "subversives."

No discrimination among candidates can be made in the price charged for the time used. For example, if one candidate is given free time, others are entitled to it. In 1952, Congress also forbade the industry to charge any candidate more than its usual commercial prices for comparable time.[45] With the growing importance and high prices of TV time, politicians began to express concern over the increasing costs of political campaigns; unequal ability to pay was creating a practical inequality in the use of radio and television despite the law. As a result, by the middle 1950s many new regulations were being suggested: Congress should regulate the prices of campaign time (presumably downward), require the industry to provide free time, and subsidize campaigns by appropriating governmental funds to buy time for candidates. These suggestions were so radical that no one seriously expected them to become law.

Another FCC regulation requires that the time provided for candidates be equal in amount and desirability; one cannot be given a half hour while another, who wants the same, is restricted to fifteen minutes; one cannot be scheduled at a period when audiences are habitually large and another at a time when most people are in bed. No discrimination in services is permitted; for example, help in writing scripts, supplying recordings or films, and so on.[45A]

One question which has created difficulty over the years is whether an informational speech on the policies and the conduct of his office by a governmental official who is also a candidate for re-election should come under Section 315. The problem was finally brought to the FCC during the campaign of 1956 when President Eisenhower made a speech on free time on the national radio and television networks on the Near East crisis created by the Egyptian seizure of the

Suez Canal. In response to a petition from the networks, the Commission, by a vote of 4 to 3, held that the other party candidates for the Presidency, of which there were five demanding equal time, did not have to be accommodated. The President was considered to be acting in his capacity as an official, and not as a candidate; he was reporting to the nation on an international crisis, and not campaigning for votes. In early 1957, the FCC issued another ruling on a similar case. It held that a telecast of the swearing-into-office of a recess-appointed judge of a state court who was also a candidate for election was a mere news program and therefore did not call for a grant of equal time to his opponents in the election.

The exact limits and specific applications of these rulings are uncertain. As a result, the industry, despite these cases, has been reluctant to permit the appearance of candidates on their facilities on time devoted to non-political purposes or sold to commercial sponsors. In such instances, other candidates may acquire the right to equal free time.

As a result, President Frank Stanton of CBS has urged an amendment to the statute, excepting from the requirement of Section 315 the appearance of candidates on news, news interview, panel discussion, debate, and similar type programs. Stations and networks would organize many such programs for the major party candidates, particularly in Presidential campaigns, if the law permitted them to do so without thereby producing a flood of demands for free time from all other candidates. A much greater public service could be performed. Section 315, therefore, is viewed as restricting, rather than fostering, service in the education of the public on election issues. CBS claimed that politicians need not fear discrimination. The amendment would apply the exception only to the type of program specified; equality of opportunity would still apply to all other uses of the medium by candidates. Also, the industry would have control over the exempt programs and could be trusted to be fair in presenting a balance of points of view.

Numerous versions of the Stanton proposal have been written into bills introduced into Congress. Most of them restrict the exceptions to the Presidential candidates of the major parties only and then exclusively to the kinds of programs specified above. Hearings, however, soon showed a fear among many politicians that inequality would result; neither of the major parties trusted the other. While the objectives were praised by some members of Congress, the idea itself did not meet with universal approval.

The statutory rule of Section 315 is limited to candidates. For other campaign speakers, both the FCC and the industry have held that the general both sides rule is applicable—that is, merely a fair treatment, rather than an equal right to time, for the different points of view on the election issues.

The general both sides principle has also been applied to religious programs; the industry has tried to accommodate a multiplicity of sects. Realizing that absolute equality for all is impossible—there being too many of them—a common practice has been to distribute time among the "recognized denominations." Stations and networks vary greatly in the policy of selling or giving time; some do both and some do one or the other exclusively. Throughout the entire industry, however, the both sides rule does not serve to provide time for attacks on religion or against any church.

The FCC has agreed with the industry. Licenses have been denied to religious applicants who proposed to withhold time from sects preaching opposite dogmas.[46] The Commission has also refused to upset decisions on whether time for religious programs should be sold or provided free.[47]

What about the preaching of atheism? Should it be considered as an attack on religion by way of denial of religious convictions, or as the advocacy of one side of a religious controversy? When Robert H. Scott was denied time by three California stations—KQW, San Jose, KPO and KFRC, San Francisco—he petitioned the FCC to revoke their licenses. The petition was denied, but in its opinion the Commission thought that the subject should be treated as a controversial one and that, therefore, atheistic views should not be completely suppressed so long as they were not put in the form of abusive or intemperate attacks on existing religious beliefs.[48] It is clear in the opinion, despite some interpretations to the contrary, that the FCC was *not* saying that atheists should have equal time with all preachers.

All the Commission achieved was trouble. An overwhelming majority of the people in the country believe in a deity and are intolerant of freedom for a small minority to deny this conviction. The broadcasters have always been aware of this fact and, fearing the violence of public indignation, have insisted that programs of this nature were not in the public interest. The Scott Case, therefore, drew fire from the industry, the clergy, the press and from Congressmen. KQW showed that listeners could also be added to this opposition group. Although the FCC issued no order or coercive process, Scott

was put on the air on time taken from the regularly scheduled Salt Lake City Tabernacle program. The station also asked listeners to send in their reactions. Over 5,000 letters were received, divided 80% to 20% against Scott. KQW thereupon announced that no more sermons on atheism would be broadcast. While the circumstances of this so-called "experiment" made the results of doubtful accuracy, they did go to show what no one has ever denied—that advocacy of atheism is unpopular.

New fuel was added to the fire when the FCC in the spring of 1948 put the license of WHAM, Rochester, New York, on temporary renewal pending a study of a complaint of denial of time to an organization called "Free Thinkers" and then, a few months later, granted a regular renewal without holding a hearing on the complaint. Protests were carried to a special House of Representatives Committee which was set up to investigate the Commission. The extreme nature of the criticism shows the degree of heat which was kindled. Representative Charles J. Kersten, for example, took the position that "atheists have no more standing to ask equal time with religious programs over the air than violators of the moral law would have the right to expound immoral ideas on an equal basis with time granted to those who defended the moral law."[49] Religious leaders, despite all evidence to the contrary, complained to the Committee that religious programs were being driven off the air.

The Committee decided to investigate. During the hearing, the Commission was given a "rough" time.[50] It was also "spanked" in the Committee's "scathing report to Congress" which declared that the Commissioners had exceeded their authority and had "embarked upon a dangerous and mischievous line of reasoning."

The pressure was effective. The Scott case, which never did mean much as a regulation, became a dead letter for all practical purposes when the FCC interpreted it to mean that broadcasters did not have to schedule *any* programs on atheism so long as the denial of time was not due to the licensee's personal disbelief in and dislike of atheistic views. Evidence of this intent or motive, of course, can rarely, if ever, be shown. Moreover, the broadcasters were convinced that the accumulation of pressure would induce the FCC to dodge the issue so as not to invite more trouble.

They were right. When Scott was again denied radio time, he filed a second petition for revocation of license. The FCC, however, flatly refused even to set a hearing. "It does not appear from the information submitted by you that any program broadcast by the named

stations was directed against you personally or against the position which you espoused. In the Commission's view, the facts submitted by you do not present a situation in which the station has denied an opportunity to afford equal time for the presentation of a controversial issue of public importance. There is no obligation on the part of a station licensee to grant the request of any and all persons for time to state their views on matters in which they may be interested." [51]

That occasional complaints against individual broadcasters should appear is inevitable in the light of practical programming problems, the vagueness of the both sides rule, and the aggressiveness of the critics. At the same time, the industry has built a meritorious record of over-all fairness to different points of view. While a few critics have disagreed with this conclusion, it is supported by the evidence.

The Commercial Sustaining Balance

As a result of the insistence upon educational and cultural programs, discussions of public affairs and controversial issues, speeches by governmental officials and service for farmers, the public interest has been interpreted to require the broadcasters to put on some programs which are not sponsored by advertisers. Over the years Congressmen have rationalized this regulation as merely making mandatory something which the broadcasters should be willing to do in return for their licenses. If a person does not want to provide a public service, the opportunity to reap profits from the business should be given to another, who is willing.

In its first application blanks for renewal of licenses, in 1927, the FRC called for information on the "average number of hours sold weekly before six p.m. and after six p.m." [52] Subsequently, this conception of public service was asserted in general pronouncements. Broadcasters were not to be permitted to restrict their offerings to those kinds of programs which advertisers want to sponsor; "broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers." [53]

In Congressional committee hearings, the charges of "excessive commercialism" have been sporadic. Numerous suggestions to establish legislative controls have been made. Sometimes, particularly during the earlier years, the proposals were drastic. While none was enacted, the net result has been to emphasize and strengthen the rule that a "reasonable proportion" of sustaining programs must be broadcast.

In 1926, the Chicago Federation of Labor urged a statutory restriction on the amount of time which could be sold.[54] Two years later, Commissioner Sykes told a House committee that he would welcome some kind of statutory limitation and suggested that advertising be permitted during the daytime only. A bill in 1928 proposed to give the FRC authority to prohibit network advertising entirely. In the next year, the question of a blanket prohibition against all radio advertising was raised in a Senate committee hearing.[55] In 1932, a bill was introduced in the House to forbid all advertising on Sunday.[56]

In the same year, the Senate decided that an investigation was in order. The Commission was therefore directed to determine "to what extent the facilities of a representative group of broadcasting stations are used for commercial advertising purposes" and to report on "what plans might be adopted to reduce, to limit, to control, and, perhaps, to eliminate" such use.

After an investigation, the FRC recommended against a prohibition of all advertising on the grounds that such action would "destroy the present system of broadcasting." As to other restrictions, the Senate was merely told what it knew already: that various kinds were possible—the fixing of an amount or percentage of time for sustaining programs, or a limitation of commercial programs to particular hours—and that Congress could act if it wished by legislating such details or by telling the Commission to do so. At the same time, the difficulty of going into detailed regulations for hundreds of stations scattered over the country, each with different audiences and different service problems, was pointed out. The FRC report also proved a boomerang to those who had been charging excessive commercialism. A survey of the offerings of 582 stations over a seven-day period showed that 63.86% of the hours were devoted to sustaining programs and only 36.14% to commercial programs.[57]

The attack on commercialism was therefore not due to the sale of too much time to sponsors. The real cause was the conflict between "non-commercial" and "commercial" radio, which goes back to the very beginnings of regulation. In the 1920s, one of the objections to locating regulatory authority in the Department of Commerce had been the accusation that it had favored business over non-business applicants. Strong demands had been made that Congress put in the Act of 1927 a protection of the right of educational institutions to hold licenses. To a large extent the strength of the demand came from the political power of the farm bloc. Spokesmen were the land—grant colleges, farm organizations and the Department of Agriculture. While

Congressmen expressed sympathy for a statutory protection of educational stations, none was enacted. As one of the "fathers" of the radio bill, Wallace H. White, explained: "At the time we were working on the legislation the agricultural land-grant colleges were very insistent that they should have a privileged status. There were various other groups that were just waiting to advance their claims if we gave any recognition to a prior right to anybody. We had to write it in very general terms, vesting discretion in the Radio Commission to make the best distribution they could, or we had to undertake to make an allocation to services in the legislation, which would be rigid and which would be fruitful of interminable discussion here in the legislative body. It was hopeless to try to work it out in the legislation."[88]

During the early years, there was a heavy mortality among stations licensed to educational institutions. From 202 in the late 1920s the number dropped to 38 in 1936. As a result, the old charge of fostering excessive commercialism was now directed at the FRC. At times, the attack became bitter. For example, upon the naked assumption that the major purpose of the Act of 1927 was to prevent favoritism to commercial broadcasters, the Commissioners were accused of violating the very law they had sworn to enforce by granting the best license terms to business men. Congressmen showed great interest. Farm organizations and the Department of Agriculture expressed a fear that rural service would suffer and the farmers would no longer be able to receive information being developed by the agricultural colleges and the extension service of the Department.

In 1930, many educational interests joined in a demand for governmental action to protect their opportunities to own stations and organized the National Committee on Education by Radio. Immediately, the Committee urged legislation to reserve 15 percent of the standard frequencies for the exclusive use of educational institutions and governmental agencies, and Senator Simeon D. Fess of Ohio introduced bills in the Senate to carry out this recommendation.[89] Strong opposition was expressed by the FRC, the American Bar Association and the radio broadcasting industry.

Another result of the pressure of the educators was a Senate Resolution which required the FRC to report in detail what it had done to the applications of educational institutions for new or improved facilities and to what extent commercial stations permitted educators to use their microphones. The Senate asked: "Does the Commission believe that educational programs can be safely left to the voluntary gift of the use of facilities by commercial stations?"

The FRC clearly and emphatically answered this question, "Yes." The study showed that the record of performance was good and the willingness to cooperate widespread. Of 533 stations, 97.75% reported that their facilities had been offered to educational institutions. Their interest, on the other hand, was low. Of 525 stations, 94.48% reported that educators did not use all the time made available.[60]

Meanwhile, a few labor and religious organizations jumped on the educational band wagon, notable among them being the Chicago Federation of Labor and the AFL, the Missionary Society of St. Paul (commonly known as the Paulist Fathers), and the Jehovah's Witnesses.[61] They based their claims for facilities upon the bare-faced assertion that only so long as a station was operated by a non-business licensee could it be performing a public service. In the words of the CFL: "We urge that radio be not wholly prostituted to its lowest use —that of amusing the multitude in order to sell merchandise—but that a substantial part of the limited precious radio facilities be allocated for education, information, instruction and inspiration."[62]

As a result of this pressure, another attempt at legislation was made in 1934. While the bill which became the present Communications Act was pending in Congress, an amendment—commonly called the Wagner-Hatfield Amendment—proposed to require the new FCC to reserve one-fourth of all broadcasting facilities for the exclusive use of "educational, religious, agricultural, labor, cooperative, and similar non-profit-making associations."[63]

This attempt at legislation also failed. While vigorous support was given by numerous Catholic organizations, by many Congressmen and by some educational institutions, the opposition was stronger. Committees of the Senate and House were unsympathetic. In debate on the floor, Congressional opposition appeared widespread.[64] The radio industry, of course, saw the proposal as a serious threat to its very existence and presented a united front. Joining them were the FRC and many educators.

Again, Congress decided upon an investigation as the best way out of the conflict between such powerful antagonists. The Communications Act of 1934, therefore, directed the FCC to make a study and to report its recommendations on the advisability of a legislative segregation of facilities.

During its extensive hearings, the Commission found the same polarity which the FRC had disclosed in 1932. In opposition to the groups demanding their own licenses and their own stations, many witnesses expressed a preference for the opportunity to use the micro-

phones of the commercial broadcasters. Many well-known and influential educators were on this side of the issue, and industry spokesmen declared that they were willing to cooperate. As a result, the FCC resolved the years-old conflict in favor of this solution. "It would appear that the interests of non-profit organizations may be better served by the use of the existing facilities, thus giving them access to costly and efficient equipment and to established audiences, than by the establishment of new stations for their peculiar needs." Like the FRC before it, the FCC recommended: "That at this time no fixed percentages of radio broadcast facilities be allocated by statute to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities." [65] With this conclusion, the fight for non-commercial frequencies was over, so far as the standard band is concerned.

Because this fight for frequencies was grounded on an attack against commercialism, its result was to establish still more firmly the old rule that broadcasters must carry sustaining programs. Furthermore, the FCC was pushed into threatening vigorous enforcement. "It is our firm intention to assist the non-profit organizations to obtain the fullest opportunities for expression." The promise of cooperation, which the commercial broadcasters had made, would be carried out "in good faith" under the "direction and supervision of the Commission." [66]

During the early 1940s, the Commission granted license renewals as a matter of course. Program regulation was neglected as a result of a pre-occupation with war work. It was reported that in some instances station schedules were as high as 95% commercial and that the few sustaining programs were often relegated to the bad hours of early morning and late night when audiences were small.

As a result, the attack on commercialism was revived. In Senate and House committee hearings, witnesses, Congressmen and Commissioners declared that more programs should be sustaining. The enactment of legislation to set a specific proportion of time for such service, or to direct the FCC to do so, was again discussed in favorable terms. [67]

The FCC was moved to act. In 1945, Chairman Paul A. Porter told the NAB that the Commission was studying the subject. The motivation was "a growing body of responsible opinion" in Congress and in influential sections of the public. Also, "many influential broadcasters have expressed to me deep concern over what they themselves describe as an alarming trend toward 'excessive commercial-

ism.'" Porter thought that the pressure for regulation was so strong that some kind of governmental coercion could not be avoided. "The cloud on the horizon is bigger than a man's hand and I know that responsible broadcasters see it and are concerned about it."[68]

In the same year, 300 licenses were put on temporary renewals. In the next year, the Commission issued a report in which it reiterated the old rule that the devotion of "a reasonable proportion of time" to sustaining programs was essential to "operation in the public interest" and declared that a more careful scrutiny of each applicant's performance would be made.[69] No specific percentages or segments of airtime were specified. Like the FRC, the Commission adhered to the idea that its statutory power did not permit such detail in program regulation. Practice, however, gave a clue to what the FCC thought was a proper proportion. The Commission was "quiescent if commercials are 80% or under. If figure passes 80, fur flies."[70]

In justification of the regulation, the FCC described five functions performed by sustaining programs.[71]

(1) They make for variety. Advertisers in general prefer programs of news and entertainment. As a result, if all time is sponsored, programs of these types would dominate the air. In particular would educational and cultural programs, and discussions of both sides of controversial issues, suffer by neglect. That some broadcasters agreed with the Commission is shown by the testimony of CBS. "One use Columbia makes of sustaining programs is to supplement commercial offerings in such ways as to achieve so far as possible, a full and balanced network service. For example, if the commercial programs should be predominantly musical, Columbia endeavors to restore program balance with drama or the like in its sustaining service."

(2) Sustaining time can be used to broadcast programs which, by their very nature, are thought to be unsuitable for sponsorship. Even though advertisers might be willing to sponsor such programs, the mere broadcast of a commercial plug would be objectionable—"the sermon which you have just heard was brought to you by . . . producers of . . ." and so on. While no list or specification of the kinds of programs which fall in this category has ever been issued, those which have been most frequently mentioned are: religious services, discussions of governmental activities by governmental officials, accounts of civic events and celebrations, meetings of the United Nations, and the President's speech to Congress on the State of the Union.

(3) Sustaining time can be, and often is, used to provide a service

for minorities. While some advertisers have been willing to sponsor programs for only small audiences, this is the exception rather than the general practice. Hence, it has been concluded that the commercialization of an entire program schedule would produce less of such service than the critics have thought desirable.

Programs intended for minorities have sometimes turned out to be more popular than was originally expected—"we frequently find that we are able to cater to appetites that large numbers of people did not even know they possessed."[73] Radio has often been—and according to the FCC has the duty to be—a leader in the cultivation and education of the public in new tastes. Small audiences have been known to grow into big ones. For example, the New York Philharmonic Orchestra expanded from an approximate 5,000,000 listeners per month in 1930 to an estimated 28,000,000 in 1946.[74] When this increasing popularity attracts sponsorship, the proportions of sustaining service, in the opinion of the FCC, should not suffer. "The way is open for devoting sustaining time to still other types of programs having less than maximum audience appeal."

(4) Sustaining time provides broadcasting opportunities for nonprofit organizations. By this regulation, therefore, the FCC was doing no more than to carry out the promise it made to Congress in 1935 when, as previously shown, it opposed a statutory segregation of AM facilities for such groups. Furthermore, because radio spokesmen, including the NAB, declared a willingness to make the microphones available to such people, the FCC was merely insisting that they also carry out their promises. In another sense, public interest was defined broadly enough to include the interests of people who desire to go on the air as well as the interests of listeners. Civic, governmental, agricultural, educational, religious and labor programs are ingredients of public service.

(5) Finally, if the broadcasters are required to put on some sustaining programs they will be stimulated to experiment, to explore new fields and to devise new types of programs. For the most part, according to the Commission, new developments cannot be expected from advertisers. Being limited by the narrow objective of selling goods and services, they prefer the tried and tested popular appeals. Moreover, it was held that the public interest requires the broadcasters to make programs; to be mere sellers of time is not enough. They should not be permitted to shift this duty to the advertising agencies.

There has been a general, industry-wide acceptance of the obligation to broadcast sustaining programs.[75] Many broadcasters

have declared that these offerings make for good public relations. Even if the rewards can not be counted in dollars, they can be seen in enhanced prestige with articulate sections of the public. "Highbrows" have wielded an influence out of proportion to their numbers. Station advertising and publicity releases have often boasted about the quality of public service programs.

Some opposition, however, has been expressed. One complaint has been that governmental officials are opposed to the industry making money. While the statements of some of the extreme critics have looked suspiciously like challenges of the profit motive and have seemed to imply that the making of money is inconsistent with service in the public interest, this has not been the prevailing attitude in governmental circles. Commercialism and advertising have been accepted by the FCC as characterizing the American System. "Advertising represents the only source of revenue for most American broadcasting stations, and is therefore an indispensable part of our system of broadcasting."[75] Moreover, governmental officials have said that large profits are good because they enable the broadcasters to devote more money to the public service through sustaining programs.

Controversy over the sustaining-commercial rule also springs from different interpretations of the public interest. Some critics of the industry have alleged that only programs satisfying minority tastes are "good" and that popularity results in inferior quality. Other critics have objected to specific, rather than all, popular programs, using against their pet dislikes such tags as tin-pan alley stuff, trashy shows, and dime novel melodramas. At one time, the criticism led some of the broadcasters to fear that the FCC was going to insist that only sustaining programs are in the public interest.

Some of the radio people have also gone to the extreme in the defense of their commercials. They have said that only those programs which advertisers are willing to sponsor are in the public interest. Programs must pay their own way. "If it's not good enough to sell, it's not good enough to be on the air."[76] In a similar vein, the FCC found that many broadcasters "saw no difference between a commercial and a sustaining program, and a few even stated their belief that a station could operate in the public interest with no sustaining programs."[77]

The FCC has refused to go all out for either kind of program. Both are desirable. "More than half of all broadcast time is devoted to commercial programs; the most popular programs on

the air are commercial. The evidence is overwhelming that the popularity of American broadcasting as we know it is based in no small part upon its commercial programs."[78]

In frequency modulation and television, the FCC has not been content to rely upon the generosity of commercial stations for educational service. It has reserved frequencies for non-commercial broadcasting by educational institutions, in addition to requiring that commercial stations provide sustaining time for educational programs. Originally, in the early 1940s, FM was given 40 channels, 5 for non-commercial and 35 for commercial use. After the war, when FM was moved upstairs to the 88–108 mc band, 20 channels, 88 to 92 mc, were set aside for educational institutions which were willing to undertake a non-commercial service.[79] In 1952, a similar decision was made for television. Reservations for 242 stations were distributed over the country throughout both the very high and the ultra high frequencies.[80]

The Commission experienced little difficulty in making the decision for FM. For the most part, the industry was acquiescent. Some spokesmen even declared that they thought the reservation was desirable. There was plenty of spectrum room for both the commercial and non-commercial services and, in contrast with AM, the decision did not necessitate any destruction of existing businesses. Subsequently, however, some opposition did develop. In a number of instances, demands were made on the officials of state and local governments to block plans being made by school boards to apply for the available frequencies. Because the public school systems are part of government, broadcasting stations and their state trade associations saw such proposals—particularly those for state-wide, educational, FM networks—as governmental competition for audiences. One argument which was used in this conflict therefore alleged that the American System of private enterprise in broadcasting was threatened by governmental ownership and operation.[81]

In contrast, the proposal to reserve TV frequencies was contested from the beginning and became a subject of extensive FCC hearings in which 76 witnesses testified on both sides. The controversy had many similarities with the earlier fight for AM frequencies. Leading the proponents was the Joint Committee on Educational Telecasting (JCET), composed of numerous educational interests. The opposition was led by the NAB, vigorously assisted by a number

of telecasters. While the issue was pending before the Commission, resolutions were introduced into the Senate and House of Representatives for the purpose of blocking an FCC decision by ordering it to investigate the subject and report to Congress. Another proposal, incorporated in a bill, would have required commercial TV stations to set aside 25 per cent of their schedules for sustaining, educational programs.[87] When this solution was urged before the FCC, it followed its AM precedent and rejected the proposal.

While some sections of the industry have continued to express opposition, educational institutions venturing into television have also been receiving much valuable assistance from other sections of the industry. For example, Emmerson Radio and Phonograph Company has given $10,000 to each of ten new educational stations. Telecasters have contributed equipment and techical advice valued in the hundreds of thousands of dollars. One such case is the gift by CBS of an auxiliary transmitter and antenna equipment to Chicago Educational Television Association, licensee of WTTW (TV), estimated to be worth about 575,000 dollars. In addition, some eleemosynary organizations — like the Ford Foundation — have also been making grants of financial assistance.

Are educational institutions really as interested in operating stations as their more aggressive spokesmen have claimed? Can they meet the very high expenses of TV construction and operation? Opponents of reservation have argued that AM experience answers these questions in the negative. While the Commission has not gone this far, it has felt the restraint of skepticism. In its Final TV Report it declared that the "reservations should not be for an excesssively long period and should be surveyed from time to time."[88] Subsequently, it made an announcement of policy. While there was no time set for an automatic cancellation of the reservation, after June 2, 1953 the reserved channels were made subject to change in status. After that date, commercial applicants could ask for non-commercial channels and the petitions would be considered case by case. Furthermore, a warning which years before had been issued to educational institutions apropos FM was made equally applicable to TV. "Those choice channels were not set aside for *absentees*. The ether is far too crowded, the pressure from other interests seeking to use radio far too great, to permit continued reservation of those channels, unless educators actually get busy and fill them with educational stations. There is no room for

what the railroad industry calls 'deadheading.' If education doesn't want and doesn't need those channels, and if it doesn't prove its desires and needs by actually making intensive use of them, history is going to repeat itself, and education will again find that it is left with memories of a lost opportunity." [84]

IV

WHOSE NEWS?

Complaints of prejudiced reporting appeared early in the history of broadcasting.[1] As the years passed, news programs were unable to avoid the conflicts and controversies generated by the depression, the New Deal and the Fair Deal, prewar isolationism and postwar internationalism. Particularly responsible for stirring up trouble have been those commentators who habitually launch crusades against "evil" in labor, business and government, and the "gossip columnists" of the air.

Congressmen have often resented criticism from newscasters. Advocacy of ideas has often offended social and economic groups in the country. Protests have come from all sides. Republicans have charged Democrats with using political pressure on broadcasters to get favorable treatment for New Deal and Fair Deal policies. Liberals have complained that radio and television tend to favor conservatives. Labor has maintained that business men indoctrinate listeners with the business point of view. Such "offenses", it has been said, are aggravated by the regular scheduling of news programs, making for great influence on public opinion through reiteration on a steady audience. Inevitably, pressure for regulation was the result. Complainants have frequently demanded action from the Federal Communications Commission or Congress, and some success has been achieved. The industry has also been under pressure to make reforms, thus producing self regulation alongside governmental regulation.

The Sponsor's News

Charges that advertisers are able to color the news to suit their predilections have frequently been directed at radio and television. For the most part, the industry and its newsmen have been quick to deny these accusations.[2] In the earlier days, Congressmen were usually satisfied with these denials. Later, they fell on deaf ears.

For a few years, controversy reigned in committee rooms and extended into the press. The threat of harsh regulation flared, and then died.

According to the critics, control resulted from the power to hire and fire. FCC Chairman Fly testified that sponsors "select a man whose general attitude they approve of to start with;" in this way they could be sure that their ideas would be expressed.[3] Newscaster Quincy Howe agreed with Fly, although with a different emphasis. In order to hold his job, he pointed out, a commentator "is tempted to slant his interpretation the way he thinks his sponsor might like it to go" or, at least, to avoid contradicting his sponsor's convictions.[4]

Occasional cases have been reported in the press. In 1946 the National Economic Council of New York City, described by *Broadcasting* magazine as "ultraconservative," sponsored Upton Close, an "admitted political Rightist." The Council expressly declared its intention to be to "check the growth of public taxation" and to rally the public to "the true American principles of life and living."[5] Another illustration was provided by the experience of Fiorello LaGuardia with *Liberty Magazine.* The publisher, Paul Hunter, decided to drop LaGuardia "because he is at variance with our policies"[6] and purchased a new period of time upon which to feature the magazine's editor who could be trusted to say the right things. In 1954 the AFL dropped one of its news programs, thereby giving rise to similar charges.

Some broadcasters permit a freer choice in the selection of newsmen than others. As a result, opportunities to control through the power to hire and fire vary greatly from station to station. Some years ago, for example, CBS announced a policy which was claimed to prevent control. "This network takes full responsibility for broadcasts of news and analysis transmitted over its facilities. The individual broadcasters are members of Columbia's staff, are paid by us and responsible only to us. We set aside periods of network time for news and analysis which are sold only to clients who will sponsor them as they are developed by CBS. Under no circumstances will we sell time for news and permit the sponsor to select a broadcaster who is not wholly acceptable to us or to influence the content of the broadcast."[7] Unfortunately, critics have not always been convinced that this policy has, in fact, achieved the results claimed for it.

The criticism reached its height for a short period in the 1940s and produced a legislative proposal of an extreme type. The

Wheeler-White Bill of 1943 declared that "No news items or news analyses or news commentaries shall be included in any" sponsored program.[8] Had the bill passed, all news programs would be sustainers.

The proposal met overwhelming opposition. The radio people complained that it would punish all for the sins of the few; whether guilty or not, they would be deprived of a substantial source of revenue. The public would be injured by the termination of valuable, but expensive, programs — for example, direct reports from abroad. The FCC thought that the industry should do its own regulating and the CIO approved of sponsorship, merely asking that it not be limited to business men and employers. There is also evidence that Senator Burton K. Wheeler, the principal protagonist in the Senate, saw his bill primarily as a pressure on the industry to restrain its newsmen. Like Fly, he emphasized the fact that the Communications Act placed the duty to act in the public interest on the licensees and not on the sponsors.

As a result of this opposition, the prohibition of sponsorship became a dead issue by 1947. The White Bill[9] of that year was silent on the matter.

The Broadcaster's News

Within a few years after the first radio stations went on the air, Congressmen and broadcasters were agreeing that no station owner should make his microphone the mouthpiece of his own interests or ideas.[10] In committee hearings, broadcasters told Congressmen that station management should not "editorialize;" in fact, radio spokesmen went so far as to declare that licensees should not even have any editorial policies. Once the Radio Commission was created, it quickly put the principle into effect by denying the renewal of the license of WCOT, Providence, Rhode Island. The FRC found that the licensee had been going on the air to campaign for political office, to attack his personal enemies, and to express his opinions on all kinds of questions in which he was interested.[11] Within the next year, the Commission reiterated the rule and gave public warning of the intent to enforce it.[12]

The FCC's major pronouncement of the regulation came in the Mayflower Case of 1941. For about a year and a half, the editor-in-chief of WAAB, Boston, had broadcast a "large number" of programs "urging the election of various candidates for political office or supporting one side or other of various questions in public

controversey." Upon the station's assurance that the offenses had been discontinued and would not be repeated in the future, the license was renewed. At the same time, the Commission warned that it was not nullifying the regulation. "A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate." [13]

About five years later, the traditional stand of the industry began to change. NAB President Justin Miller and Vice President A. D. Willard began attacking the above dictum in the Mayflower Case as destructive of freedom of speech and urged the industry to fight for a change. These leaders interpreted the FCC's words as prohibiting broadcasting stations to produce "editorials"; analogy was made to the editorial pages of the press. Moreover, they said, stations should have the same right as the newspapers to exercise a positive influence on community affairs. "If a paper sees a condition in its community that should be remedied, it gets up and fights. We're wishy washy. The only thing we're 'agin' is sin — and it has to be so obivous that we are almost sure there is no contender on the other side of the question. The newspaper stands for what it knows to be proper and right in its community and has gained prestige in standing for those things during the years." [14]

Widespread interest, if not unanimity of opinion, was quickly generated. Many broadcasters went along with Miller's interpretation of the Mayflower Case, but others thought that they already had the right to broadcast their opinions on current events. The latter interpreted the Mayflower Case as saying merely that they could not limit the expression of opinion to their own; they must also provide opportunities for the broadcasting of other points of view. Another group adhered to the older position of the industry which disavowed any desire to formulate and broadcast an editorial policy. Some of the broadcasters abstained from the controversy entirely. The bulk, however, joined the crusade, holding that so long as the industry had any doubt of the meaning of the Mayflower Case the FCC should be asked to make its ruling clear, but they refused to criticise the Commission.

The FCC responded. Thorough hearings were held; the witnesses represented a variety of interests: broadcasters, labor, education, churches and government. Although some opposition to the right to editorialize was evident, most of the witnesses favored it

so long as the expression of diversity of opinion was not destroyed. The weight of the argument also defended editorializing as a positive good; it could be a means of fostering the expression of a greater variety of points of view. For example, where particular ideas were expressed in any program, a licensee could see that other ideas were also aired through his editorials.

In the spring of 1949, the Commission, with one dissenting vote, rendered its decision.[15] The Second Mayflower Case, as it is sometimes called, clearly recognized the right of a licensee to express his opinions over his own facilities. Station performance, however, must be "fair" and a "balance" of points of view must be maintained. Editorials "may not be utilized to achieve a partisan or one-sided presentation of issues."

Once the industry received this approval of the right to editorialize, it did not rest easy. In some quarters there was a fear that the brashness of some would generate complaints which would make trouble for all. While projects for community improvement have tended to be safe subjects,[16] economic and political issues have quite often aroused the passions of critics. This apprehension induced *Broadcasting* magazine to sound a note of warning: "But the right to editorialize doesn't mean it will be incumbent upon broadcasters to rush to their microphones on every national or international issue. That would be folly indeed. We shudder to think what would happen if stations acquired for themselves political party labels like the newspapers. . . .While we strongly favor the right of broadcasters to editorialize over their microphones, we vehemently oppose any concerted move whereby stations would attempt to counsel on the national or international scene or delve into politics per se."[17]

Not everyone in the industry has felt such fears. Some have urged stations and networks to strike out aggressively in new directions. A few have advocated the broadcasting of editorials at regular periods, viewing such a practice as being analogous to the editorial pages of the newspapers. More extreme voices have declared in favor of the adoption of definite editorial policies even if they should label stations by such tags as Republican or Democrat, liberal or conservative, isolationist or internationalist.

Practice, however, has been spotty. For the most part, the broadcasters have refrained from editorializing and where they have indulged they have tended to keep to the safe subjects. Occasionally, however, a station or network has boldly stepped into the

arena of volatile controversy; some licensees who rigidly adhhered to the policy of non-editorializing in earlier years have changed to the bolder position. Moreover, stations have reported that their editorials are popular and have been effective as audience builders. An interesting case of bold editorializing is a TV editorial broadcast over a Florida station which severely criticized a sentence pronounced by a local judge against a 16-year-old Negro boy who pled guilty to robbery; imprisonment for life, said the news editor of WTVJ (TV), Miami, "smacks of the dark ages of the South." The editorial was effective in calling the case to the attention of the Governor who promised that it would not be forgotten by the Parole Board which would correct the injustice when, in the exercise of its judgment, a parole becomes justifiable."[17A]

The Second Mayflower Case also forbade the broadcasters to establish a particular "line" to which newscasters must conform. The rule, however, was not created by the FCC in this case. In fact, the regulation goes back into the earlier days of the industry. Throughout the 1930s, the radio people appearing before Congressional committees were asked whether they required their newsmen to color the news in conformance to the point of view of management. Numerous spokesmen for the industry assured the Congressmen that they were doing no such thing; in fact, they went further by declaring that any broadcaster who did control the content of news programs was violating his duty to the public interest. As a result, the older rule against the propagandizing of a station owner's ideas was extended to news programs and, in 1939, the NAB Code formalized the industry's position into the rule that "news broadcasts shall not be editorial."

Charges of the violation of this regulation have been very rare. A recent case, however, provides an interesting illustration. The Radio News Club of Southern California, an organization of newscasters, filed charges against G. A. Richards who was the licensee of KMPC, Los Angeles, WGAR, Cleveland, and WJR, Detroit. He was accused of ordering the KMPC news staff to slant news programs so as to express his personal predilections.

During extensive hearings, there was testimony to the effect that Richards insisted upon unfavorable treatment for his pet dislikes, mostly the New Deal, and kindly treatment for his favorites, mostly right-wing Republicans. Witnesses said that some of the methods Richards ordered his newsmen to use in carrying out his objectives were the exclusion or inclusion of news items, depending

upon whether they were favorable or unfavorable, and the employment of derogatory or laudatory adjectives.

Before a decision was reached, the licensee died. Mrs. Richards expressly promised the Commission that if the licenses were renewed and transferred to her, she would not commit the offenses charged against her husband in her operation of the stations. The FCC, therefore, was able to avoid the disagreeable task of destroying such profitable businesses by termination of the licenses without sacrificing its regulation of news programs.

Newspaper News

Whether newspapers should be licensed to operate broadcasting stations has been an issue "pretty nearly as old as broadcasting itself . . . . I remember that back in 1928, when I was general counsel of the Federal Radio Commission, every so often it was argued to the Commission that newspaper ownership was somehow open to criticism." [18]

One group of complainants was composed of newcomers. Being unable to find room for new stations in the crowded spectrum, they saw newspaper stations keeping them out of the business. A governmental ban on the press would make stations available to these latecomers. Hence, it was argued that publishers should not be permitted to determine the kind of news to be given to the public by way of both the press and radio. Diversity, and not concentration, of control should be the rule to be followed in granting licenses. Some of these people went so far as to accuse the Commission of fostering monopolistic control over the means of mass communication by favoring newspaper applicants for radio stations.

Some broadcasters already in the business opposed the granting of FCC licenses to newspapers on the grounds that the owner of both media was in "an unduly advantageous competitive position." [19] That some broadcasters had real grounds to fear competition seems clear. Publishers sometimes established a close business relationship between their newspapers and their radio stations. For example, employees solicited advertising for both the station and the newspaper, thereby cutting costs over a non-associated competitor. Also, more inducements were offered to potential advertisers. An associated station could plug a sponsor's products by both oral and written commericals. The offer of joint rates or discounts for the use of both the paper and the station constituted an inducement to an advertiser to give his business to the associated station and,

sometimes, to take it away from a non-associated competitor. A still more extreme inducement to advertisers, which was sometimes used, was the offer of free space in the newspaper or free time on the radio station where the services of one or the other were used. There have also been a few reports of coercion on advertisers by requiring them to take time on the station in order to get space in the paper, thus taking business away from a competitor. Therefore, some advertisers also opposed newspaper ownership.

Another complaint of non-associated stations was that they had more difficulty in getting newspaper publicity for their programs than did the associated stations. Instances have been reported where newspapers carried their own stations' logs and additional publicity for their programs but discriminated against the non-associated stations in the community by denying them all publicity, or by restricting the amount of it, or by making the cost discriminatorily high. The advantage of the wider publicity, of course, tended to attract busines to the newspaper station.[20]

Another attack on newspaper ownership came from the CIO and the United Automobile Workers. Commissioners and Senators were told that "most of the daily press is biased against labor" and that "some of the more glaring instances of discrimination against labor unions have been committed by newspaper-owned stations."[21] Concentration of control was depriving the unions of the opportunity to present their version of the news to the public. The pages of the newpapers being closed to them, they turned to radio only to find that the publishers were keeping them out of this medium also.

Newspaper ownership was discussed in Congressional committee hearings and in debates on the floor of both houses of Congress from as early as 1926. Congressional opinion ran the gamut from outspoken opposition to newspapers to the notion that the problem should be solved one way or another.[22] As the issue simmered and boiled, the FCC began to take notice of it. Discussion and debate among the Commissioners and within the staff became common in the 1930s. In hearings before the Commission in which newspapers were involved, the question was discussed by the competing applicants.

In March, 1941, the FCC decided to bring the problem out into the open by making an investigation.[23] Immediately, the newspaper people organized into the Newspaper-Radio Committee in order to defend their interests and were supported by the NAB. While

some of its members were fighting the press, the trade association joined it. The battle raged before the Commission and was carried into the courts and the committee rooms of Congress.

The first objective was to stop the investigation. The authority of the FCC was therefore challenged. When the Commission refused to grant a motion to dismiss the proceedings, the publishers turned to the courts. Again they failed. The judges held that the authority of the FCC was very broad indeed. "The Commission's right to grant licenses or to revoke licenses in the public interest, and likewise to make rules and regulations necessary to the carrying out of the provisions of the Act, implies the grant of all means necessary or appropriate to the discharge of the powers expressly granted." [24]

Having failed to stop the investigation, the publishers and their allies then proceeded to exert efforts to influence the results. Specifically, their objective was to prevent the FCC from making any rules by stirring up Congressional opposition. They therefore carried their case to the interstate commerce committees of both houses of Congress.

Committee opinion was clearly against a newspaper ban. Also, individual committeemen were critical even of an investigation. As a result, the FCC was put into a very difficult position. While some Congressmen had been complaining for years because the Commission had been doing nothing, now other Congressmen were complaining because the Commission was doing something. If the Commissioners felt irked, they had good reason. In frustration, Chairman Fly challenged Congress to solve the problem itself if it was not going to let the Commission do so.

In addition to this pressure, attempts were made to check the FCC by legislation. One bill directed the Commission to report recommendations to Congress instead of taking any action itself, [25] and another expressly prohibited the FCC to deny any person a license because of his "occupation or business association." [26]

The FCC responded quickly to the Congressional pressure. On January 13, 1944, it terminated the newspaper investigation and sent to Congress, without recommendation, a summary of the information it had accumulated. [27] No formal administrative regulations were proposed or adopted. At the same time, however, the FCC declared that it would try to prevent "concentration of control" over the media of mass communication and to "encourage the maximum number of qualified persons to enter" the industry. [28]

Newspaper pressure, therefore, was not completely successful. The FCC decision meant that newspapers might be disqualified simply on the grounds that they are newspapers. It held that where there are competing applications for the same facilities between newspaper and non-newspaper interests, the Commission will favor the latter if both meet all the requirements for a license. On the other hand, if the newspaper is held to be the better qualified, it will be tapped for the grant. The fact that an applicant is a newspaper is only one factor to be considered and does not disqualify *per se*. As a result, newspaper ownership has continued to grow and bulks large in television as well as aural broadcasting. Local newspapers have been preferred over non-residents on the grounds of a better knowledge of the kind of service needed by the community and a greater desire to provide it. Also, where non-newspaper applicants have been held to have insufficient financial resources to provide a high quality of service, newspapers have won licenses. Despite these facts, however, newspapers have on occasion been barred.

With the intense competition among applicants created by the scarcity of the very high frequencies which were allocated to television, the controversy over newspaper ownership took on new vitality. Newcomers found themselves forced into hearings by mutually competing applications for the same facilities. Frequently, newspapers were among the competitors, thus invoking the FCC's policy in favor of diversification and against concentration of control. While the Commission favored newspapers on the grounds of superior qualifications in some of these cases, in others they were denied grants merely because they were newspapers. As a result, a rising protest from the publishers again became noticeable.

The courts have consistently sustained the authority of the Commission. Despite this fact, newspaper applicants getting unfavorable decisions have continued to charge that the FCC is acting illegally. Many appeals have been taken to the United States Court of Appeals for the District of Columbia which, as the precedents mounted, began to write opinions of increasing assertiveness. For example, in the Scripps-Howard Case, Judge Fahy wrote: "But where one applicant is free of association with existing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest, may let its judgment be influenced favorably toward the applicant whose situation promises to promote diversity."[29] Four years later, the Court pointed out that its past precedents "strongly sup-

ported" the FCC's decisions made on this ground.[29A] Subsequently, the opinion in the McClatchy Case emphatically declared that so long as the Commission gives a fair hearing and has evidence to support its decision, it is "entitled to consider diversification of control in connection with all other relevant facts and to attach such significance to it as its judgment dictates."[29B]

In the attempt to prevent concentration of control, the FCC has at times singled out the publishers for a special regulation. It has required separate organizations for newspaper and station where they are under common ownership. Except for a unity of control at the executive level, each must have its own employees. This was one of the grounds upon which the Commission approved the transfer of the license of WSSR, the only radio station in Stamford, Connecticut, to the *Stamford Advocate*, the only local newspaper.[30]

The right to editorialize has some interesting and significant implications for newspaper stations. They are extremely vulnerable to charges that they deliberately slant the news in order to conform to the paper's editorial bias. When a commentator expresses opinions which coincide with those of the newspaper, a suspicion of control, whether there has been any real coercion or not, may result. The notion that a newscaster may slant his program voluntarily in order to please his publisher-boss has also been asserted. Where a commentator is, at the same time, employed by the newspaper, or where he had formerly been so employed, suspicion of editorial coloration has been particularly strong.

Two interesting cases may be cited. In the spring of 1943 a reporter on Station WIOD, Miami, Florida, made a night-before-election appeal urging the public to vote for certain candidates for city offices. The station was owned by ex-Governor Cox of Ohio, who also owned the *Miami Daily News*. The paper had already strongly supported the same candidates in its editorials. Furthermore, the commentator had been managing editor of the newspaper in 1939. As a result, although he defended his comments on the ground of freedom of speech, charges were made against the station in hearings of the Senate Committee on Interstate Commerce.[31]

KOB, Albuquerque, New Mexico, carried programs attacking the policies of and making personal charges against the Governor, John J. Dempsey. At the time, KOB was owned by T. M. Pepperday, the publisher of the *Albuquerque Journal*, which had taken the same position in its editorials. In addition, Pepperday and Dempsey were involved in a personal political feud. In defense of the station was the

fact that the commentator was an employee of another newspaper. The broadcasts made trouble for the station when Dempsey asked the FCC to revoke its license on the grounds that the programs were "designed to advance the editorial policies" of the *Journal* "on public questions of major importance." [83]

Because of this vulnerability, the newspaper station must be unusually vigilant in seeing that other points of view are also accommodated, and the FCC has emphasized the seriousness of this obligation. "Where the licensee has a connection with a newspaper in the community which has taken a position in regard to such controversy, then the failure, refusal, or arbitrary restriction on the right to present an opposing point of view of the controversy over the station, becomes aggravated." [84]

A publisher may be kept out of the radio and television industry on the grounds that the kind of newspaper he has published demonstrates his unfitness to operate a station in the public interest. For example, in 1938 the application of the *Bellingham Herald* for a local station in the state of Washington was denied, one of the grounds being that the "applicant, through the publication of numerous articles reflecting upon the honesty and integrity of the public officials and upon the morals and private lives of the citizens of Bellingham and Whatcon county, has been the source of discord and dissention and has been inimical to the general welfare of the community." [84]

The case of the *New York Daily News* is the *cause celebre* on this subject. In 1946 the paper's application for an FM license was challenged by the American Jewish Congress on the grounds that the *Daily News* had shown a "consistent bias and hostility" against Jews and Negroes in both its editorial and news columns, thus showing that it "could not be relied upon to operate its station with fairness to all groups and points of view in the community." After weighing the evidence on both sides, the Commission thought that the charges were "lacking in probative force" and therefore did not disqualify the *Daily News.* [85] As a result, while the application for an FM license was denied in favor of a competing applicant, it was done on other grounds and a TV grant was subsequently forthcoming. The significance of the case, therefore, lies in the FCC's reassertion of and emphasis upon its authority to deny licenses where charges of this kind are proved.

Nobody's News

Newscasters have been frequently criticised for coloring their re-

ports with their own prejudices.[86] Complaints have come from governmental officials, pressure groups and the general public. Some critics have asked for a governmental ban against the expression of opinions and a governmental requirement that news programs be restricted to factual, objective reports of current events.

While the question of regulation has been discussed by Congressmen and Commissioners, none has resulted or been seriously considered. One obstacle has been the difficulty of framing a formula which would be enforceable. Probably more important, however, has been the fact that most critics really did not want objectivity. Congressmen and pressure groups have complained only when they disliked the ideas which were expressed.[87] What they wanted was freedom of expression for the ideas they liked.

After some years of relative quiet from the critics, there was a resurgence of complaints against coloration of the news by reporters in the 1940s. Most of the resentment was stirred up by those commentators who were attacking their pet dislikes and peddling "inside dope" about the doings and misdoings of people in the public eye. Governmental officials, particularly Congressmen, were vigorous complainants. Having a tendency to dislike all criticism of their activities, they became most antagonistic when they were charged with political corruption or with disregard of the national interest. Commentators who preached their doctrines and then urged their audiences to "write to your Congressmen" were also irritating. In reaction, Republicans and Democrats alike threatened the industry with regulation if it did not exercise more restraint over its commentators.

Politically powerful organizations outside the government were also among the critics. For example, Fulton Lewis, Jr., drew the fire of the CIO for his attacks on the unions and their leaders. *Life* magazine charged Lewis with "stirring up a phony atomic security scare" by putting on the air the charges of a former Air Force Major that secret information and equipment had been handed over to Russia by a Democratic Administration, despite the fact that these charges were false and groundless.[88] Fiorello LaGuardia drew the displeasure of the National Association of Manufacturers by describing it as a "mean, selfish, greedy crowd" and accusing it of "vicious, malicious misrepresentation."[89]

Disapproval of the performance of crusading commentators even came from industry circles. For example, *Broadcasting* magazine complained: "And perhaps it's true that, overnight, these radio pundits became celebrities, by dint of a 200-station network and high

audience ratings garnered by sharp and flamboyant mouthings. All too often these reporters riding radio's crest carry on their own political and personal vendettas, upbraiding those they don't like, while showering glory upon their favorites." Station KFI, Los Angeles, justified a ban on sponsored local commentaries on the grounds that: "Many commentators deliberately make controversial issues out of factual news stories. By stirring up controversy, or making attacks on prominent individuals, they seek to develop an audience for themselves." E. B. Craney, General Manager of Pacific Northwest Broadcasters, declared that the air was being dominated by "a little handful of pretty voiced sensationalists, scandal mongers and know-it-alls in New York, Washington and Hollywood." [40]

When legislation was considered by Congressional committees, however, the best formula that could be devised was a prohibition against the making of "any false accusation or charge against any person" over the air. [41] In the discussion of such legislation, all parties recognized that it would be inadequate. The most that could be expected from such a prohibition would be pressure on the industry to place more restraints on the freedom of speech of its commentators out of the desire for self protection. As a result, the notion of imposing upon radio and television a legislative requirement that news be reported only factually and objectively was discarded after some years of discussion, during which the proposal failed to acquire any strong support.

In the absence of any clear-cut regulation by the government, it has become common practice in the industry to classify news programs into two kinds: news reports and news commentaries. For the first, objectivity is the ideal and is required by the codes. The 1939 NAB Code declared that news should not be colored by the opinions or desires of the person who is delivering it over the air and the present Code requires news programs to be "factual, fair and without bias." These words are copied into the TV Code. Critics, however, have not always agreed that all broadcasters have fully achieved these ideals of objectivity in practice. For commentators, on the other hand, a considerable degree of freedom of expression is frankly permitted.

Many broadcasters schedule both kinds of programs and many reject commentaries. An interesting case is that of CBS. For many years, Columbia has refused to permit its newsmen to express their opinions [42] and in at least one instance a newscaster was fired for doing so. After some years of asserting this policy, the network seemed to be going through a change; rumors in the industry said that newsmen

were being given *carte blanche.* And then, in 1957, CBS again clamped down in a number of cases and reiterated its "long-standing" rule against newscasters taking editorial positions.

The network created a furor in journalistic circles. Newsmen charged CBS with censorship and declared that the policy was impossible in practice. In fact, they said, CBS was not carrying out its own policy, its news programs which were classified as "analysis" were not completely objective. In response, network officials admitted that while 100 per cent objectivity is impossible, it could be approximated where newscasters and news analysts did not intentionally marshall their facts to prove a pre-conceived point of view but carefully gathered and presented the information on both sides in such a way as to give audiences the evidence upon which they can draw their own conclusions. According to CBS, its newsmen must approach their work with a desire and a determination to be objective even though they may not be able to achieve it completely in the eyes of critics.

Everybody's News

The expression of different points of view has been the government's answer to complaints of colored reporting. The both sides rule is as applicable to news reporting as it is to other programs which advocate particular points of view. The regulation is established in the FCC's second decision in the Mayflower Case. As a result, the Commission does not have to search for objectivity and truth in any specific news program and freedom of speech for all is protected.

This regulation has been widely accepted by the industry. In the attempt to put it into effect a number of practices have been adopted. One is to hire newsmen with different predilections. In this way, one slant can be balanced by a different slant and a variety of points of view get expression in the over-all performance of a station or network. Another practice has been to schedule sustaining news programs for the deliberate purpose of securing the expression of points of view contrary to or different from those expressed in sponsored programs. Finally, licensees sometimes provide opportunities for people who have been attacked by commentators to go on the air to reply. Occasionally, time for the answer has been taken from a commentator on the grounds that only in that way can the defense get the same coverage as the attack.

A few cases will illustrate the kinds of problems which can arise and the methods of solving them. In the spring of 1954, CBS news-

man Edward R. Murrow telecast a "documentary" program on Senator Joseph R. McCarthy, Republican, of Wisconsin. The program was interpreted by the Senator to be an attack on him and equal time to answer was demanded. Subsequently, commentator Fulton Lewis, Jr., presented McCarthy as a guest on his program over the MBS network, at which time the Senator made an attack on Murrow. Then, CBS gave the Senator equal time to answer Murrow over CBS facilities and paid the costs of filming the McCarthy reply. CBS also announced the adoption of a policy of giving technical assistance under various circumstances to speakers who are accommodated because of the both sides rule in news programs.

In the summer of 1954, President Frank Stanton broadcast an editorial over Columbia's facilities expressing the network's position in favor of freedom for radio and television to attend and report the proceedings of governmental agencies. The occasion was the exclusion of television from the committee rooms by a special Senatorial Committee appointed to hold hearings on a motion to censure Senator McCarthy. The network carried out the both sides rule by taking the initiative in seeking a speaker of national prominence and prestige, who disagreed with the CBS position, to present the contrary arguments. As a result, Federal Judge Harold R. Medina was given equal time over the CBS network.[42A]

Offended interests and people usually take their demands for an opportunity to answer directly to the stations or networks which broadcast the attacks. Sometimes, they go to the FCC. Most commonly, the Commission merely sends the complaints to the broadcasters in question, but sometimes it also asks for an explanation. Complainants are informed that the FCC has no authority to put any particular person or point of view on the air, or to order any broadcaster to do so. FCC authority, however, does permit it to make an inquiry into the overall performance of a licensee and a determination of his fairness to all points of view. As a result, complaints to the Commission constitute a threat to the license and a pressure on the broadcasters to carry out the regulation. Where the Commission asks for an explanation, the regulatory pressure is more coercive.

The right to answer is justified on a number of grounds. Where a commentator makes defamatory statements, a suit for damages is not always an adequate remedy. Uncertainty in the law of defamation, procedural difficulties, and variations in state laws constitute obstacles to complainants. Even if a suit should be successful, money damages might be less compensatory than an opportunity to influence

public opinion. The best remedy may be a publication of the other side—that is, the denial and defense—to the same people who had heard the charges. Furthermore, even if a commentator's statements are not defamatory, people might still be injured and should, therefore, be given a remedy. Finally, the public interest requires that the microphone should not be a personal weapon in the hands of anybody or be used to indoctrinate the public. People should be given a choice between different points of view, and freedom of speech for those who are attacked should be protected as well as for those who do the attacking.

Whose News?

If everybody's news is to be broadcast, the public should be told whose news it is. To this end, two regulations have been proposed: " (1) programs should be labelled as news reports or as commentaries, and (2) the sources of the news items being broadcast by a newscaster should be identified.

From as early as 1930, Congressmen began to urge the industry to label their programs. " The suggestion fell on many receptive ears, and many broadcasters put it into practice. It is established as an industry-wide rule by the NAB radio and television codes: "Commentary and analysis should be clearly identified as such."

A requirement that news sources be disclosed, however, met intense opposition. The news fraternity saw an abridgment of their freedom of speech. Commentators who depended upon "leaks" and back-of-the-scenes contacts for information were afraid that such a regulation would dry up these sources because potential informers would become inhibited. The industry also objected. While some thought that a few commentators were putting on a performance of low quality and others saw the extremists making trouble for all, the broadcasters insisted that governmental regulation was not the solution. Disclosure would require the interjection of frequent announcements in a news program so disrupting to its continuity that the public would be annoyed. This would occur, for example, where an AP item would be followed by the expression of an opinion which, in turn, might lead to the report of some "inside dope." Finally, fact and opinion are frequently so interwoven as to be indistinguishable.

The proponents of regulation based their case on principle. They wanted to prevent fraud on the public. Listeners have no way of distinguishing between fact and opinion, and commentators can peddle their prejudices under the guise of objective reporting. Labelling

would put the public on guard. Disclosure of the sources of news items would prevent commentators from disguising "gossip" as fact and from reporting wire-service news as their own. "They say 'Flash from Cairo.' It is not a flash that they have got from Cairo. They are taking the AP or the UP or the INS."[45]

A weightier cause of the pressure for regulation was a resentment among many Congressmen against the attacks made upon them by the extremists among the commentators. In the discussions, derogatory names were used: gossip merchants, key-hole peepers and peddlers of inside dope. Regulation, therefore, was motivated by a desire to restrain the crusaders and special pleaders by deflating them in the public eye. If the public were fully informed about what they were doing it would no longer accept them as authoritative or reliable.

This pressure, however, never appeared to be very strong. As a result, the resistance of the industry was effective. There is no governmental regulation, and self regulation is limited to labelling.

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GOVERNMENTAL REGULATION *versus* SELF REGULATION

Broadcasters have always recognized the existence of intra-industry conflict and disagreement. They have a saying, for example, that "what one wants another dislikes."

It would be inaccurate, however, to accept this notion without qualification. There are also areas of substantial, if not unanimous, agreement. In the field of program regulation, numerous broadcasters would like to see more *laissez-faire*.

Hands Off

In the early days of radio, the government met little opposition to its regulation of programs. According to the testimony of the Commission's first General Counsel, the industry actually helped the FRC to enter this field of regulation by raising program issues and by introducing evidence on program promises and performance in the hearings in license cases. In order to justify their right to continue in business or to avoid reductions in hours of operation or in kilowatts, broadcasters tried to show the high quality of their programs; in cases of competing applications, they tried to show the "darker side" of each other's programs.[1] Testimony from these early years has also been given by one of the first Commissioners; according to him the radio lawyers "meekly produced the program records of their clients" instead of trying to resist the Commission's assertion of authority in this field.[2] The protection of the interests of their clients constituted their primary concern.

Broadcasters who received unfavorable decisions, of course, did not like regulation, and before long some of them began to attack the Commission. These people, however, stood alone; there was no organized, industry-wide protest.[3] In fact, as late as 1934 the NAB was expressly giving its blessing to the Commission.[4]

Within the next few years, this attitude toward regulation began to change. Individual broadcasters began to urge the Commission to let them alone. An industry-wide trend was also develop-

ing. In 1941, the NAB Board of Directors adopted a resolution "opposing any legislation or administrative action which directly or indirectly impairs the rights (which it believes to be guaranteed by statute) of broadcasters to have complete control of programs and program material, business management, and operating policies."[5] In particular, the NAB was expressing opposition to FCC authority to consider programs in license cases.

The change was not made without pain. Many radio people could not help believing that the industry had benefited by the Commission's deletion of poor stations; many broadcasters were torn between a fear that "bad actors" would hurt the whole industry and a desire for freedom from governmental restraint. Some interesting examples of this dilemma are reported in Congressional committee hearings. In 1942, NAB President Neville Miller testified that the FRC had been "justified" in denying renewals of the licenses of a number of outstanding offenders; he based his justification in the cases of the medical mal-practices of Brinkley and Baker, and in the case of the Reverend Shuler's waging of vendettas, "on the grounds that there was quite a violation. . . . . of other laws than merely the pure operation" of their stations.[6] About a year and half later, he took it all back. When Senator Wheeler asked him whether the Commissioners had had the legal right to make their decisions in these cases, he replied: "I think they acted without authority." Also, NBC's Trammel said that the FRC had "rightly" deprived Brinkley of his license while simultaneously arguing against governmental regulation. Columbia's Paley thought that the Commission was "wrong in asserting the power to revoke licenses; but. . . . . in the face of the record of those stations probably it was a good thing they went off the air."[7]

Later in the 1940s, the fight against regulation developed into a vigorous one. Under the leadership of President Justin Miller, the NAB set out to unify the industry, to stimulate support from the other media, and to get Congress to enact legislation expressly disavowing any grant of authority over programs to the FCC. After the issuance of the Blue Book in 1946, regulation became the major issue in the relations between the government and the broadcasters.

The FCC was subjected to a barrage of criticism and, at times, the accusations against it were extreme. "Get a law passed. Establish a bureau. Let it issue its own regulations. And before long you have not an agency of the people, but a bureaucracy of the few."[8] Dictatorship was also charged; it was said that the

Commission had the industry terrified. A rumor during the Chairmanship of James L. Fly amusingly alleged that all Fly had to do was to raise his eyebrow and Madison Avenue developed an acute case of the jitters.[9] At the 1946 NAB Convention, FCC Chairman Charles R. Denny, Jr., twitted Justin Miller for his name-calling. "However, my host in various public statements over the nation since the publication of the Bluebook has been teasing the Commission, saying we are stooges for the Communists. He has said that we have violated the First Amendment which guarantees freedom of speech. He has called us 'obfuscators', 'intellectual smart-alecks', 'professional appeasers', 'guileful men', 'astigmatic perverters of society.' Now those comments haven't cooled our friendship because, you see, we believe in free speech."[10]

Not one of the NAB's objectives was achieved in full measure. In the first place, the opponents of regulation failed to carry the whole industry with them. Many broadcasters were indifferent; in effect, their attitude was tantamount to acquiescence in regulation. Others expressed a positive approval of regulation. For example, E. B. Craney, manager of a number of stations in the Northwest, appeared before a Senate committee as a witness in opposition to the NAB. While disapproving of any FCC authortity "to single out any one particular program and to go after a licensee about it" he was in favor of a general, over-all review of programs at the time of license renewal in order to determine whether a good job had been done. He saw nothing to fear from FCC regulation. "In the past I have asked the Commission to review my operation in open hearing, before they gave me a renewal of license."[11] Other broadcasters held similar attitudes.[12]

Individual broadcasters also supported regulation in some cases. For example, at the very same time that NAB officials were fighting against FCC regulation as a matter of general principle, many broadcasters were expressing approval of FCC control of horse racing and give-away programs. Their motives were: a belief that such programs were inferior, a fear that they were bad business, and a desire to have their legality clarified; but they also believed that they would have to offer such programs as long as their competitors did so, or lose audience support. In other words, the attitudes of broadcasters have not been dominated by principle alone; an individual broadcaster might believe in *laissez-faire* in the field of programming but act to the contrary because of what he believes to be more

compelling reasons. The effect has been to give some support to regulation.

Broadcasters therefore used FCC program standards to strenghten their applications against competitors, thus taking the initiative in making program performance an issue in FCC license cases at the very time that the NAB was trying to get the industry to present a united front against FCC regulation of programs through its control of licenses. For example, applicants asked the Commission to examine the program schedules of competing applicants for evidence of lotteries, excessive commercialism, offensive advertising, horse racing, and hard liquor accounts. Also, even though competing stations did not initiate program regulation, winners did defend favorable decisions which were grounded upon the FCC's program standards. The WADC-WGAR case is in point. When the Commission's decision in favor of WGAR was challenged in the courts by WADC on the grounds that the FCC had no legal authority to regulate programs, WGAR intervened and filed briefs in defense of the FCC's decision.[18] Emphasis cannot be too strongly placed upon the fact that the cumulative effect of such cases, whatever the conscious intent of the parties, is to strengthen and encourage regulation.

Support for regulation has often been unintentional. Time and again, the broadcasters have recognized that the "soft spots" in the industry constitute an invitation to regulation. Even though "bad actors" may be opposed to regulation and join in a verbal assault against it, they are more effectively throwing their weight in favor of it because their offenses stimulate pressures upon governmental officials to invoke coercive measures against the offending practices.

Opponents of regulation also failed to secure the whole-hearted support of the other media. Appeals for help were made to the newspaper and motion picture industries on the principle of freedom of speech and press. Radio spokesmen told the other media that these freedoms were indivisible; all must hang together or they would hang separately. The results, however, were contradictory. On the one hand, newspapers published editorials, and the executives of both media issued public statements, lauding freedom of speech in broadcasting and condemning threats of governmental encroachment. At the same time, however, magazines often published criticisms of radio and TV programs, and some moving pictures ridiculed the industry for its commercialism. Such unfavorable publicity, it must be stated, tends to feed the pressures making for regulation.

The leaders of the revolt against regulation also failed to con-

vince all of the industry's critics. This is important because discontented interests have always been quick to "run to the government." It is true that these people have been minorities (public satisfaction with the industry's programs has always been widespread) but this fact must not be premitted to depreciate the significance of their pressure. While some broadcasters have been inclined to make this error, others have been more realistic. Most, however, have thought that the influence of minorities has been greater than it should be. They have declared that the FCC has too often taken complaints too seriously; it has too often acted in response to them. Whatever the merits of this contention, the fact cannot be denied that critics have often been energetic, aggressive, articulate, and influential.

The case against regulation was also taken to Congress. The NAB and individual broadcasters asked for new legislation which would end FCC program regulation, and specific statutory proposals were presented in committee hearings. Again the compaigners met with failure; although they received a sympathetic response from committees of the House of Representatives, they ran into strenuous opposition in the Senate. As the parade of spokesmen made their arguments against regulation over and over again, the Senators seemed to become more adamant. "You know how it is when you are on the bench and the witness gets to where he is not convincing you. In such a case you just let him go ahead and let him talk all he wants in order to make his record." At one time, a witness who argued in favor of governmental regulation invoked a Senator's praise: "I have no questions, but I do want to compliment the witness on making the most constructive, most logical, and most necessary statement that we have heard yet in these hearings. We have heard too much of selfishness and too much in self interest. So this testimony of yours, sir, comes as a great relief from this deluge to which we have been subjected."[14] It was apparent that the opponents of regulation could not get the desired legislation, and this was generally admitted by their spokesmen.

They refused to become discouraged, however. Although no success was expected within "a lifetime", they declared that they would continue the fight. Believing in the merits of their cause, they were convinced that they could ultimately change the minds of their opponents. Since the 1940s, however, they have exerted little effort to do so.

We Do It

In pursuit of their objectives, spokesmen have argued that governmental regulation is unnecessary because the industry regulates itself. The broadcasters can be trusted to do a good job without governmental coercion. They have always recognized that programs can be good, bad, or mediocre; from the beginning, they have formulated standards for their own guidance.

The making of codes has been the industry's approach to self regulation. Statements of good and bad programming have been drawn up by networks, individual stations, and trade associations. The first industry-wide statement of standards was adopted by the NAB in 1929. In general terms, this Code was primarily concerned with prohibitions of subject matter which created offense. In 1939, a much more elaborate document was issued. There was considerable detail in specifying offenses, but the provisions were positive as well as negative; they committed the broadcasters to a "public service." In 1948, a new and more elaborate Code—following the pattern of the 1939 document—went into effect and, in 1952, a separate Code for television was adopted.[15]

The TV Code follows the pattern of the radio Code. In fact, programming standards are largely the same for both kinds of broadcasting. Some differences, however, do exist. For example, TV is concerned with decency and decorum in dress and action, visualization of public events in news programs, dramatizations of advertising appeals, and use of background advertising which can be shown on the screen throughout the course of a program.

As changing practices and criticisms dictated, both Codes have been periodically revised. Modifications, however, have been in minor details; the original pattern and the basic provisions have remained constant. In the summer of 1956, producers and distributors of TV films were admitted to code control.

Despite the accomplishments in code-making, the industry has failed to get its critics to accept the contention that self regulation is adequate and that governmental intervention is therefore unnecessary. Critics have agreed that self regulation is the ideal method of securing a high standard of public interest in programming but have, at the same time, claimed that governmental action is essential because of the weaknesses and failures of self regulation.

In the first place, they have said, the industry would not have accomplished as much as it did if the government had not stood

by with a big club.[16] Governmental regulation has produced code-making. While many broadcasters would have formulated standards solely out of the desire to improve their own performance, a substantial number of them had to be pushed into action. In fact, the mere threat of regulation has been coervice. When Congressmen and Commissioners have become aggressive, when they have talked about making rules or revoking licenses, the radio and television people have turned to self regulation in the belief that that is the way to avoid governmental punishment.

Secondly, the critics have argued that governmental regulation is essential because the industry cannot enforce its own codes. Testimony to this weakness in self regulation has also come from governmental officials and broadcasters. For example, some years ago the FCC declared that its study of actual performance over a period of years would "suggest that on networks and stations alike, the NAB standards are as honored in the breach as in the observance."[17] When E. J. Glade, Chairman of the NAB Code Committee, was testifying before the Senate Committee on Interstate Commerce, Senator Wheeler charged that "many stations" were ignoring their own rules. Glade admitted it. "Yes, sir; that is unfortunately true. That is a matter of great concern to those of us who are trying to elevate the standards of operation for radio broadcasting."[18]

In order to meet this argument, the broadcasters have often considered how they could "put teeth" into their codes. The problem has been difficult. One obstacle has been a fear of the anti-trust laws and an uncertainty as to how far they permit the NAB to go. Hence, black-listing or boycotting has never been attempted. Expulsion of an offender would be possible, but has many defects. It could not be used against non-members, of which there are many. Also, many members would not take it seriously, as past experience shows. In fact, broadcasters have even taken the initiative by threatening to resign if code provisions were too restrictive or if any discipline against offenders were attemped. Finally, from its own point of view the NAB would find such action weakening. It needs the revenues from membership dues and its capacity to speak for the industry *vis-a-vis* governmental officials would diminish with decreasing membership rolls.

In 1946, G. A. Richards, President of WGAR, Cleveland, and KMPC, Los Angeles, proposed the adoption of a system patterned on that of the motion picture and baseball industries. In the next

year, a number of advertisers and radio people suggested the formation of an "Advisory Council" composed of top executives of radio, sponsors and advertising agencies whose function would be to "improve" programs. These proposals produced rumors to the effect that the industry was considering a "Czar" system of self regulation. Protests from broadcasters were vigorous and widespread. As a result, denials that this kind of control was intended were immediately forthcoming from NAB officials, and the flurry died down along with the proposals. The NAB fell back upon "strictly voluntary" obedience.

It was left to the telecasters to be the first to initiate an enforcement procedure. The TV Code of 1952 created a "Seal of Approval" which is granted to all subcribers to the Code and the display of which certifies that the recipient is in "good standing." A "Code Review Board" was established as the policing authority. Its task is to monitor programs and to receive complaints of violations of the Code. Where the Board thinks that coercion is merited, it may submit charges to the "Television Board of Directors" of the NAB, which is authorized to withdraw the Seal from an offender who is found guilty after a hearing. In 1956, a similar Seal was provided for radio stations. While subscribers are unable to display the Seal on the air visually, they are authorized to publicize their membership by oral "air-identification announcements" and to print the Seal on their stationery and publications.

The TV Code Review Board has reported favorably on its experience. Telecasters have quite generally complied with the Code; violations occur only among a minority of subscribers. Complaints and accusations are being settled by informal conferences with the stations involved and a deliberate attempt is being made to avoid publicity. Warnings have been issued and a few persistent offenders have been asked to surrender their Seals.

Despite these claims, the criticism has continued. Violations of the Code have been charged even by people in the television and advertising industries: for example, executives of TV stations, advertising directors of sponsoring companies, and account supervisors in advertising agencies. Some critics attribute many violations to inadequate enforcement; they have said that the Review Board has been too lenient and that persistent offenders should not be protected under a cloak of secrecy.

The enforcement procedures have not eliminated three serious problems. First, some Code members have continued to fight

against any enforcement. In fact, at one time a few telecasters threatened to resign from the NAB, and to create a separate oganization and code, when the revocation of their Seals appeared imminent. Secondly, although the Code Review Board has urged complainants to bring their charges to the Board, many have continued to go to the government instead. Finally, not all telecasters have subscribed to the Code or are members of the NAB.

Most important, the efforts of the industry to enforce its own regulations have failed to eliminate governmental regulation. This conclusion is shown by the experience of the 1950s.

During these years, the FCC was in one of its "quite periods." Newly appointed Commissioners made numerous public statements professing *laissez-faire* and denying that the FCC had the legal authority to regulate programs. *Broadcasting* magazine declared that the Blue Book "is bleached;" numerous broadcasting executives told the author, in personal conversations, that governmental regulation was of little significance in their daily operations.

Appearances, however, were deceptive. Regulation by pressure, if not by the death sentence, was evident. While the Commissioners were professing individualism, they were also making threats against the broadcasters. Individual Congressmen joined in the pressure. Stations were told to conform or face punishment. Moreover, the Commissioners did more than talk. Numerous licenses were put on temporary renewals. The FCC placed great weight on program regulations in passing on grants to newcomers. This fact was particulary important in competing television applications for the scarce VHF. Those who made the best showing were favored. When an applicant was already a radio broadcaster, which was often the case, a record of obedience was vital. Past violations of program standards were pointed out by competitors and proved fatal. Regulatory and coercive effects were clearly felt by many in the industry and greater efforts at self regulation were apparent.

Moreover, efforts by some Commissioners to induce their colleagues to refrain from regulating programs failed. For example, Commissioner Craven urged this position upon the others, but they refused to go along with him. *Broadcasting* magazine, which has consistently opposed program regulation by the Commission, admitted editorially that it had not stopped regulating. "This FCC, like its predecessors, during both Republican and Democratic administrations, keeps giving lip service to broadcasting free from program

censorship, and then acts the other way—by innuendo or lifted eyebrow." [19]

Whose Public Interest?

In the defense of self regulation, broadcasters have also argued that the industry can and does do a better job of determining the public interest than the government. "I do not believe for an instant that any small group of men in a regulatory body can have adequate contact with the needs and desires of listeners throughout the country. In other words, the thousands of station managers and program directors throughout the country, because of their daily occupation in serving their listeners, are much better qualified as practical judges of what is in the public interest than any Commission sitting in Washington." [20]

Moreover, these spokesmen have said there is no reason to fear what the industry will do if it is "let alone" by the government. Irresponsible broadcasters are not free to do as they might please; they cannot define the public interest solely in the light of their own predilections. Only by accurately weighing public opinion can they acquire the audiences which advertisers, who pay the bill, want to reach. Hence, "if a broadcaster continues to do a disservice to the public, it will correct itself economically. He will suffer in circulation and as he suffers in circulation, he is bound to suffer in income. That may weed him out of the business." [21] In other words, the dial-twisters can and do regulate programs.

For the most part, these contentions have been rejected. In the first place, critics have often denied that the broadcasters satisfy the public's tastes in programs. As early as 1928 this reaction was expressed in Congressional committee hearings— [22]

"Commissioner Pickard: I believe the program directors have tried to give their listeners what they want; I think that is the answer to your question.

Representative Davis: I will say I do not think they have done it, though.

Commissioner Pickard: I am not sure either".

This failure to serve audiences, critics have claimed, has sometimes been due to the fact that advertisers exert a more coercive influence over programs than the public; where there is a clash between the two, some broadcasters will surrender to the demands of sponsors rather than accept the desires of audiences. Financially weak stations are said to be particularly vulnerable. In the evaluation of public

tastes, a mutual distrust has been noticeable. Critics have been unwilling to accept the industry's judgment of audience reactions and have insisted upon making their own. The evidence produced by market surveys, polls and other studies has often been viewed with indifference. Congressmen have been inclined, at times, to place more weight upon letters from constituents, modified by their own ideas of good and bad.

On the other hand, the industry has defended the reliability of its knowledge with vigor and persuasiveness. Market surveys and opinion polls are conducted with scientific accuracy, whereas the critics and governmental officials rely upon hit-or-miss methods. Some public discontent must be expected; radio and television cannot please everybody. Moreover, they say, governmental officials tend to place too much weight upon expressions of discontent. Complainants are often ignorant of the programs which are available because they do not take the trouble to examine published schedules. "High-hats" should take the same attitude toward radio and television that they take toward the theatre or opera; they should not expect to be given the performance they want at the time they want it, but should be willing to attend when it is offered. In many instances, critics are merely "do-gooders" who want to control other people's tastes.

A more fundamental rejection of the claims of the industry's spokesmen has taken the form of denying that program popularity is synonymous with public interest. In other words, the public's definition of the public interest is not always the real and true one. As a result, the industry is not serving the public interest merely by giving the public the kind of programs it wants.

This contention rests upon the notion that popular tastes are too low. It has been said that if the great American public were given solely what it wants, the air waves would be devoted to gambling and lotteries, gang dramas, dripping love, dime novels, sensational gossip and jazz music. Fingers have been pointed to the great popularity of "bad" programs. For example, before the FRC wiped KFKB off the air, Brinkley's programs making diagnoses of physical ills, which were reported to the station through the mails, and prescribing medication, all of which was done without seeing the patients, attracted an enormous following. A 1930 *Radio Digest* survey of listeners gave KFKB the largest number of listener votes of all stations in the poll.[23] Give-aways are another example which has often been cited. Their popularity makes them valuable as audience builders. Hence, as long as some broadcasters indulge in such offerings others

are forced to do likewise in order to meet the competition for audiences. In FCC hearings, some broadcasters admitted that even though they thought such programs were bad, they could not eliminate them. Another argument alleges that most people are unable to judge what is good for themselves. Their gullibility makes them easy prey to gossip, sensationalism and propaganda.

These ideas have led to the contention that the broadcasters and telecasters have a duty to improve the public's tastes rather than merely satisfy those desires which are expressed in popularity polls. The public should be given the opportunity to test its likes by being offered different kinds of programs. Sometimes "good" programs have proved more popular than originally expected. When they were offered, people were given the chance to discover interests they did not know they had. This contention has, in fact, been accepted by some of the leaders in the industry. William S. Paley of CBS, for example, has testified: "We give the people what they want to hear and we experiment with their willingness to hear other things for which they may not even know that they have an appetite."[84] Also, the critics have asserted that over a period of time the industry can exert a great influence in the cultivation of new tastes. CBS has also provided evidence for this argument. According to President Frank Stanton: audiences for such programs as "New York Philharmonic Symphony Orchestra, the Columbia Workshop, Invitation to Learning, Columbia Broadcasting Symphony" had been "growing steadily."[85]

The conclusion has therefore been asserted that a mere pandering to popular tastes will have the result of lowering program quality and of entrenching the popularity of the old favorites. If the public is given only what it knows it wants, it would never get a chance to find out that it likes something else. Only when it is offered the "better" programs can it get the chance to show its desire for them.

Query

The discontent of critics has been directed at the government as well as the industry. The dissatisfaction has even invaded official circles. Congressmen have charged the Administrators with laxness, while the Commissioners have challenged the law-makers to solve programming discontents by legislation. The query is therefore pertinent: In the light of the vagueness of the term "public interest" and the many conflicting ideas of good and bad, can the search for a public interest ever be satisfactorily concluded?

VI

CONFLICTING FREEDOMS

The industry's opposition to governmental regulation of programs has been bolstered by attacks upon the Commission's legal authority. In fact, the latter has been the hand-maiden of the former. As more and more broadcasters entered the fight against governmental regulation, the arguments against the FCC's legal power appeared more frequently and increased in intensity. Whereas in earlier days the cry of illegality was a mere whisper, it had grown into a roar by the 1940s.

The legal argument has also served to resolve the dilemma which appears where the broadcasters think that the regulations are intrinsically good but still resent governmental coercion. As already shown, many of the FCC's program standards originated in radio circles. As a result, most broadcasters have had no objection to them on their merits. At the same time, they have been able to fight FCC enforcement through the licensing power. Even if a regulation is good, they have claimed that the Commission had no legal right to make it.

Opposition to those regulations which the broadcasters think are unnecessary, or inherently bad, has been given an added force. The industry has not limited itself to the mere contention that the Commission made a mistake in interpreting the public interest. Opponents have also said that the Commission had no authority to make the regulations because it was given by law no jurisdiction over programs.

The charge of illegality has been denied by the supporters of regulation. Both sides have pressed their cases before the Commission, Congressional committees, and the courts. The controversy has presented some difficult questions. Does the FCC's duty to protect the public interest give it authority over programs? What is the meaning of the specific statutory provisions forbidding the FCC to censor programs and to interfere with freedom of speech over the air?

The Public Interest

One of the first to challenge the program authority of the Commission was radio lawyer Louis G. Caldwell. As counsel for stations which had lost their licenses, he expounded his interpretation of the law in the courts and, later, expanded his audience as a writer and as a witness before Congressional committees. In 1935, he was joined by a well-known radio personality, Henry A. Bellows. As a member of the first Commission, he had interpreted the public interest to include programming but in 1935, as an executive of CBS, declared that this interpretation was wrong and that the FRC had been guilty of "a flagrant violation of the very law we were appointed to administer."[1] Whereas in 1934 the NAB had accepted the legality of the Commission's authority,[2] it swung into the opposite position in the early 1940s, and President Justin Miller became the leading lawyer-spokesman for this point of view. Many radio executives and lawyers helped to swell the ranks of the Commission's opponents.

The burden of the attack has rested on the allegation that Congress did not "intend" to give the Commission authority to pass on program performance in making decisions on whether stations are acting, or will act, in the public interest.[3] In other words, Congress intended merely to control interference between stations, and the public interest standard of licensing must therefore be limited to the technical, or engineering, matters of power, frequency, and so on. The Commission, therefore, could not consider programs in granting or denying licenses. Where statutes prohibit particular kinds of programs, enforcement properly rests in other organs of government. For example, action against profanity, obscenity and lotteries can be taken only by criminal prosecution in the courts. Defamatory statements are subject to suits for damages. False and misleading advertising falls under the jurisdiction of the Federal Trade Commission. The inevitable conclusion from this interpretation would be that broadcasters could be punished but could not be put out of business. Some spokesmen against the FCC's licensing power did not go so far; they argued that its authority extends only to those subjects specifically prohibited in the Communications Act.

The principle of Congressional intent, however, has been a poor guide to the interpretation of the statutes dealing with radio and television. Good grounds for proving intent has been worked up on both sides. As a result, when one reads the "proof" of the opponents

of regulation, their case seems clear—until he takes a look at the "proof" presented by the defenders of regulation.[4]

Both the FRC and the FCC rejected the attack on their legal authority. As previously explained, the first Commissioners declared: "The Commission believes it is entitled to consider the program service rendered by the various applicants, to compare them, and to favor those which render the best service."[5] Subsequently, the FCC adhered to this interpretation when it asserted that it not only has "the authority to concern itself with program service", but that "it is under an affirmative duty" to do so "in its public service determinations."[6]

When the attack was carried into the committee rooms of Congress, numerous Congressmen also flatly denied its validity. Even before the Act of 1927 was passed—in fact, as early as 1924—they began to think of public interest in terms of good and bad programming.[7] Subsequently, Congressional committee hearings devoted considerable attention to this subject. Commissioners were frequently asked why they failed to control this or that practice which individual committeemen thought objectionable. Congressmen declared that if the Commission does not consider programs, the public interest concept would become meaningless; it must mean what the public receives on its sets. Hence, it includes good technical reception, on the one hand, and satisfactory program fare, on the other. Congressmen have declared that even if the technical performance of a station were perfect it might still be operating against the public interest simply because of the kind of material it broadcasts. Senator Wallace H. White, one of the "fathers" of the original radio act and influential in radio legislation in later years, summarized this wide-spread attitude. "But so long as we have in the law that basic conception that an applicant has no absolute right to a license but must establish to the satisfaction of the Commission that he is serving a public interest or meeting a public necessity or a public convenience, something which seems to me to be basic in our law, I just do not see how there can be any judgment as to whether a station is serving a public interest or not unless there is a chance to view and review the programs which a station has been passing out to the listening ear of the American public."[8]

This legal issue has also been presented to the courts in numerous cases, but at no time have they struck down the Commission's authority. The FCC has been given considerable discretion in the making of standards and it must observe specific statutory regulations on programs, whether they are incorporated in the Communications Act or in other statutes. For example, when Congress in 1948 took the pro-

hibitions against profanity, obscenity and lotteries out of the Communications Act and put them into the Federal Criminal Code,[9] the FCC did not lose its authority to consider such offenses in license cases.[10]

When Brinkley invoked judicial review to save KFKB's license from the FRC axe, Justice Robb, speaking for the Court of Appeals of the District of Columbia, sustained the Commission's power on the grounds that "the business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the commission is necessarily called upon to consider the character and quality of the service to be rendered."[11] A year later, that Court also sustained the termination of the Reverend Shuler's license. Justice Groner stated: "We think it was its (FRC) duty in considering the application for renewal to take notice of appellant's conduct in his previous use of the permit."[12] In more recent years, the Court has had a number of opportunities to reiterate these interpretations of the Commission's authority.[13] In a case of competing applications where the FCC chose one party over the other largely on grounds of programming, the Court declared: "But in a comparative consideration, it is well recognized that comparative service to the listening public is a vital element, and programs are the essence of that service."[14] In a companion case the Court went still further by insisting that the FCC *must* take evidence on program service, and make findings on this evidence, in order to decide whether one applicant "will better serve the public interest" than a competing one.[15]

Many opponents of regulation have refused to accept this judicial support of FCC authority as conclusive. In justification, they have often pointed out that the United States Supreme Court has not ruled squarely on the question. Believing in the rightness of their interpretation of the statutes, they have held to the hope that this top Court would sustain their contention. As a result, there has been a strong desire to get the issue before the Supreme Court.

Again, the result has been failure. In a number of cases, losing parties in the Court of Appeals asked the Supreme Court to review the decisions, but it refused to do so.[16] When it invalidated some of the FCC's rules against give-away programs in 1954, it nevertheless expressly recognized the authority of the Commission to regulate programs which are also regulated by Congressional statutes provided the Commission stays within the limits of those statutes. "Indeed, the Commission would be remiss in its duties if it failed, in the exercise

of its licensing authority, to aid in implementing the statute, either by general rule or by individual decisions." [17]

In a number of other cases, in which program regulation was not at issue, the words of the Supreme Court have given the opponents of regulation little comfort. In the Sanders Case, Mr. Justice Roberts seemed to believe that FCC authority was limited to the technical area. "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." [18] Opponents of program regulation seized upon this *dictum* as judical authority for their position, but whatever comfort they found in Robert's words was transitory. [19] Only three years later, Mr. Justice Frankfurter was saying: "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." [20]

The radio people made conflicting interpretations of Frankfurter's words. Some thought that they gave the FCC a program power broader than that claimed by the Commission. Others adhered to their denial of FCC authority, saying that the *dicta* had "no application" to the control of programs. The FCC, however, held steady to its traditional claims of authority. [21] Chairman Fly declared: "The law with respect to the Commission's power, or rather lack of power, over radio programs was left just where it has always been." [22]

Censorship

A second facet in the legal attack on FCC authority is the contention that Congress has positively forbidden the Commission to regulate programming. Section 326 of the Communications Act of 1934 says that the FCC should not censor programs and this, it is charged, is exactly what the Commission has been doing.

In fact, from the very beginning of governmental regulation, both Congress and the industry have expressed emphatic opposition to

censorship. But what does the word mean? There can be no doubt that the Annual Radio Conferences held by the industry in the early 1920s defined censorship as any kind of governmental control over programs.[23] Subsequently, however, the definition became confused. As already shown, the broadcasters and their lawyers did not invoke the prohibition against censorship when the FRC first began to regulate programs. In fact, the Commissioners themselves were the first to do so. When they were pressed in Congressional committee hearings of the late 1920s for their failure to cure some alleged programming defect or other, they fell back upon the statutory prohibition of censorship as justification. Considerable discussion ordinarily followed, but no clear line between the authority to protect the public interest and the taboo against censorship was drawn.

Not much later, the problem was brought to the courts. In two early cases in which licenses were terminated, the losing parties invoked judicial review on the grounds that the FRC was guilty of censoring their programs. But the Court of Appeals for the District of Columbia disagreed: "This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship."[24]

The official and authoritative definition of censorship was thus established. The court made a distinction between previous restraint and punishment after an offense has been committed. Only the former is censorship. If the Commission should attempt to blue-pencil or edit programs, if it should require that programs be given clearance before they could be broadcast, that would be censorship. On the other hand, if a broadcaster can put on the air anything he wishes without getting advance governmental approval, he can subsequently lose his license for violating the public interest. In this way, the Commission can consider the program record without being guilty of censorship.

Some of the opponents of regulation have disagreed with this interpretation; they have given the term a broader meaning. In fact, they have declared that any program regulation by the FCC is censorship. Consideration of past performance has been called "ex post facto censorship" and "censorship by the back door." They wanted none of it—"front, back or side door, before, during or after the fact."[25]

The dominant contention, however, has been to accept the Court's definition but to insist that the Commission is nontheless guilty of censorship, in violation of this definition of the word, because it does impose a previous restraint on future programs. Control of a license is the power of life and death over the business of a broadcaster. Therefore, FCC views on good and bad programming, a mere press release, or a speech by one Commissioner, are coercive. As Paley of CBS put it, the Commission's mere "whispered wishes will be amplified over all the kilocycles in the land." [26] NBC's Trammell agreed. "The authority to refuse to renew a license because of the nature of programs that have been broadcast is a form of censorship much more powerful than the blue pencilling kind of censorship. It permits the Commission a tremendously wide latitude in determining what the listeners of the country may or may not hear. It gives the Commission most persuasive powers of suggestion as to the programs which it feels should be broadcast." [27]

Experience gives much support to this contention that the FCC does control programs before they are put on the air. Newcomers must state future program plans which satisfy the FCC in order to get a license. Informal conferences have often caused stations to change their practices. Formal review of past conduct may also control future programming. Defendant licensees who have anticipated unfavorable decisions have protected themselves by promising to conform to the Commission's program standards. Two examples are the WHKC and the first Mayflower Cases. In the former, the station promised to cease its discrimination against labor unions and, in the later, the station promised to stop editorializing on one side of controversial issues to the suppression of other points of view. Both licenses were therefore renewed. In neither case was the FCC punishing for past performance. In both cases it was regulating the future program practices of the stations.

A formal adjudication of a license may establish a previous restraint in still another way. This has occurred where the license was renewed but the FCC declared that the past derelictions would be held over the head of the licensee in the future. "The facts developed in this proceeding will, however, be given cumulative weight in dealing with any future question involving the conduct of this station." [28]

In addition to experience, the opponents of regulation have relied upon a decision of the United States Supreme Court which used the same kind of reasoning in a newspaper case as early as 1931. In Near v. Minnesota the Court held that the suppression of a newspaper from

future publication because it had been guilty of publishing malicious, scandalous and defamatory matter in the past was "the essence of censorship."[29] Chief Justice Hughes emphasized that the government was censoring by trying to suppress Near's freedom of expression in the future and was not merely punishing him for his past conduct.

"As free as the press" became a common slogan in the controversy over censorship. Press and radio are considered to be twin instruments of mass communication, entertainment and education. Therefore, they should be treated alike. If it is censorship to suppress future publication of a newspaper because some governmental official thinks its past performance has been unsatisfactory or illegal, FCC suppression of broadcasting or telecasting in the future on the same grounds is also censorship.

The courts, however, have not agreed. Despite the Near Case, the Court of Appeals has continued to assert and follow the interpretation of censorship as previous restraint in the narrow sense. While the Supreme Court has had opportunities to deny this interpretation and to establish the broader doctrine of Near v. Minnesota as the rule for broadcasting, it has not done so. It has refused to take many cases which losing parties tried to appeal from the lower courts and, when it did take the case against give-away programs, it was completely silent on the question of censorship.[30] The effect is to leave the doctrine of the Court of Appeals as the authoritative one.

The opponents of regulation were no more successful when they pushed their arguments before the weighty Senate Committee on Interstate and Foreign Commerce. One Senator declared that the notion that radio and press were similar "is as farfetched as comparing an elephant to a flea." Another added: "I do not accept in any degree that there is no difference between the power of the Government with respect to newspapers and the power of the Government with respect to radio communication." Moreover, the radio people were told that they were "just indulging in dreams" if they thought they could get their contention accepted: "Congress will not stand, in the long run, for any such interpretation."[31]

Freedom of the Air

Another facet in the positive case against program regulation has been the argument that the FCC has been abridging freedom of speech contrary to Section 326 of the Communications Act of 1934 and the First Amendment to the United States Constitution. In other

words, even if the Commission is not guilty of censorship, in the strict legal sense, it is still acting illegally.

This charge, also, has been denied by the proponents of regulation. As a result, another legal issue has been raised over program regulation. The controversy has centered on a number of conflicting interpretations of freedom and of the effects of FCC regulation upon freedom.

In the first place, the defenders of regulation have pointed to the general nature of FCC standards. Except for such subjects as profanity, defamation, lotteries and the like—to which the right of free speech has never been extended—the Commission does not regulate the contents of specific programs. There has been no specification of the ideas to be expressed or suppressed; no orders to put a particular person or organization on the air; no allocations of periods to be devoted to the various kinds of service. The Commission has often asserted, in fact, that it could not go into such details without exceeding its legal authority. As a result, freedom to decide the Who, What and When is left up to station management.

Broadcasters have taken this argument with skepticism. They have frequently pointed out that although the FCC puts its regulations in a general form, their enforcement in specific cases results in the regulation of the contents of programs. For example, the Scott case presented the question whether atheistic views should be broadcast and the Commission's decision implied that they should. While the WHKC case merely held that labor's views should be expressed as well as those of employers, the effect was tantamount to saying that the station should put UAW officials on the air.

In the second place, the Commission's supporters have argued that it is promoting and expanding freedom of speech. This interpretation rests on the notion that broadcasters, if left alone, would destroy freedom by controlling the ideas to be given expression or to be suppressed. The control which advertisers are able to exercise would be another restraint on freedom.[85] Therefore, when governmental regulation secures broadcasting opportunities for the people and the ideas which would be suppressed, it is enhancing freedom of the air.

Many industry spokesmen have pointed out that the problem is really one of conflicting freedoms. The fact is that any program regulation, whether by government or by the industry, both limits and fosters freedom. Protection of one freedom inevitably restrains another freedom. Neither the government nor the broadcasters can secure complete freedom for all.

Upon this fact, the opponents of regulation have built a defense of the legality of self regulation and an attack on the legality of FCC regulation. The case is as follows: It is immaterial that the industry abridges freedom, because the law does not forbid that. Also, it is immaterial that the FCC protects freedom because it is, at the same time, abridging freedom and that is the very kind of governmental activity which is prohibited by the Communications Act and the Constitution.

Like the rest of its case against governmental regulation of programs, the industry's case on this legal issue has failed in the courts. Moreover, the prevailing opinion in the influential Senate Committee on Interstate and Foreign Commerce has been expressed in the words of a former Chairman: "I have heard a lot of talk about the First Amendment of the Constitution, and I have heard a lot of talk from you people about the freedom of the radio, but it is my opinion that such discussions are being employed as red herrings." [25]

The Law

Law is what the judges say it is. Although the United States Supreme Court has not passed squarely on the legal issues raised by the opponents of regulation, it has had opportunities to do so and its refusal to take these opportunities establishes the interpretation of the law made by the lower Federal courts as the authoritative one. The conclusion, therefore, is indisputable: the FCC has the authority to regulate programs provided it obeys the statutes passed by Congress, it does not censor in the narrow and technical sense of supervising specific programs before they are broadcast, and its regulations are in the public interest.

VII

CONCLUSIONS: THE POLITICS OF REGULATION

Although American broadcasting stations are commercial enterprises, the federal government has decided that they have a duty to serve the public interest even if this may mean at times that they must disregard the profit motive. The requirements which the public interest imposes upon the broadcasters have been defined by Congress in the enactment of statutes and by the FCC in the formulation of the principles upon which licenses will be granted or denied. Government, therefore, has decided that the industry should avoid many practices which have been judged to be offensive; the list includes obscene and profane language, lotteries and gambling, defamation and personal feuds, false and excessive advertising. On the positive side, the public interest has been held to require cultural and educational programs, service for minority tastes, both sides discussions of public affairs and controversial issues, equal opportunities for political candidates to appeal for votes, the allocation of a reasonable amount of time to sustaining programs, and reliable, informative reports and discussions of news and current events.

Regulation of programs has not been an easy task. It has been burdened by controversy and pressure politics. Everybody has ideas about what radio and television stations should do in their programs. Throughout the history of the industry, governmental officials have asserted their personal predilections of good and bad; broadcasters have created ideal goals; organizations and individuals have expressed their likes and dislikes.

It has become a fashionable American practice to "run to the government". As a result, neither the regulators nor the regulated can ignore the political environment within which they must work. Congressmen and Commissioners have often been influenced by the attitudes of the industry's critics as well as by their own feelings; sometimes, it seems, the critics are more vocal and influential than the general public. Moreover, differences of opinion have pitted Congressman against Congressman, Commissioner against Commissioner,

broadcaster against broadcaster, and critic against critic. These conflicts have created contradictory demands which have been more uncompromising at some times than at others and which have made the tasks of station managers difficult.

The Federal Communications Act encourages controversy; the public interest is admittedly a vague standard. In giving the FCC such broad discretion, Congress has followed a traditional pattern which has become common practice in American administrative law; that is, Congress lays down a general standard and then delegates to an administrative agency the duty and authority to legislate the detailed rules and regulations which may be necessary to carry out the general policy.

This practice has often been justified by writers on administrative law on the grounds that the details of regulation deal with technical matters and should therefore be decided by agencies which can hire experts to do the work. Politics should play no part and Congressional consideration of specific rules and regulations would invite a multiplicity of pressures. Unfortunately, the experience of program regulation shows that this rationalization does not have as much validity as has often been claimed for it. The delegation of legislative power to the FCC has not avoided pressure politics in the making and enforcement of the program regulations. In the first place, pressure groups and individuals have carried their demands to the Commissioners. Also, Congress has not completely escaped all involvement in the details. Pressure groups have often induced Congressmen to bring pressure on the Commissioners; hence, Congress has become the instrument of pressure. In fact, Congress looks upon the FCC as its agent and is not willing to let it alone; Congressional committees have frequently investigated its activities and have made side excursions into the realm of criticism. Congressional pressure has both incited and restrained regulation. Going further, it can be said that Congress has made the politics of regulation more complicated. Frequently, committees of the two Houses have exerted contradictory pressures on the FCC; at times, the House of Representatives has tried to check FCC regulatory efforts and the Senate has demanded more regulation. Congressional pressure has also changed from time to time; regulatory activity which the Commission is urged to undertake in one year has called down criticism in a later year.

Broadcasters have sometimes agreed, and at other times disagreed, with the Commission. There is a substantial consensus on many of the current program regulations. Indeed, some of them have origi-

nated in broadcasting circles. At the same time, controversies over the definition of the public interest and the effect of particular regulations upon freedom of speech have split the regulated from the regulators. Broadcasters, therefore, have charged a violation of the public interest; not only has the government made an incorrect interpretation but it has been guilty of cynically using that pious concept to the violation of the Constitutional prohibition against governmental infringement on freedom of speech. In the past, controversies have simmered and flared, and then died down.

A recent controversy has been raised by the duty to provide time for political candidates and the requirement that they be given equal opportunities to use the microphone. Broadcasters believe that the public takes a dim view of campaign speeches, particularly in primaries and local contests. Unknown candidates attract small audiences. More than that, the demands of politicians for time may disrupt schedules; when there are numerous candidates, the problems become more complicated. Failure to meet demands may create violations of the law or, if legal, future retaliation; audiences resent the cancellation of their favorite programs; sponsors dislike breaks in the continuity of their advertising which acquires increasing effectiveness by the regularity of repetition.

These complaints, however, have not induced the industry to ask that it be relieved of the duty to serve American politics. Instead, the broadcasters accept the duty but have urged that the rigid requirements of the equal opportunity rule be modified. They argue that the regulation restricts their ability to serve the public interest more effectively by scheduling more programs of debate and discussion by the leading political figures of the day. Freedom of speech is also involved. Whereas the industry points out that change in the regulation would provide more freedom for the important candidates, many politicians fear that a change would restrict their freedom. Candidates like to use such an effective influence on public opinion as radio and television and therefore refuse to surrender their legal protection.

Legislation has been introduced into Congress, but none of the bills has become law. This experience demonstrates the wisdom of Congressional delegation of legislative authority to a regulatory agency instead of incorporating detailed rules in a statute. In the case of political broadcasting, this traditional policy was not observed. As a result, the statute has created an inflexibility in regulation; a new rule can not be easily adopted as it is shown to be desirable because

of the cumbersomeness of Congressional procedure. Bills proposing the changes which the industry wants have been easily pushed aside by the demands of more pressing measures, such as tariffs, foreign policy, farm aid, unemployment, and national defense. If the rule had been made by the FCC, there would be greater flexibility because the Commission could repeal it and issue a new one after holding hearings on the merits of the change and finding that the evidence supports it.

Another current controversy has arisen over the accessibility of the microphone and camera to the proceedings of governmental agencies. The FCC has insisted that the broadcasters must give the public some programs of information on current affairs but Congressional committees and courts have denied permission to bring the equipment into the committee rooms and court rooms. There is a contradiction among governmental officials; what one demands another makes impossible. Hence, the industry has protested that its capacity to serve the public interest by bringing such informational programs into the homes of the country is being blocked.

The NAB, state broadcasting associations, and individual station operators have been demanding freedom of access to this news source. Much support has been given by the press, but little success has been achieved. A few Congressional committee hearings have been televised, the most popular ones being a Senate investigation into interstate crime and the hearings on various charges and counter charges which had been hurled between Senator Joseph McCarthy and the War Department. In a few scattered instances, some lawyers and judges have urged a limited telecasting of trials. For example, the Colorado Supreme Court has let the decision up to each judge so far as the proceedings of his own court may be involved. The Bar Association of the State of Texas has urged telecasting subject to a number of restrictions such as the prohibition of the use of flashing or artificial lights, and the broadcasting of the testimony of witnesses who object. In general, however, the bar and bench have been adamant in their opposition. Canon 35 in the Code of Ethics of the American Bar Association prohibits the photographing or broadcasting of trials and many state associations have taken the same position. The demands of the industry, however, are still being pressed.

The arguments on both sides of this issue express diametrically opposed interpretations of public interest and freedom of speech. In defense of the right of access, it is asserted that broadcasting is journalism just as much as newspaper reporting and is therefore entitled

to the same Constitutional rights. Freedom of the press can be destroyed just as much by the suppression of news at the source as by prohibiting its expression. Moreover, the public has a right to hear and see what its government is doing. In reply, opponents dispute these attempts to rely upon legal rights. American law does not recognize a right to broadcast or to receive broadcasts of actual proceedings. Neither is freedom of speech being infringed. The broadcasters have the same rights as newspapers to send newsmen to the sessions of governmental agencies and to report what they observe.

Secondly, the industry claims that it can do a better job of educating the public and stimulating its interest in American government through first-hand rather than by second-hand reporting. The service would therefore make for better government. In answer, opponents claim that the broadcasts of proceedings would rob them of a judicial atmosphere. The distractions would make it difficult to get to the truth through the examination of witnesses; brash ones would be tempted to court the publicity whereas more timid ones would be inhibited. These contentions, of course, assert and deny that the broadcasting of proceedings is in the public interest.

The industry attributes this attitude to a general misunderstanding of its techniques. The press had the same obstacles to overcome many years ago. Hence, the industry denies that broadcasts directly from the committee rooms and the court rooms of the country would stimulate personal misbehavior. In fact, the publicity would create such a reaction of disapproval among so many people that it would prevent individuals from making spectacles of themselves. Also, the advanced stage of technical development makes broadcasting so unintrusive that there would be no interference with orderly procedure. The microphones are the same as are commonly used in public address systems, and tape-recordings may be taken for use in delayed broadcasts. Only a few cameras are needed for telecasting. They can be kept in the rear of the room and behind partitions; they are noiseless and need only ordinary room lighting. As a result, the participants in the proceedings would hardly be aware of the fact that they were being recorded, broadcast, or telecast. Finally, experience shows that the telecasting of proceedings does not violate the public interest by fostering sensationalism.

Whether the broadcasters agree with the merits of specific regulations or not, there is a strong disapproval of FCC control as a general proposition. In the early years, there was no organized opposition. In the 1940s, however, the pressure picture changed; the NAB, sup-

ported by many leading radio executives, urged Congress to enact new legislation depriving the FCC of authority to pass on program standards in the grant or denial of licenses. One argument was that the broadcasters are in a better position to define the public interest than the FCC. Another declared that governmental regulation is unnecessary because the industry does perform its duty to its public. There has always been much experimentation and new programs have been created. In addition to an idealistic desire to serve, broadcasters are motivated by economic considerations; the competition for audiences is keen and the only way to attract them is by doing a good job. Therefore, the accomplishments that make American broadcasting so good have been those of the industry and have not come from the government.

These claims have not induced Congress to enact the desired legislation. Congressmen, and even the industry's most severe critics, have admitted the merits of the arguments but have deprived them of their effectiveness by insisting that they are not equally true of all stations. Although over-all performance has been excellent, a few stations are mavericks and, as some Senators have put it, government regulates because these few make it necessary. In other words, the pressure for regulation has prevailed.

Parties which have lost license cases have also appealed to the courts. It is a characteristic feature of American administrative law to authorize judicial review on the grounds that regulatory agencies have made erroneous interpretations of the law, and this has been done in the Federal Communications Act. The interpretation of public interest, censorship, and freedom of speech are such legal questions; hence, broadcasters have challenged FCC rulings on these grounds.

The objective of this attack has also been to deprive the FCC of authority. Again, the industry has met failure; FCC program regulation through the license has been held valid under the statutes and the Constitution. On the grounds of statutory interpretation, however, the courts held that the FCC's definition of lotteries in its rules against give-away programs was largely incorrect.

At times, broadcasters have expressed fear of administrative dictatorship. Leaders in the industry have pointed to regulation by threat; the danger of losing his license has made the individual broadcaster helpless. If he should appeal to the courts and they should sustain the FCC, as they have done in most cases, his business is gone. Hence,

station owners and operators have felt compelled to obey. The price of challenge is too high.

The fear has been greater at some times than at others. Much depends upon the pressure of Congressmen, the vigor of the critics, and the personal predilections of the Commissioners. As a result, since the early 1950s most station managers have looked upon governmental regulation as a minor problem in their work-a-day worlds. They point to the fact that most of the public, by far, is pleased with the service it is getting. Program managers must evaluate whatever criticism they may receive but must also constantly keep in mind that it comes only from minorities. People being what they are, no station can satisfy everybody.

The fact is that the FCC has never been severe. Even when its criticism of the industry rang the loudest, in the Blue Book era around 1946, it did not destroy going business concerns. Over the years, it has always been reluctant to invoke the death sentence and has rarely done so. Regulation of programs has been most common in cases of competing applications where some of the parties had to be denied the opportunity to improve their facilities or had to be turned away because of the limitations of the spectrum. Yet, in many of these cases, the parties were able to show equal competence to operate stations, and program standards offered the only grounds upon which distinctions could be made. Program regulation has therefore been mostly an instrument for the making of choices among mutually exclusive applicants.

Congressmen, Commissioners and broadcasters have often expressed desires to find a less drastic procedure, and suspenion of licenses for short periods has been the proposal most commonly discussed. Its weakness lies in the fact that it is not appreciably less severe. A station under suspension would lose advertising accounts and audience loyalties which took years of hard work and expense to acquire; the losses might even destroy its capacity to operate when the period of suspension is ended. More likely, the losses would restrict its financial ability to give adequate public service and therefore might not subsequently cure the defects in its programming which originally brought the suspension down upon it. Also, the fact that there would be no substitute for the station during the period of suspension would decrease the public's choice of stations; this would be a very material deprivation of service in one-or-two-station markets. The penalty of suspension, therefore, might be contrary to the public interest and would be nearly as destructive of freedom of speech as

absolute termination of the license. As a result, the restriction of licenses to 90-day periods has been the most common procedure in actual use against broadcasters who have existing business interests at stake.

Whether the FCC is severe or not, and whether the broadcasters agree that particular regulations correctly interpret the public interest or not, many of them contend that the regulation of programs is governmental censorship and abridgement of freedom of speech. It has been admitted, of course, that freedom of speech is not absolute. Consequently, the government can legitimately ban such subjects as obscenity, profanity, lotteries, defamation, advocacy of the use of violence, and false advertising; these have been the traditional subjects upon which speech and press have been regulated in Anglo-American law. But, it is said, punishment must also be by the traditional procedures—namely, by criminal prosecution, or by civil suits for damages, or by administrative cease and desist orders; suppression of future broadcasting by termination of licenses for these offenses constitutes a previous restraint on the future freedom of speech on legitimate subjects, which is censorship. Many broadcasters continue to adhere to this contention despite the refusal of the courts of agree with them.

As a matter of fact, government regulates broadcasting differently than it regulates some of the other communications industries. As a result, censorship and freedom of speech have been given contradictory effects in different media.

(1) *Public Utilities.* Companies which offer public service in point-to-point communication by telephone, telegraph and radio are classified as common carriers. Hence, they must serve all comers, unless they can give legitimate reasons for not doing so, and their rates are regulated. The closest analogy in broadcasting lies in the field of political electioneering. Apart from this exception, broadcasters are permitted to pick and choose among those who want to use their facilities and, hence, to suppress the freedom of some while giving freedom to others. It is generally thought in the industry, although not expressly held by any court, that an FCC attempt to tell any radio or television station whom to put on the air would be invalid,

(2) *The Press.* There is no death sentence for publishers. Governmental suppression of future publication on the grounds that past offenses show an incompetence to publish a newspaper in the public interest has been held by the United States Supreme Court

to be censorship contrary to the Constitution. In broadcasting, the rule is exactly the opposite; this kind of regulation has been expressly held by the United States Court of Appeals for the District of Columbia not to be censorship.

(3) *Moving Picture Theaters.* Some states have created boards of censors which exercise a previous restraint on freedom of speech; inspection and approval of films are made conditions precedent to the right of theaters to exhibit them. This technique is admittedly censorship, and yet the United States Supreme Court, as early as 1915,[1] held it to be Constitutional in this medium of mass communication. More recently, the Court has been whittling away on this old decision. Hence, the old doctrine that moving pictures constitute only a form of entertainment, and are not to be regarded as a part of the press or as organs of public opinion, has been reversed and the medium has been held to be entitled to the Constitutional protection of freedom of the press.[2] The Supreme Court has also required the states to restrict the breadth of discretion of their censors; for example, authority to ban exhibition of films on the grounds that they are "sacrilegious"[3] or "immoral, harmful, or tending to corrupt morals"[4] has been held to be so vague as to give the censors an unlimited authority, which is illegal. The majority of the judges, however, have refused in any case to go all the way and prohibit governmental inspection and licensing of films as conditions precedent to their exhibition.[5] In broadcasting, on the other hand, any requirement that a program can not be put on the air until it has been previewed and approved by the FCC would be illegal, and the United States Court of Appeals for the District of Columbia has so held.

REFERENCES

CHAPTER I

1. See Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 68th Cong., 1st Sess., on H. R. 7357, pp. 60, 83 (1924).
2. Hearings before the Committee on Interstate Commerce, United States Senate, 69th Cong., 1st Sess., on S. 1 and S. 1754, pt. 3, pp. 266, 267 (1926).
3. Bellows, Henry A., Is Radio Censored? Harpers Magazine, Vol. 171, p. 701 (Nov. 1935).
4. Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 70th Cong., 1st Sess., on H. R. 8825, p. 26 (1928).
5. FRC, Second Annual Report, General Order No. 21, pp. 8, 42, 166-170 (1928).

5-A. For many years broadcasters have been urging an extension of the license period, the most recent proposal being 5 years. While the idea has received considerable support from individual Commissioners and Congressmen, it has not been considered sufficiently imperative to be given precedence in Congressional deliberations over the more serious questions of engineering regulation in the field of spectrum allocations. The advantage of the longer term, of course, would be to reduce the frequency of FCC checks.

A more radical proposal is to give permanent licenses which would be subject to revocation at any time. The advantage of this change would be to make license termination more difficult because of a shift in the burden of proof. Under the statutes, a broadcaster who applies for the renewal of his license must prove that he is legally entitled to the renewal; in cases of revocation, the FCC must prove that stations are not entitled to their licenses.

6. Broadcasting, Sept. 3, 1945, p. 15. This valuable trade periodical has gone through a number of changes in name. Before 1945, it was called simply Broadcasting. In that year, the word Telecasting was added in recognition of the new medium. Then, in 1957, the magazine returned to the more convenient title which, its editors explained, is just as accurate because both radio and television are broadcasting. See also the KFBI Case, 2 FCC 455, 459 (1936).
7. The writers do not agree on the number of such cases. The reason for the disagreement is simply that the number is uncertain. The FRC Reports show only five cases, but it seems likely that there were others. It is possible, as some opponents of regulation have charged, that in many of the earlier cases programming practices constituted the real ground for deletions of stations without that fact being made apparent. Furthermore, there have been decisions, both by the FRC and the FCC, in which unsatisfactory programming was only one of the grounds for denials of renewals, and it is difficult to determine how heavily it weighed in those cases.

CHAPTER II

1. Act of 1927, 44 Stat. at L. 1162, sec. 29; Act of 1934, 48 Stat. at L. 1064, sec. 326. In 1948 the prohibition was removed from the Communications Act and incorporated into the Federal Criminal Code. USCA, title 18, sec. 1464. This change, however, has been held by the FCC to leave undisturbed its authority to terminate the licenses of stations over which the offensive language has been broadcast. The Commission's power still rests upon the statutory directive that a station is to be permitted on the air only so long as it operates in the public interest, and the use of offensive language as defined in the Criminal Code does not meet this test. See 13 Fed. Reg. 5075 (Sept. 1, 1948).
2. Duncan v. U.S., 48 F (2d) 128, 132, 133 (1931).
3. Chase, Francis S., Sound and Fury, p. 20 (Harper Bros. N. Y. 1942).
4. Hearings before the Committee on Interstate Commerce, United States Senate, 71st Cong., 2d Sess., on S. 6, pt. 12, pp. 1607-1609; pt. 13, p. 1750 (1930).
5. Baker v. U.S., 115 F (2d) 533, 538-540 (1940). The Court goes into considerable detail in describing the cancer treatment.
6. FRC, Fifth Annual Report, pp. 78, 79 (1931).
7. Broadcasting, June 25, 1951, p. 72.
8. Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 82nd Cong., 2d Sess., on H. Res. 278 (1952).
9. H. R. Rept. 2509, 82nd Cong., 2d Sess. (1952).

9-A. Upon the rise of television, this trade association took the new medium into its membership along with radio, and the name was changed to National Association of Radio and Television Broadcasters. On January 1, 1958, it returned to the simpler name, The National Association of Broadcasters, for the sake of convenience; the NAB asserted that both radio and television operators were encompassed in the general term Broadcasters.

10. FRC, Second Annual Report, pp. 152, 153 (1928.)
11. Louis G. Caldwell, Freedom of Speech and Radio Broadcasting, 177 Annals of the Am. Acad. Pol. Soc. Sc., 202 (Jan. 1935).
12. Trinity Methodist Church, South v. FRC, 62 F (2d) 850, 852, 853, (1932).
13. New York Times, Nov. 21, 1938, p. 7.
14. Bellows, Henry Adams, Is Radio Censored? 171 Harpers 697, 707 (1935).
15. New York Times, Dec. 23, 1938, p. 4. For a more complete account of Father Coughlin's radio activities and experiences, see Chase, Francis S., *op. cit.*, pp. 88-95.
16. Independent Broadcasting Co. v. FCC, 193 F (2d) 900, 902 (1951).
17. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong., 2d Sess., on H. R. 8301, pp. 361, 362 (1934).
18. KFKB Broadcasting Association v. FRC, 47 F (2d) 670, 671 (1931). The interesting story of the rise and fall of Brinkley can be found in Chase, Francis S., *op. cit.*, pp. 60-79 (1942).
19. 56 Rep. American Bar Association, pp. 390, 391 (1931); 57 *Ibid.*, p. 467 (1932).
20. Hearings on H. R. 8301, *op. cit.*, p. 78 (1934).

21. See WRBL (Columbus, Ga.) Case, 2 FCC 687 (1936); KXL (Portland, Ore.) Case, 4 FCC 186 (1937); WMBQ (Brooklyn, N.Y.) Case, 5 FCC 501 (1938); WMBC (Detroit, Mich.) Case, 6 FCC 867 (1938).
22. The quotations are taken from Broadcasting, July 15, 1946, p. 52; Mar. 3, 1947, p. 42; June 14, 1948, p. 52; July 5, 1948, p. 24; July 26, 1948, p. 30.
23. Proposed Rules, 13 Fed. Reg. 4748 (Aug. 17, 1948); Final Rules, 14 Fed. Reg. 5432 (Sept. 1, 1949).
24. Broadcasting, Aug. 16, 1948, p. 50.
25. Public Law 772, 80th Cong., 2d Sess., June 25, 1948.
26. U. S. Code, title 18, Sec. 1304.
27. For years, radio spokesmen have protested the possibility of double punishment—conviction by the courts and loss of license. It was often pointed out that this constituted unfair and discriminatory treatment of radio as compared with competing media—for example, the press—which was not subject to the "death sentence."
28. This case provides an illustration of an interesting inconsistency in American pressure politics. While politicians and lobbysts would not interfere in a case pending before a court, they do not hesitate to interfere in a case pending before a quasi-judicial administrative agency.
29. 13 Fed. Reg. 5075 (Sept. 1, 1948).
30. ABC v. U. S., 110 Fed. Supp. 374 (1953); FCC v. ABC, 347 U. S. 284 (1954).
31. See Broadcasting, Mar. 18, 1957, p. 78.
32. *In re* Application of Capital Broadcasting Co., (FCC release 16701 *mim.*) Oct. 13, 1947.
33. *In re* Application of the Northern Corporation (FCC release 52007, *mim.*) July 26, 1950.
34. *In re* Application of Port Frere Broadcasting Co. (FCC release 54663 *mim.* pp. 21-26) Oct. 12, 1950.
35. S. 1564, 1624, 2116, 82nd Cong., 1st Sess. (1951). See also Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 81st Cong., 2d Sess., on S. 3358 (1950). Similar bills continued to appear in subsequent years.
36. See the Shuler, "Oregon Wildcat," and WCOT Cases previously discussed in this chapter.
37. See *In Re* Bellingham Broadcasting Co., 8 FCC 159, 172 (1940).
38. *In Re* Application of Port Huron Broadcasting Co. (FCC release 48-1116, *mim.* pp. 3-12) June 28, 1948. Despite the verdict of guilt, the station's license was renewed. WHLS had been following an industry-wide practice which was not, at that time, thought to be illegal. The FCC therefore held that the station was not at fault and that its violation of the law was not a deliberate or wilful one. The case was interpreted as establishing a policy for the future.
39. Broadcasting, May 10, 1948, p. 4; May 17, 1948, p. 221.
40. Houston Post Co. v. U. S., 79 F. Supp. 199, 204 (1948)
41. Felix v. Westinghouse Radio Stations, Inc., 89 F. Supp. 740 (1950). See also Summit Hotel Co. v. NBC, 8 A. (2d) 302 (1939).
42. 186 F. (2d) 1 (1950). The United States Supreme Court refused to review the case, 341 U. S. 909 (1951).

43. H. R. 9971, Sec. 4, 69th Cong., 1st Sess.
44. H. R. Report 1886, 69th Cong. 2d Sess.
45. Hearings before the Committee on Interstate Commerce, United States Senate, 78th Cong., 1st Sess., on S. 814, pp. 950, 951 (1943).
46. S. 814, Confidential Committee Print, 78th Cong., 2d Sess., p. 53 (1944); S. 1333, 80th Cong., 1st Sess., p. 22 (1947).
47. H. R. 7782, 82nd Cong., 2d Sess. (1952).
48. H. R. 7062, 82nd Cong., 2d Sess. (1952).
49. H. Rept. 2426, 82nd Cong., 2d Sess. (1952).
50. Broadcasting, Feb. 9, 1948, p. 50; July 12, 1948, p. 52.
51. Hearings before the Select Committee to Investigate the FCC, House of Representatives, 80th Cong., 2d Sess., pursuant to H. Res. 691 (1948).
52. See the testimony of Chairman Coy, *Ibid.* See also FCC Public Notice 28055 (*mim.*) Oct. 22, 1948.
53. Legislation to extend the prohibition against censorship to the speakers who are campaigning in behalf of a candidate was already pending in Congress. See S. 1379, 82nd Cong., 1st Sess. (1951). The FCC supported new legislation of this kind on the grounds that the Westinghouse Case permitted Section 315 of the Communications Act of 1934 to be circumvented.
54. Hearings pursuant to H. Res. 691, *op. cit.* See the testimony of Chairman Coy.
55. Although the members of the House of Representatives investigating committee were critical of the FCC, they failed to find any solution to the problem themselves. They didn't even make any recommendation for Congressional consideration. H. Repts. 2461, 2479, 80th Cong., 2d Sess.
56. *In re* the Application of WDSU Broadcasting Corporation, FCC Release 69843 (*mim.*) p. 5 (Nov. 26, 1951).
57. FCC, Report on Public Service Responsibility of Broadcast Licensees (FCC Release 90265 *mim.* p. 73) March 7, 1946. The industry soon tagged this report with a nickname: The Blue Book. The light blue color of its cover, together with the idea that it contained bad news, soon made the name better known than the official title. Hence, it will be cited hereafter as the Blue Book.
58. Hearings on S. 1 and S. 1754, *op. cit.*, pt. 1, p. 60.
59. Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 70th Cong., 2d Sess., on H. R. 15430, pt. 1, p. 8 (1929).
60. FRC, Second Annual Report, pp. 168, 169 (1928).
61. See the WCRW Case, *Ibid.*, pp. 155, 156.
62. Blue Book, *op. cit.*, p. 73.
63. Hearings on S. 6, *op. cit.*, pt. 6, 230; FCC, Second Annual Report, p. 19 (1936).
64. 2 FCC 559 (1936).
65. 52 Stat. at L. 111 (1938).
66. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing

such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. USCA, title 18, sec. 1343; 66 Stat. 722.
67. 2 FCC 76, 77 (1935).
68. Blue Book, *op. cit.*, p. 86.
69. *Ibid.*, p. 85.
70. *Ibid.*, p. 73.
71. FRC, Second Annual Report, p. 168 (1928).
72. *In re* Great Lakes Broadcasting Co., FRC, Third Annual Report, pp. 32, 35 (1929).
73. Blue Book, *op. cit.*, p. 81.
74. *Ibid.*, p. 88.

CHAPTER III

1. Hearings before the Committee on Interstate Commerce, United States Senate, 69th Cong., 1st Sess., on S. 1 and S. 1754, pt. 3, p. 228 (1926).
2. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong., 2d Sess., on H.R. 8301, p. 117 (1934).
3. Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 70th Cong., 1st Sess., on H. R. 8825, p. 22 (1928).
4. *In re* Great Lakes Broadcasting Co., FRC, Third Annual Report, pp. 32, 34 (1929).
5. *In re* Powel Crosley, Jr., and The Aviation Corporation, Docket No. 6767 (FCC release 84571 *mim.*) p. 13 (1945).
6. FCC, Report on Public Service Responsibility of Broadcast Licensees (Release 90265 *mim.*) p. 31, March 7, 1946—hereafter cited as the Blue Book.
7. For example, see the testimony of Commission Chairmen at such widely separated times as 1929 and 1943. Hearings before the Committee on Interstate Commerce, United States Senate, 71st Cong., 2d Sess., on S. 6, pt. 6, pp. 229, 230 (1930); Hearings before the Committee on Interstate Commerce, United States Senate, 78th Cong., 1st Sess., on S. 814, p. 76 (1943).
8. Speech before NAB convention by FCC Acting Chairman Charles R. Denny. Quoted from Broadcasting, Oct. 28, 1946, p. 42.
9. FRC, Second Annual Report, pp. 52, 21 (1928).
10. General Order No. 81, FRC, Fourth Annual Report, p. 14 (1930).
11. Simmons v. FCC, 169 F (2d) 670 (1948). The Supreme Court denied a petition for certiorari, 335 U.S. 846 (1948).
12. Blue Book, *op. cit.*, p. 65.
13. FRC, Second Annual Report, p. 168 (1928).
14. Blue Book, *op. cit.*, pp. 59, 60.
15. When ABC permitted Bing Crosby to go wax shortly after the war, considerable concern was expressed among some radio interests:

"There is a more serious side. The advertiser and his agency, already exerting great influence over programming, would become practically autonomous. Why a network anyway? Just buy the lines or ship air express for simultaneous broadcast, without regard to time differentials. Eliminate the repeat broadcast. The client tailors his own network to suit each schedule.

"Would the networks then be able to maintain national service at high level? What would happen to special events coverage; a national emergency; an inauguration; a Bikini atom test; a world's series; Presidential speeches on the state of the nation?" (Broadcasting, Aug. 26, 1946, p. 50).

16. Blue Book, *op. cit.*, p. 32.
17. See *Ibid.*, pp. 33-36.
18. See CBS, Radio's Daytime Serial, (Sept. 1945).
19. FRC, Third Annual Report, p. 34 (1929).
20. The Blue Book, *op. cit.*, p. 71.
21. Broadcasting, June 25, 1951, p. 63.
22. Address of Commissioner Clifford J. Durr before the Conference of the Independent Citizens' Committee of the Arts, Sciences and Professions, Inc., June 23, 1945. (FCC release 83045 *mim.* p. 6).
23. Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 70th Cong., 2d Sess., on H. R. 15430, pt. 1, p. 234 (1929).
24. Address by Commissioner Clifford J. Durr before the Third Free World Congress, Oct. 29, 1943 (FCC release 71454 *mim.* p. 6).
25. 10 FCC 515, 518 (1945).
26. Broadcasting, Dec. 2, 1946, p. 15.
27. H. Res. 21, 2109, 83rd Cong., 1st Sess. (1953).
28. S. Res. 319, 82nd Cong., 2d Sess. (1952); H. Res. 86, 83rd Cong., 1st Sess. (1953).
29. Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 68th Cong., 1st Sess., on H. R. 7357, pp. 82, 83, 179 (1924).
30. "If any licensee shall permit any person who is a legally qualified candidiate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: Provided . . . No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."
31. *In re* Great Lakes Broadcasting Co., *op. cit.*, p. 34.
32. H. R. 7986, 73rd Cong., 2d Sess. (1934).
33. S. 2910, 73rd Cong., 2d Sess. (1934).
34. Sayre, J., An Analysis of the Radiobroadcasting Activities of Federal Agencies, The Radiobroadcasting Research Project, Harvard University. Studies in the Control of Radio, No. 3, pp. 11-19, (June, 1941).
35. For example, over a long period, a national hook-up carried the preachings of W. R. Cameron, the *alter ego* of Henry Ford, on time sold to the Ford Motor Company. A more recent example is the following "message" which a local announcer of WHBC, Canton, Ohio, cut into the Fulton Lewis program on behalf of the sponsor, The Timken Roller Bearing Co. "To be realistic about this cost of living business, you don't dare overlook those taxes you pay before you even see your paycheck. It's a big hunk, I'm sure you'll agree. Worse than that, it's unjustified. You're paying taxes to support governmental waste and inefficiency. No one wants to be a party to a hoax. Yet, by collecting taxes on the pretext of using it for

sound purposes, when in fact the money is being wasted, we taxpayers are parties to a hoax. Write your Congressman and Senators today and tell them you're fed up with this spending orgy perpetrated against,and not for, the taxpayer." Quoted from Broadcasting, Sept. 29, 1952, p. 29.
36. S. 814, Confidential Committee Print, 78th Cong., 2d Sess., pp. 55-58 (1944).
37. S. 1333, 80th Cong., 1st Sess., pp. 24-26 (1947).
38. See Hearings on H. R. 7357, *loc. cit.*, and Hearings on S. 1 and S. 1754, *op. cit.*, pt. 3, p. 228
39. Testimony of former NBC President, M. H. Aylesworth, Hearings on S. 6, *op. cit.*, pt. 13, p. 1715.
40. WHKC Case, *op. cit.*, p. 518.
41. Hearings on S. 814, *op. cit.*, pp. 124, 276.
42. 8 FCC 340 (1941).
43. 10 FCC 515 (1945).
44. The Communist Control Act of 1954, 68 Stat. at L. 775, sec. 3. No cases having arisen under this statute, the interpretation is that of the author.
45. 66 Stat. at L. 711, sec. 11 (1952).
45-A. For the FCC's regulations in detail, see Rules and Regulations, Part 3, Radio Broadcast Services. In 19 Fed. Reg. pt. 9, pp. 5948 ff, Sept. 1954, there is an extensive explanation of the regulations.
46. See *In re* Young People's Association for the Propagation of the Gospel, 6 FCC 178 (1938). In this opinion, the FCC followed an FRC precedent. See FRC, Third Annual Report, p. 35 (1929). Both Commissions, therefore, have applied the rule against propaganda stations to churches.
47. McIntire, *et al.* v. William Penn Broadcasting Co., 151 F (2d) 597 (1945); certiorari was denied by the Supreme Court, 327 U. S. 779 (1946).
48. *In re* Petition of Robert Scott (FCC release 96050, *mim.*) July 19, 1946.
49. Broadcasting, Aug. 23, 1948, p. 25.
50. Hearings before the Select Committee to Investigate the FCC, House of Representatives, 80th Cong., 2d Sess., pursuant to H. Res. 691 (1948).
51. FCC letter to Scott, Oct. 28, 1949. Typed copy provided by the Commission.
52. Hearings on H. R. 8825, *op. cit.*, p. 22.
53. FRC, Second Annual Report, p. 168 (1928). See also *In re* Great Lakes Broadcasting Co., *op. cit.*, pp. 34, 35.
54. Hearings on S. 1 and S. 1754, *op. cit.*, pt. 3, p. 205.
55. Hearings on S. 6, *op. cit.*, pt. 5, pp. 192-194.
56. H. R. 8759, 72nd Cong., 1st Sess. (1932).
57. S. Res. 129. The Resolution and the Report of the FRC have been published: Commercial Radio Advertising, Senate Document 137, 72nd Cong., 1st Sess., pp. 2, 31-34 (1932).
58. Hearings before the Committee on Interstate Commerce, United States Senate, 73rd Cong., 2d Sess., on S. 2910, p. 191 (1934).
59. Reports of the American Bar Association, Vol. 56, p. 382 (1931).
60. S. Res. 129, *op. cit.*, pp. 71-106.
61. These groups were all special pleaders. The CFL and AFL wanted a clear channel for the labor station, WCFL, in Chicago. The Paulist Fathers, licensee of WLWL in New York, had become discontented with the 15½

hours air-time weekly allowed by the FRC under its policy to restrict those facilities already granted to special interests. (See *In re* Chicago Federation of Labor, FRC Third Annual Report, p. 36, 1929). The Jehovahs wanted to force the networks to provide them time to preach their sermons.

62. Hearings on S. 6, *op. cit.*, pt. 14, p. 2080.
63. Hearings on H. R. 8301, *op. cit.*, pp. 147-154.
64. One of the most telling arguments against the demand for a segregation of frequencies was the fact that many existing radio businesses would have had to be destroyed in order to make room for the newcomers. Another effective argument was the fact that many of the protagonists did not operate—or did not intend to operate—as non-commercial or non-profit broadcasters. While the organizations themselves did not exist for the purpose of making money, some of them did sell, or wanted to sell, more or less time to advertisers.
65. FCC Release 11861 (*mim.*); 70 Cong. Rec., pp. 4144, 4145 (Mar. 21, 1935).
66. FCC Release 11861, *supra.*
67. The proposals went so far as the introduction of bills into the House of Representatives. See H. R. 4314, 79th Cong., 1st Sess., and H. R. 1936, 80th Cong., 1st Sess.
68. Broadcasting of Tomorrow, Chairman Paul A. Porter's speech to the NAB, March 12, 1945. (FCC Release 81029 mim.) pp. 3, 4.
69. The Blue Book, *op. cit.*, p. 131.
70. Broadcasting, Mar. 31, 1947, p. 4.
71. The following discussion has been taken from the Blue Book, *op. cit.*, pp. 30-45, except where noted.
72. Testimony of William S. Paley, Chairman of the CBS Board of Directors, Hearings on S. Res., 113, *op. cit.*, p. 358.
73. CBS Annual Report, 1946, p. 6.
74. See Hearings on H. R. 8301, *op. cit.*, pp. 115-119.
75. The Blue Book, *op. cit.*, p. 73. The FRC took the same position as early as 1928. See Second Annual Report, pp. 19, 20.
76. Broadcasting, April 16, 1945, p. 40.
77. The Blue Book, *op. cit.*, p. 56.
78. *Ibid.*, p. 29.
79. FCC, Report of Allocations from 44 to 108 mc., Docket No. 6651, (Release 83095 mim.) p. 5 (1945). FCC regulations also made these licenses really non-commercial and non-profit. "No sponsored or commercial programs shall be transmitted nor shall commercial announcements of any character be made. A station shall not transmit the programs of other classes of broadcast stations unless all commercial announcements and commercial references in the continuity are eliminated." FCC Rules and Regulations, Part 3, Subpart D, Sec. 3.503 (c).
80. FCC, Sixth (Final) Report and Order, Docket Nos. 8736, 8975, 9175, 8976, Release 52-294 (1952). Published by Broadcasting, April 14, 1952, Part II. Non-commercial and non-profit operation was also specified. FCC Rules and Regulations, Part 3, Subpart E, Sec. 3.621.
81. Over the years, the broadcasting industry has been little troubled by the spector of governmental ownership and operation. The few State University stations have been accepted with equauimity. In the early 1930's,

there were murmurs of support for Federal broadcasting, particularly for a United States Government network to compete with the privately owned nets. See Kerwin, J. G., The Control of Radio, Public Policy Pamphlets No. 10 (1934). Such proposals, however, failed to attract the enthusiasm of even the most aggressive of the critics of "over-commercialization."
82. See H. R. 3543, 82nd Cong., 1st Sess. (1951).
83. FCC, Sixth (Final) Report and Order, *op. cit.*, p. 6.
84. Education's Opportunities in Radio, Speech by Commissioner Clifford Durr, Baltimore, Dec. 2, 1944 (*mim.*) p. 5.

CHAPTER IV

1. Hearings before the Committee on Interstate Commerce, United States Senate, 71st Cong., 2d Sess., on S. 6, pt. 13, pp. 1716-1718 (1930).
2. "No sponsor has ever made the slightest attempt to influence treatment of the news in any way; nor, if he had so attempted it, would he have got anywhere. The only difference between a sponsored and a sustaining program is that on the sponsored program there is . . . time for the commercial." Testimony of commentator Elmer Davis, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 77th Cong., 2d Sess., on H. R. 5497, pt. 1, p. 258 (1942).
3. Hearings before the Committee on Interstate Commerce, United States Senate, 78th Cong., 1st Sess., on S. 814, p. 50 (1943).
4. Quincy Howe, Policing the Commentator; A News Analysis, Atlantic Monthly, Vol. 172, Nov. 1943, p. 47.
5. Broadcasting, Jan. 28, 1946, p. 30; Feb. 25, 1946, p. 91.
6. "Mr. Hunter called me in Washington yesterday . . . He told me the advertisers didn't like my Sunday night radio program. They were pressing him hard. He didn't know what to do. He stated he was frantic and couldn't afford to lose the advertising. He begged me and apologized that he had to terminate it at once." New York Times, May 30, 1946, pp. 1, 22.
7. Edward R. Murrow, Vice President and Director of Public Affairs, in a letter to Jack Gould, radio editor of the New York Times, Jan. 26, 1947, Sec. X, p. 11. Gould rejected Murrow's claim that advertisers had no control over CBS news.
8. Confidential Committee Print, S. 814, 78th Cong., 2d Sess., p. 54 (1943).
9. Committee Print, S. 1333, 80th Cong., 1st Sess. (1947).
10. Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 68th Cong., 1st Sess., on H. R. 7357, pp. 82, 83, 179 (1924); and Hearings before the Committee on Interstate Commerce, United States Senate, 69th Cong., 1st Sess. on S. 1 and S. 1754, pt. 3, p. 228 (1926).
11. FRC, Second Annual Report, pp. 152, 153 (1928).
12. *In re* Great Lakes Broadcasting Co., FRC, Third Annual Report, p. 34 (1929).
13. 8 FCC 333, 340 (1941).
14. Quoted from Broadcasting, Aug. 26, 1946, p. 24.
15. Report of the FCC, In the Matter of Editorializing by Broadcast Licensees,

Docket No. 8516 (FCC release 49-769, *mim.*) June 1, 1949. 14 Fed. Reg. 3055 (June 7, 1949).

16. Some examples are WCAU's campaign to improve drinking water in Philadelphia, WMCA's advocacy of measures to solve housing problems in New York, and WOR's demand that the Mayor of New York hold public hearings on traffic conditions. See the New York Times, Jan. 18, 1948, Sect. X, p. 11.
17. Broadcasting, June 13, 1949, p. 48.
17-A. See *Ibid.*, December 16, 1957, p. 72.
18. Testimony of Louis G. Caldwell, Hearings on H. R. 5497, *op. cit.*, pt. 2, p. 610. An FRC Commissioner, Eugene O. Sykes, testified to the same conclusion. *Ibid.*, pt. 1, p. 119.
19. See Tri-State Broadcasting Co. v. FCC, 96 F (2d) 564 (1938) where a broadcaster was strongly enough motivated to carry his fight against a newspaper into the courts after failing to stop the granting of a license in hearings before the FCC.
20. Summary of the Record, FCC Investigation into Newspaper Ownership, Docket No. 6051 (FCC release 73100 *mim.*) pp. 13-16, 27-34 (1944).
21. Hearings on S. 814, *op. cit.*, p. 283.
22. See H. R. 3892 (1937) which proposed to divorce the two media.
23. FCC Order 79, 6 Fed. Reg. 1580 (Mar. 22, 1941).
24. Stahlman v. FCC, 126 F (2d) 124, 128 (1942). See also FCC v. Stahlman, 40 F. Supp. 338, 340 (1941); FCC Public Notice 51684 (July 1, 1941); FCC Order 79-A, 6 Fed. Reg. 3302 (July 6, 1941). The lawyers of the Newspaper-Radio Committee were up against a very broad grant of power to investigate. (See Sec. 403, Federal Communications Act of 1934, 48 Stat. at L. 1064).
25. H. R. 5497, 77th Cong., 2d Sess., Sec. 7 (1942).
26. S. 814, 78th Cong., 2d Sess., Confidential Committee Print, p. 71 (1944).
27. Congressional opposition continued to be expressed after the FCC had disposed of the case. In 1945 a special committee of the House of Representatives expressly recommended that "this entire matter of newspaper ownership" be determined by Congress and not by the FCC and took the position that Congress should not enact a ban against such ownership. H. Rept. 2095, Final Report of the Select Committee to Investigate the FCC, House of Representatives, 78th Cong., 2d Sess., pursuant to H. Res. 21, p. 17. In 1947 the White Bill repeated the prohibition proposed in S. 814, cited *supra* note 26. See S. 1333, 80th Cong., 1st Sess., Committee Print, p. 40. In 1952, a Conference Committee deleted from the McFarland Bill (S. 658, 82nd Cong., 2d Sess.) a similar restriction of FCC authority. The report of the Committee explained this deletion on the ground that the prohibition was unnecessary because the FCC did not have the power anyway. (H. Rept. 2426, 82nd Cong., 2d Sess.) According to rumors in the industry, however, the real reason was a White House objection to such legislation which the conferees were afraid would produce a Presidential veto unless the clause was deleted. In subsequent years, restrictive bills of various kinds have continued to appear.
28. 9 Fed. Reg. 702, 703 (Jan. 18, 1944).
29. 189 F (2d) 677, 683 (1951); the Supreme Court refused to review the de-

cision, 342 U. S. 830 (1951). See also Plains Radio Broadcasting Co. v. FCC, 175 F (2d) 359 (1949).
29-A. Clarksburg Publishing Co. v. FCC, 225 F (2d) 511 (1955). See also Allentown Broadcasting Corp. v. FCC, 222 F (2d) 781; 232 F (2d) 57 (1955).
29-B. McClatchy Broadcasting Co. v. FCC, 239 F (2d) 15, 18 (1956). Certiorari was denied by the Supreme Court, 1 L. ed. (2d) 665 (1957).
30. Docket No. 6777 (FCC release 88327 *mim.*) 1945.
31. Hearings on S. 814, *op. cit.*, pp. 319-321.
32. *In re* Petition of John J. Dempsey, Docket No. 8044 (FCC release 7277 *mim.*) 1946. Pepperday denied the charges and the case was later dropped by the FCC upon the request of the complainant.
33. *In re* Petition of Homer C. Rainey, Docket No. 7666 (FCC release 4126 *mim.*) p. 6 (1947).
34. 6 FCC 31, 32 (1938).
35. Memorandum Opinion, Docket Nos. 7234, 7665 (FCC release 9296 *mim.*) 1947; Docket No. 7665 (FCC release 20183 *mim.*) 1948.
36. Variety, for June 25, 1945, pp. 26, 30 made an interesting appraisal of 30 of the big names among radio newsmen. On the estimate of "political slant", none were classified as objective. Twelve were conservative, reactionary or extremely reactionary; of these, specific prejudices were listed for some. Of the others, three were classified as liberal and 11 as middle of the road. The CIO News for February 26, 1945, p. 7, tarred all the networks with the brush of anti-labor prejudice on the grounds that a big majority of their newsmen slanted their programs against labor.
37. From personal experience, FCC Chairman Fly testified: "When a particular statement of a broadcaster hits home on an individual his attitude on free speech and on commentators and on the powers of the Commission is apt to swing into reverse pretty rapidly." Hearings on S. 814, *op. cit.*, p. 933.
38. See *Life*, Dec. 19, 1949, p. 24; Jan. 9, 1950, pp. 2, 24.
39. Broadcasting, May 20, 1946, p. 10.
40. *Ibid.*, Jan. 29, 1945, p. 42; April 9, 1945, p. 28; Feb. 10, 1947, pp. 18, 25.
41. S. 814 and S. 1333, *supra.*
42. See the testimony of William S. Paley, then President of CBS, in Hearings before the Committee on Interstate Commerce, United States Senate, 77th Cong., 1st Sess., on S. Res. 113, pp. 359, 360 (1941). See also the subsequent explanation in Hearings on S. 1333, *op. cit.*, p. 501 (1947). But see CIO News, *supra* note 36.
42-A. Copies of the transcripts supplied by CBS.
43. See S. 814 and S. 1333, *supra.*
44. Hearings on S. 6, *op. cit.*, pt. 13, p. 1716.
45. Hearings on S. 814, *op. cit.*, p. 123.

CHAPTER V

1. Caldwell, Louis G., Freedom of Speech and Radio Broadcasting, Annals of the Am. Acad. Pol. Soc. Sc., Vol. 177, p. 197 (Jan. 1935).
2. Bellows, Henry A., Is Radio Censored? Harpers Magazines, Vol. 171, p, 701

(Nov. 1935). Bellows later changed his mind.

3. In the early 1920s, when Congress was considering radio legislation, the Annual Radio Conferences opposed a statutory delegation of authority to regulate programs. See Hearings before the Committee on Interstate Commerce, United States Senate, 69th Cong., 1st Sess., on S. 1 and S. 1754, pt. 1, pp. 54, 60, 67, 83 (1926).
4. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong., 2d Sess., on H. R. 8301, p. 117 (1934).
5. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 77th Cong., 2d Sess., on H. R. 5497, pt. 1, p. 124 (1942).
6. *Ibid.*, p. 136.
7. Hearings before the Committee on Interstate Commerce, United States Senate, 78th Cong., 1st Sess., on S. 814, pp. 259, 743, 89 (1943).
8. Broadcasting, June 17, 1946, p. 52.
9. In testifying before a Senate Committee, Fly protested against this characterization. In his defense, he pointed out that he had often expressed himself against the prevalence of soap operas on network schedules and, even though he had been vigorous in doing so, he had been ineffective. "Why, you couldn't get them out of there with a crowbar, much less with an eyebrow." Hearings on S. 814, *op. cit.*, p. 131.
10. Quoted from Broadcasting, Oct. 28, 1946, pp. 42, 44. Miller denied any antagonism, *Ibid.*, p. 65.
11. Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 80th Cong., 1st Sess., on S. 1333, pp. 549 ff.
12. See, for example, Broadcasting, Mar. 25, 1946, p. 94; May 6, 1946, p. 4; Dec. 23, 1946, p. 48; June 2, 1947, p. 87.
13. *Ibid.*, Nov. 11, 1946, p. 80; Sept. 20, 1948, p. 30. See also Simmons v. FCC, 169f (2d) 670 (1948).
14. Hearings on S. 1333, *op. cit.*, pp. 169, 447.
15. By this time, the NAB had taken TV stations into its membership.
16. See Hearings on S. 1333, *op. cit.*, p. 30 ff.
17. FCC, Report on Public Service Responsibility of Broadcast Licensees (FCC release 90265, *mim.*, pp. 79, 38-47) Mar. 7, 1946. This report is commonly called the Blue Book by the industry and is so referred to herein.
18. Hearings on S. 814, *op. cit.*, pp. 453-455. The testimony also admits extensive voluntary obedience to codes.
19. Broadcasting, May 27, 1957, p. 122.
20. Testimony of CBS President Frank Stanton, Hearings on S. 1333, *op. cit.*, p. 322.
21. *Ibid.*, p. 319.
22. Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 70th Cong., 1st Sess., on H. R. 8825, p. 231 (1928).
23. See Chase, Francis, Jr., Sound and Fury, p. 70 (Harper Bros., N.Y., 1942).
24. Hearings before the Committee on Interstate Commerce, United States Senate, 77th Cong., 1st Sess., on S. Res. 113, p. 352 (1941).
25. Hearings on H. R. 5497, *op. cit.*, pt. 1, p. 289.

CHAPTER VI

1. Bellows, Henry A., Is Radio Censored? Harpers Magazine, Vol. 171, p. 701 (Nov. 1935).
2. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong., 2d Sess., on H. R. 8301, p. 117 (1934).
3. See Caldwell, Louis G., Freedom of Speech and Radio Broadcasting, Annals Am. Acad. Pol. & Soc. Sc., Vol. 177, pp. 188-207 (Jan. 1935). See also the arguments of Justin Miller in Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, U. S. Senate, 80th Cong., 1st Sess., on S. 1333 (1947).
4. See the FCC Report on Public Service Responsibility of Broadcast Licensees (Release 90265, mim., p. 28), Mar. 7, 1946, hereinafter cited as the Blue Book. See also pp. 23-28, 129.
5. FRC, Second Annual Report, p. 161 (1928). See also Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 70th Cong., 1st Sess., on H. R. 8825, pp. 26, 188 (1928).
6. See the Blue Book, *op. cit.*, p. 28.
7. Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 68th Cong., 1st Sess., on H. R. 7357, pp. 60, 83 (1924).
8. Hearings on S. 1333, *op. cit.*, p. 409.
9. Public Law 772, 80th Cong., 2d Sess. (1948). U. S. Code, title 18, Secs. 1304, 1464.
10. 13 Fed. Reg. (Sept. 1, 1948) p. 5075. See also FCC v. ABC, 98 L. ed 699, 705 (1954).
11. KFKB v. FRC, 47 F (2d) 670, 672 (1931).
12. Trinity Methodist Church, South v. FRC, 62 F (2d) 850, 852 (1932).
13. See Simmons v. FCC, 169 F (2d) 670, 672 (1948); Bay State Beacon v. FCC, 171 F (2d) 826, 827 (1948); Easton Publishing Co. v. FCC, 175 F (2d) 344, 348 (1949); Independent Broadcasting Co. v. FCC, 193 F (2d) 900 (1951).
14. Johnston Broadcasting Co. v. FCC, 175 F (2d) 351, 359 (1949).
15. Plains Radio Broadcasting Co. v. FCC, *Ibid.*, 359, 362.
16. For example, certiorari was denied in 284 U. S. 685 (1932); 288 U. S. 599 (1933); 335 U. S. 846 (1948).
17. FCC v. ABC, *loc. cit.*
18. FCC v. Sanders Brothers Radio Station, 309 U. S. 470, 475 (1940).
19. Justin Miller, NAB President, was still relying upon the *obiter dictum* of Mr. Justice Roberts in May, 1947. See letter to Representative Harris Ellsworth, pp. 16, 17 (copy supplied by NAB).
20. NBC v. U. S., 319 U. S. 190, 215, 216 (1943).
21. The Blue Book, *op. cit.*, p. 28.
22. Hearings before the Committee on Interstate Commerce, United States Senate, 78th Cong., 1st Sess., on S. 814, p. 933 (1943).
23. See Hearings before the Committee on Interstate Commerce, United States Senate, 69th Cong., 1st Sess., on S. 1 and S. 1754, pt. 1, p. 60 (1926).
24. KFKB Case, *op. cit.*, p. 672. A year later, this definition was re-asserted by the Court in the Trinity Church Case, *op. cit.*, p. 853.
25. Broadcasting, editorial, June 14, 1948, p. 52.

26. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 77th Cong., 2d Sess., on H. R. 5497, pt. 1, p. 225 (1942).
27. Hearings on S. 1333, *op. cit.*, p. 408.
28. KIEV Case, 8 FCC 207, 210 (1940). See also Mayflower Case, 8 FCC 333, 341 (1941).
29. Near v. Minn., 283 U. S. 697, 713 (1931). See also Hannegan v. Esquire, Inc., 327 U. S. 146, 151 (1946).
30. FCC v. ABC, *loc. cit.*
31. Hearings on S. 1333, *op. cit.*, pp. 149, 120, 126.
32. At times, advertisers have confessed their guilt:

"One of the fundamental objectives of General Foods advertising is to create a favorable and receptive attitude toward its products among the largest possible number of consumers.

"The use of controversial personalities or the discussion of controversial subjects in our advertising may provoke unfavorable criticism and even antagonism among sizeable groups of consumers. Such reaction injures both acceptance of our products and our public relations.

"General Foods advertising, therefore, avoids the use of material and personalities which in its judgment are controversial." (New York Times, Aug. 20, 1950, p. 42).

33. Hearings on S. 1333, *op. cit.*, p. 233.

CHAPTER VII

1. Mutual Film Corp. v. Industrial Commission of Ohio, 236 U. S. 230 (1915).
2. U. S. v. Paramount Pictures, Inc., 334 U. S. 131 (1948).
3. Burstyn, Inc. v. Wilson, Commissioner of Education of New York, 343 U. S. 495 (1952).
4. Superior Films, Inc. v. Department of Education of Ohio, 346 U. S. 587 (1954).
5. Some of the Justices would go the whole way in reversing the Mutual Film Corporation Case.

APPENDIX

POLITICS, PROFITS, AND ELECTRONICS

The legal authority of the Federal Communications Commission in the field of broadcast engineering is extensive. Congress has authorized and directed the commission to: [1]

Classify stations and prescribe the nature of service.
Establish areas or zones to be served by each station.
Assign frequencies to each station and determine its power and time of operation.
Approve the location of stations.
Prevent interference of one station with another.
Regulate the apparatus to be used for the purpose of producing the best signal emission.
Inspect stations and their equipment.
Determine the qualifications of the operators of station apparatus.
Study new uses for radio, provide for experimental uses of frequencies, and generally encourage scientific developments.

Every newcomer is subject to this regulatory authority even before he has any business to be regulated. He must get a construction permit before he can build a station. Failure to do so, or failure to observe the engineering regulations prescribed in the construction permit, may disqualify him for a license, without which he cannot operate. The U.S. Department of Commerce, the industry's first regulator, did not possess such authority. As a result, it was frequently presented with the disagreeable dilemma of either destroying an investment of thousands of dollars which an applicant had previously made in studios and equipment or violating its own engineering rules and regulations.[2]

Experience shows that the FCC's legal authority has been adequate. Despite this fact, the day-to-day task of regulating has not been easy; it has not been simply one of promulgating the correct knowledge of an absolute science. In the first place, the engineers have not always agreed on what is "right." More disturbing has been the fact that engineering problems frequently have political and economic ramifications. Engineering decisions, therefore, have been affected by a concern over the economic consequences of particular regulations and by the political maneuvering of numerous conflicting interests. As a

result, the Commission has always had to keep at least one eye on a Congress which has always looked upon the Commission as its agent and hence subject to its control.

The problems involved in allocating frequencies to the broadcasting companies, from the beginning of the industry to the present time, are discussed in the attempt to show by actual experience this mixture of politics, economics and the physical sciences, and the difficulties which the mixture has created for the governmental officials who have done the regulating and for the industry which has always had a vital stake in what they have done. In the discussion of these problems, the processes of policy formation and decision making are demonstrated.

Sectionalism

In the beginning, Secretary of Commerce Hoover licensed stations as the applications came in. Stations therefore grew where the economic climate was most propitious, namely north of the Mason-Dixon line, the Northeast, and the Pacific Seaboard. Applications were slow from the South and West. The economics of broadcasting, in other words, were inconsistent with an equal sectional distribution of facilities.

The disparity was recognized by Hoover as early as 1923. He therefore drew up a plan by which the country was divided into five zones and frequencies were distributed to each. Enforcement, however, was another matter. In the next few years, applications continued to pour in from the urban areas, and the newcomers demanded licenses even if they meant a further imbalance in the geographical distribution. Attempts to carry out the policy merely attracted criticism and attack from these newcomers. Furthermore, applications from the backward areas were still slow to come in and the Department could not create, on its own initiative, stations where it thought they should be but for which there were no applicants. Finally, the Department lost control completely when the courts struck down its coercive authority by holding that it could not deny a license to any newcomer and could not control stations as to power, frequency and location.[8]

The South and West did not remain acquiescent for long. As individuals and corporations became interested in the broadcasting business, they noticed the heavily favored North and Northeast. Also, their Congressmen came to their defense. The Department of Commerce was soon under attack and the discontent was one of the reasons for the creation of the Federal Radio Commission, predecessor of the FCC.

Stations for the South and West

At the end of its first year, the Federal Radio Commission was being criticized for violation of its legal duty to make a satisfactory redistribution of facilities. The Radio Control Act of 1927 directed the Commission to make a distribution of licenses, frequencies and power among the states and communities in the country so as to "give fair, efficient and equitable radio service to each of the same." Also, the country was divided into five zones which were approximately equal in population and therefore varied considerably in territorial size.[4] Representative Ewin L. Davis of Tennessee, who was pushing most vigorously the claims of the South, interpreted the statute to mean *equality* among the zones in number of frequencies, amount of power, and full or part time operation. The Commission, supported by the broadcasters and Congressmen from the North,[5] refused to accept this contention; they emphasized *service.* If listeners could get programs from stations in other zones, for example from New York clear channel stations, it was enough so long as the service was *fairly approximate* to that received by listeners in other sections of the country.

Congressmen from the South and West were in reality fighting to get business opportunities for their constituents. In fact, it was asserted that they had a *right* to own and operate stations. Listeners had a right to service from their own people and should not be made dependent upon New York, Chicago or Los Angeles. As a result, in 1928 Representative Davis introduced a new bill in Congress. It required the FRC (1) to "make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power," to each of the five zones and (2) to "make a fair and equitable allocation" to each of the States within each zone, "according to population."

Northern Congressmen went down the line against the bill. They were representing sectional interests just as much as its supporters. They did not want their constituents to be wiped out of business, or to be made into smaller businesses by reductions in power or time, just to accommodate latecomers from the South and West. Furthermore, they had real grounds for fear. Demands that the FRC should reduce Northern facilities were already being heard.

The "Davis Amendment" became law[6] and the FRC went to work. In the Fall of 1928, Order 40 made an extensive reallocation of facilities in one fell swoop.[7] Equality, however, did not result automatically from reallocation. Some standard of weighing different facilities was necessary. How was equality to be determined, for example, where

stations varied in power? Or, should two stations sharing time on a frequency be equivalent to another which had a full time license? In the summer of 1930, Order 92 established specific units, or values, for every kind of station, equality being said to exist when the zones had the same number of units.[8]

Within a few years, it became apparent that equality in facilities would create a real inequality in service. A large zone, like the Far West, needed more stations and power than a smaller zone having a more concentrated population. If the facilities in the two zones were equal, listeners in a smaller one would be getting better service than those in a larger one. Furthermore, it was engineeringly possible to license more stations, without creating interference, in a large zone than in a small one. The FRC found, however, that it could not grant the needed extra facilities in the West without destroying its equality, in terms of stations and power, with smaller Eastern zones and hence violating the law.[9]

The Davis Amendment raised new discontents. As the FRC tried to carry out the law, it drew fire from the North. Discontent was particulary strong in Ohio, Indiana, Iowa, Illinois and New Jersey. Order 40 had switched stations to different frequencies, made reductions in power, and required more time-sharing. Rather than delete a large number of stations, the Commissioners preferred the less drastic course. Broadcasters who had been satisfied began to complain that the FRC was hurting them. In addition, protests began to roll in from the public. Order 40 caused considerable confusion on the dial; previously steady listeners often found it necessary to become dial-twisters.

The Davis Amendment created a conflict between states as well as between sections. Broadcasters charged that other states fared better than their own and many state trade associations were organized to fight the Commission's changes. The New Jersey Broadcasters Association, for example, complained that New Jersey had not received its full quota of facilities in comparison with New York and Massachusetts.

The life of the Davis Amendment was destined to be a short one. Demands for repeal cropped up shortly after its enactment, the National Association of Broadcasters joining in at the end of the first year. Within the next few years, the FRC began throwing its influence on this side of the issue. At the same time, clamor from the South and West gradually diminished. By 1934, the discontent was considerably, although not completely, appeased.[10] While the FRC had not established any absolute or mathematical equality, it had elimin-

ated the extremes of disparity. The South in particular had been favored, gaining more than any other zone.

The first change in the requirement of equality was made by the Federal Communications Act of 1934. The FCC was authorized to "grant applications for additional licenses for stations not exceeding one hundred watts of power." This change permitted a slight inequality in facilities in order to cure some of the inequality in service and was designed primarily to please the Far Western zone, in which there was still considerable discontent. All that remained was outright repeal of the Davis Amendment and this came only two years later. In June, 1936, Congress restored the original requirement of the 1927 law. Equality of facilities by zones was replaced by "fair, efficient and equitable" service by states and communities within the states.[11]

Despite its faults, the Davis Amendment had some constructive effects. It produced a more genuine national distribution of facilities. Economic reality, however, was still more powerful than law. As a result, for some years to come there were underserved areas. In 1945 the FCC reported: "Nearly 10,000,000 people within the continental limits of the United States live outside the daytime service areas of any standard broadcast station, and more than 21,000,000 live outside the nighttime primary service area of any standard broadcast station. Approximately 38.5 per cent of the area of the continental United States lies outside the daytime service area of any standard broadcast station and 56.9 per cent lies outside the night time primary service area of any such station."[12] These underserved areas were distant from the cities in which stations were located, for example the wide open spaces of the Far West and rural Northern New England. Some correction, however, appeared later. For a number of years after the war, there was a considerable increase in the number of new stations going on the air and some of them were located in these areas. Optimism over the opportunities to make profits was clearly a major motivation for this development.

With the rise of frequency modulation and television the Commission was able to exert control over the distribution of frequencies from the beginning. It was determined to prevent the maldistribution which had grown up under the first-come-first-served practice of the early days of AM and, hence, to avoid a later necessity to wield the axe against going business concerns. Tables of Allocations were therefore formulated. That is, specific channels were allocated to specific localities over the country, with due regard being given to the distribution of the population and to the geographical separation necessary to control interference. In TV, for example, channels were

assigned to 1,274 cities and communities.[13] The Tables were given some flexibility by permitting applicants to ask for changes in specific allocations, which have been considered by the Commission on a case-to-case basis.

Although there was some controversy within the industry over TV's Table, the FCC justified it on a number of grounds. The statutory mandate was being met. On the economic side, the FCC declared that the Table would foster nation-wide competition in the industry.[14]

In 1957, Commissioner Craven proposed that the TV Table be abandoned. He thought that it had accomplished its objectives; the pattern of distribution of frequencies had become set by this time and the Table was therefore no longer necessary. The effect of Craven's proposal would have been to permit the FCC to grant applications as they came in, if the new stations met engineering standards.

The proposal split the industry. Some telecasters agreed with Craven; they thought that the change would speed the licensing of new stations. Others, however, were afraid that existing stations would suffer a degradation of service. This was particularly true of the Association of Maximum Service Telecasters (AMST). Composed of large TV stations which had organized to protect their extensive coverage, this organization thought that the abandonment of the Table of Allocations would tend to decrease the mileage separation between stations as new ones were licensed, thereby making their areas of coverage by reliable signals smaller.

After consideration of the proposal, the Commission decided that the time for the change was not ripe. It therefore dismissed, with Craven concurring, the proposal and decided that it should be reconsidered at some time in the future; Commissioner Craven is expected to re-introduce it when a favorable decision becomes more appropriate.

Zoning of Commissioners

Sectional discontent with the work of the Department of Commerce was the cause for another provision in the 1927 statute. The FRC was composed of five Commissioners, one from each zone. Southern and Western Congressmen were determined that the Commission should not become a Northern and Eastern agency. They thought that residence in a zone would make each Commissioner aware of its problems and informed about its needs.

At first, the representative idea was dominant. Most of the Commissioners tended to concentrate upon the affairs of their own zones. In Congressional committee hearings they often refused to answer

questions dealing with other sections of the country. When Congressmen or broadcasters wanted to consult the FRC on some matter at issue or to secure information, they usually went to their "own" Commissioners.

Within a short time, the representative notion began to lose caste. It violated the concept of the FRC as a national body. Under the statute, decisions were to be made by the Commission as a whole and the assumption was that before a decision was made all the Commissioners would consider the matter before them. In practice, however, issues affecting a specific zone were often decided by the Commissioner from that zone, and the others accepted his recommendations. To those people who looked upon the FRC as a judicial body, the representative idea was particularly objectionable. They declared that the Commission was a kind of court and should act as one.

The representative idea also created trouble for the Commission. Commissioner often vied with Commissioner to get favorable treatment for his "constituents." Disappointed broadcasters often attacked the Commissioners from their zones. For example, the New Jersey Broadcasters Association placed upon Commissioner Caldwell the responsibility for the failure of the State to get the allocations it desired under the Davis Amendment. W. K. Henderson, owner of KWKH, Shreveport, told a House of Representatives Committee: "In order that you gentlemen may understand what I thought a commissioner meant, when Judge Sykes notified me it would be necessary to come to Washington, I did not believe him. I thought, 'You are our commissioner; why should I have to go up there to keep KOIL off my wave length. You should look after us.' It was a surprise to me to find out I would have to come all the way to Washington to keep my wave length, when we had a commissioner, as I thought, to attend to that." [15]

These objections began to appear by the end of the FRC's first year. By the beginning of 1929 the NAB was calling for the repeal of the zoning system. Subsequently, the Commission tried to cure its defects by a reorganization, [16] but to no avail. Finally, the zones were abolished when Congress replaced the FRC with the FCC in 1934 and expanded its size to seven Commissioners.

Stations For Our Neighbors

Radio signals are no respectors of national boundaries, as the public along the Southern and Northern borders of the United States is well aware. As broadcasting developed in the countries to the

North and South, it became apparent that an international agreement was a necessary prerequisite to the control of interference.

The first action was taken by the Department of Commerce in 1924. A "gentlemen's agreement" with Canada reserved a number of frequencies for use by that country and the Department refused to license American stations on them. This agreement was satisfactory until the Department lost its regulatory authority. Thereupon, a number of American stations proceeded to use these Canadian frequencies.

Upon assuming office, the FRC accepted the Hoover policy. One of its first tasks was to clear American stations off the Canadian channels. This informal arrangement thus continued to control for a number of years, but by the early 1930s it was becoming inadequate. The growth in the number of stations and in power, along with the complicated allocation pattern in the United States, necessitated a more detailed and definite system of international regulation. Hence, in 1932 a new agreement was concluded, reserving six kilocycles exclusively for Canada and specifying the restrictions under which other specified frequencies could be used by both.[17]

Relations with Mexico did not develop so smoothly. In the early years, no agreement, formal or informal, had been made, and for a number of years trouble had been brewing. By 1934 there were twelve Mexican stations, operating or under construction, along the border. Many were owned or supported by American capital. Financial control, location and programing showed clearly that they were operated for the purpose of serving this country rather than Mexicans. To make the matter more irritating, they were immune to program regulation; in fact, two of them had previously been American stations which had lost their licenses. Programs devoted considerable attention to such matters as betting on horse races, medical cures, lotteries, fortune telling, and astrology—subjects which were not permitted in the United States. Naturally, the FRC resented the frustration of its authority and American broadcasters objected to competing with stations which were under less governmental restriction.

These Mexican stations also created interference with many stations in the United States. Power output was high, one station being licensed for 500 kw. Operation with 100 kw was common. Cross-talk and squeals were heard as far away as Minneapolis, Detroit, Chicago and Atlanta. Some of the closer stations, such as those in Houston, Texas, were completely blanketed. Protests from the United States Government and requests for remedial action were ignored.

Obviously, an international conference was in order. In 1933, there-

fore, delegates from Canada, Costa Rica, Cuba, El Salvador, Guatamala, Honduras, Mexico, Nicaragua and the United States met in Mexico City. They reached no agreement, however. Mexico wanted twelve exclusive frequencies, six for use along the border, and each of the other countries made additional demands. If all their desires had been met, the result would have been to leave us only sixty channels. "The United States took the position that it was unfair and unreasonable to expect the United States to clear up or to take stations off the air which are operating in the public interest in the United States, in order to make frequency space available for stations along the Mexican border which were, in the eyes of the United States, outlaw stations." [18]

The border conflict continued and the need for a solution became increasingly pressing. Therefore, another attempt was made in 1937 and, this time, resulted in the North American Regional Broadcasting Agreement of 1941. [19]

Unfortunately, the original NARBA did not settle allocation conflicts permanently. When the treaty expired, the same difficulties and problems which had plagued the negotiators of the first treaty had to be faced all over again. The principal obstacles to the completion of a new treaty were the demands of Cuba and Mexico for more facilities; American interests thought these demands were excessive. Again, several conferences failed to produce agreement. Finally, in the Fall of 1950, the stalemate between the United States and Cuba was broken by concessions on both sides. By this time, however, Mexico had withdrawn from the conference and therefore was not a party to the 1950 NARBA.

The opposition of many stations, particularly the big clear channel stations, has prevented ratification of the treaty by the United States. These broadcasters have been afraid that NARBA will force a degradation of their facilities and therefore of their service areas. In the making of regulations on such subjects as the geographical separation of stations, limitations on power, use of directional antennas, and daytime-only operation, the FCC would have to observe the provisions of NARBA, once it became law. Hence, many American stations fear that the concessions made by the United States' negotiators would put them in danger of having new limitations placed upon their licenses. Moreover, a number of the protestants are urging the FCC to grant higher power and they are afraid that favorable action on this proposal will be prevented by the concessions required by the treaty. In the final analysis, the opposition is based upon economic grounds; financial injury may result from engineering regulations.

American broadcasters object to reductions in their coverage in order to protect foreign competitors.

Since 1950, relations between the United States and Mexico have been governed by *ad hoc* diplomacy; that is, for the most part both countries have continued to observe the terms of the old NARBA and the occasional conflicts caused by charges of interference between stations have been submitted to negotiation through diplomatic channels on a case-to-case basis. In the meantime, conferences aimed at the making of a new treaty were continued. Finally, in 1957, a five-year, bilateral treaty was signed and submitted to the Senate for approval.

Daytime-only stations have opposed ratification of this treaty. Again, the blockage has been due to the effect of the treaty upon economic interests. The Mexican Treaty increased the number of frequencies upon which Mexican stations were to be protected by limitations on the power of American daytime-only stations which are located on such frequencies. Moreover, the daytimers were in the midst of a campaign to get the FCC to expand the hours during which they would be permitted to operate both in the morning and at night; if the treaty were to become law, this expansion could not be made on the Mexican frequencies, of which there would be a large number. Hence, the daytime-only broadcasters saw the treaty as blocking an improvement in their potential capacity to expand their businesses and their profits.

This opposition has been formidable. The Daytime Broadcasting Association is composed of 150 member stations; there are about 200 daytimers on Mexican clear channels. On a number of occasions, Senators have been reported in the press as saying that there is enough opposition to prevent the necessary two-thirds vote in the Senate; many Senators are influenced by the traditional American sympathy for small business. The Senate Committee on Foreign Affairs, therefore, has made no serious effort to bring the treaty up for consideration on the floor.[20] As a result, the Mexican Treaty, as well as NARBA, is still pending.

There has been little friction in the allocation of FM and TV frequencies along our borders. Cuba has made some complaints about interference from television stations in Miami, but American telecasters have responded by charging that Cuba, contrary to Canada and Mexico, has failed to coordinate its TV allocations with those of the FCC. No serious problems, like those in AM, have developed, however.

The Standard Band

In the beginning, standard broadcasting—or Amplitude Modulation (AM)—used very little room in the spectrum. Early in 1922 stations were licensed for 618.6 kc but later in that year the Department of Commerce added 750 kc.

The number of stations continued to increase and the broadcasters recommended an expansion of the band. Secretary Hoover responded by licensing stations on several frequencies from 550.9 kc to 1351.4 kc.[21] As other users of the air waves, such as the amateurs and the merchant marine, were moved elsewhere in the spectrum, more channels were made available for broadcasting. The expansion continued until the band reached its present limits of 540 kc and 1600 kc.

It has been impossible to increase the number of frequencies any farther because of the needs of other services and because of economic obstacles. For example, many radio people in 1945 wanted the FCC to add 520 and 530 kcs to the band, but the Commissioners found that the use of these frequencies for broadcasting "would involve serious problems of interference with auto alarms on the international distress frequency of 500 kc. Moreover, most of the radio receiving sets being used today are not equipped to tune to 520 and 530 kc and it is not practicable to modify these receivers." On the other hand, the addition of 540 kc was possible. Careful limits on power and proper location of stations would solve the interference problem and the use of the kilocycle would be economically feasible because "approximately 54% of existing home standard broadcast receivers are capable of tuning to this frequency."[22]

This limited band supports a large number of stations. Rather than restricting business opportunities to a few, the government has opened them to many. Another ideal has been to give a greater variety of service to listeners by enabling them to make a choice among stations. These objectives have been achieved by the establishment of a system of classification of stations.

In 1922 Secretary Hoover divided stations into two groups. The next year three classes were created. Class A stations were given power up to a maximum of 500 watts. Class B power ranged between 500 w and 1000 w. Class C was very low power and all such stations were concentrated on one frequency. The present classification system[23] is more complex but follows the same pattern.

Class 1. Clear Channel stations are intended to provide service over wide areas and relatively long distances. *Class 1-A stations* have exclusive use of a frequency at nighttime and are required to use

power of 50 kilowatts. One or more other stations are licensed to use the same frequency during the day, going off the air at night. According to FCC engineering standards, daytime-only operation is essential to protect the extensive coverage for which the clear channel stations are intended. In other words, night operation would decrease coverage due to the interference of the skywave of the secondary station with the signals of the dominant station. Signals, which in the day are lost in the skies, are at night reflected back to the earth at considerable distances away by the Heaviside, or ionized, layers of atmosphere. Daytime coverage is by ground wave; the signals travel along the ground from the transmitters to the receiving sets, and the programs are not received over as big an area.

Class 1-B stations are duplicated, or "broken-down," clear channels. In other words, the frequencies are shared at night. Power ranges from 10 to 50 kw. By careful separation, directional antennas and power limitations, the conflict of daytime signals may be avoided or minimized. The skywave of one, however, may interfere with that of another, thus making their nighttime coverage with satisfactory signals less than that of the 1-A stations. Furthermore, daytime-only stations may be licensed on these frequencies, protecting the Class 1-B stations just as is done in the case of the 1-A channels.

Class II stations are secondary stations on clear channels, as already described. Their facilities are limited in order to protect the dominant stations. Power may be as low as 250 w but may go as high as 50 kw. Where necessary, they may be restricted to daytime operation. Directional antennas may also be required.

The development of the directional antenna, unknown in the beginning of broadcasting, has made it possible to increase power and to license more stations without creating interference with other stations on the same or adjacent channels, because signals may be beamed into specified areas instead of all directions of the compass. Service areas, therefore, may take peculiar shapes: a cone, a figure eight, or a clover leaf.[34]

Class III stations are designed to cover the cities in which they are located and the contiguous rural areas, but are not intended to provide as extensive a service as the clear channel stations. Designated as "regional" stations, many farmers, small communities and larger cities are dependent upon them. Although they are duplicated on the frequencies set aside for regional broadcasting and operate full time, the interference problem is controlled by careful separation geographically and by power limitations. *Class III-A stations* cannot use less than 1 kw nor more than 5 kw, day and night. Where the skywaves

present difficulties, the power is decreased for nighttime operation. Hence, *Class III-B stations* use between 500 w and 1 kw at night.

Class IV stations have low power and are intended to provide service to their immediate vicinities. Operating with not less than 100 nor more than 250 w, their service areas are drastically restricted. At the same time, many of them can be duplicated on the frequencies set aside for local service, so long as the necessary geographical separation is observed.

Power

"I want power; I am entitled to it, because the other fellow has it."[35] Early in the 1920s, W. K. Henderson, a manufacturer of Shreveport, Louisiana, acquired a 250 w station. He soon decided that all he had was a "mere plaything" and started out to make his station "one of the super-stations of the South." Power output was increased to 500 w, 1000 w, 3500 w, and, after a number of years of persistence, reached the top of 50 kw. In the pursuit of his objective, Henderson took his demands to the Department of Commerce, the Commission, and Congress.

While not always as frank as Henderson, many broadcasters have had the same attitude. There is pride, profit and prestige in bigness. Networks like to take on big stations in order to get coverage, and with chain affiliation go national advertising and programs by high priced, live talent which might otherwise be unavailable. Popular network programs also build a station's audience following for non-network programs, because listeners become accustomed to rely upon the station for service. This ability to reach a larger number of potential customers makes local advertisers willing to pay higher prices for the time they buy.

Not all broadcasters, of course, have made a fight for high power. Many of them do not have the financial resources to construct and operate large stations. Some recognize the place of the regional and local station in the American scheme of broadcasting and desire to provide these needed services. Others accept smallness out of necessity; they know that the limited spectrum gives them no other choice except to get out of the business. Also, the ability and ingenuity of many medium and small station operators have produced a high rate of profit on their capital investment. In recent years some of the national networks have signed affiliation contracts with a large number of these stations, thus negating an earlier exclusion from the rewards of chain broadcasting.

Once radio got started, electronic science made rapid strides. Im-

provements in equipment soon permitted operation with a wattage which was once thought impossible.[26] Inevitably, the question of a top limit arose, and in 1932 the Commission fixed it at 50 kw.

This order did not settle the question. Many of the Class I-A people were interested in "super power" and many engineers were sympathetic. Some declared that high power makes for more efficient use of a frequency because coverage is extended and more reliable service for more listeners is possible. At the same time, it was generally admitted that the problem was not exclusively an engineering one; social and economic effects must also be considered.[27] As a result, the Commissioners decided that they would not raise the limit without more information. In 1934, therefore, the FCC granted experimental licenses to the Crosley Radio Corporation and station WLW, Cincinnati, to operate with power up to 500 kw.[28]

These licenses were renewed a number of times. The experimentation, however, did not settle the question of what the maximum power should be. Many smaller stations serving in the areas covered by WLW's 500 kw complained against its high power. Widespread opposition developed throughout the industry. At the same time, other Class I-A stations decided that it was a propitious time to push their claims and the FCC was embarrassed by a snowballing of applications.[29]

Opposition was based primarily upon a fear of economic injury. "When WLW at Cincinnati was operating with the 500 kilowatt power it was tough competition for stations in Indiana, Ohio, West Virginia, and other adjacent states. If Class I-A clear-channel stations should generally be permitted to operate with 500 kilowatts or more power, stations which serve their communities so well now would be faced with the same kind of competition, and it is just as clear as the noonday sun that these stations would get the cream of the advertising business. Because their rates would be higher and because of the coverage which they would also claim, the net result would be a decrease in revenues of other stations. When the revenues of stations are decreased, it is axiomatic that their ability to serve is accordingly diminished. Give these big and powerful stations the cream of the radio business and limit the income of stations operating with less power and the influence for good of the smaller stations will decline. Their ability to reach audiences when they are trying to further some program of local interest will be of much less value than under existing conditions."[30]

It was also predicted that many stations would lose their network affiliations. This fear rested upon a statement of William S. Paley

of CBS to the effect that the coverage provided by super power stations would compel the chains to drop some of the smaller stations where the affiliation of both would merely mean a duplication of network programs. Many of these stations organized into the Network Affiliates and fought against high power.

The protest received a sympathetic response in Congressional circles. This was particularly apparent in the influential Senate Committee on Interstate Commerce. Spokesmen emphasized that, because of the social, economic and public service aspects of power, the problem was one of public policy upon which Congress was competent to act. Most important, however, was a 1938 Senate resolution, expressing the "sense of the Senate," that power over 50 kw was "definitely against the public interest" because of the monopolistic effects and the economic injury to smaller stations.[81]

This resolution was, in effect, a directive; in 1939 the FCC stopped the daytime use of 500 kw by WLW.[82] For the next few years, the Company was permitted to experiment with this wattage only from twelve midnight to six a. m. In 1942, this license also was terminated.[83] The Commission held that no need had been shown for further experimentation. The Crosley Radio Corporation, however, did not give up its favored position easily. The FCC's decision was appealed to the courts.[84] When the Commission's authority was sustained, the Company carried its protest to the Committee on Interstate and Foreign Commerce of the House of Representatives.[85]

The war years produced a hiatus when the War Production Board froze new radio construction which was designed for normal peacetime purposes. When the freeze was lifted, the issue was again joined. Applications were filed with the FCC by many Class I-A stations, some asking for power as high as 750 kw. These stations, organized into the Clear Channel Broadcasting Service (CCBS), were opposed by an "overwhelming majority of all other radio stations."[86] Among them were the regional stations which were also organized—Regional Broadcasters Committee (RBC). The NAB, due to the split in its membership, remained quiet. Rumors in industry circles reported that the CCBS, fearing that the trade association would throw its weight on the other side, gave it a warning backed up by threats of resignation.

The FCC decided to make a study of the whole question of super power instead of passing on the applications, case by case. An extensive record of engineering and economic testimony was compiled. Before a decision was reached, Senator Edwin C. Johnson produced a bill forbidding the FCC to authorize over 50 kw.[87] Immediately,

the Senate Committee on Interstate Commerce, by a unanimous vote, ordered the FCC "to hold in abeyance" its decision "pending hearing and final consideration" of the bill.[38] This action was hailed as a victory for the RBC.

An extensive record was also compiled by the Committee. Ground already covered by the FCC was surveyed by the Senators. One result of the hearings was to make the Senators aware of the difficulty and complexity of the problem which the administrators were facing. The Committee also saw that it could not solve the problem to the satisfaction of everybody any more than the FCC could; according to the Committee's report, "there is much to be said for both views." As a result, it was decided that the Commission should maintain the *status quo* until the new NARBA, which was then in negotiation, was ratified. The absolute prohibition of the Johnson Bill was dropped and the new directive was reported to the Senate.[39] The FCC obeyed.

Since then, Senatorial opponents of super power have not rested. Failing to get a statute, Senator Johnson tried a Resolution.[40] In the next Congress, he became Chairman of the Committee and hence occupied a more powerful position. Moreover, a subcommittee reported to the full Committee that power was a matter of policy rather than a mere technical, engineering problem; it could, and should, be decided by Congress as a matter of law.[41] Again, bills to forbid an FCC decision favoring power over 50 kw were forthcoming, this time in both Houses.[42]

Another problem of power has been raised by the local broadcasters. Before the war, they were generally satisfied with their low wattage. After the war, discontent developed among some of them. About 500 of the 900 local stations, organized in the Community Broadcasters Association, asked the FCC to increase power across the board for all 900 operators. The petition was based primarily upon an alleged need for economic assistance. An increase in power would expand their audiences and the stronger signals would give better reception. On the other hand, many of the larger stations objected on the grounds that competition would be intensified and a decrease in their service areas might result from an interference in signals. Also, many of the local stations were satisfied with the existing limits on their power.

When the FCC proposed to permit the use of 1 kw during the daytime only, to require the installation of directional antennas where necessary to prevent interference, and to consider increases in power only on a case-by-case basis, the Community Broadcasters Association objected. They declared that the proposal offered them too

little; moreover, many of them thought that they could not afford the additional cost of directional antennas.

The FCC has delayed action. The problems of power have not been as pressing as those created by the new television industry. As a result, the Commission has been occupied with issues raised by color television and TV's need for adequate space in the spectrum.

Clear Channels

Exclusive frequencies have also been a subject of controversy since the early days of broadcasting. In 1928, the Radio Commission ordered forty channels to be cleared of all but one station, and the storm broke. A bill was introduced into Congress to require the clearing of fifty frequencies. This number had been advocated by many broadcasters and radio engineers. On the other hand, forty was said to be too many, some broadcasters insisting that there should be none. Congress was therefore asked to force the Commission to duplicate stations, full-time, on the cleared channels. The furor over the next few years, reverberating in Congressional committee hearings on pending radio legislation, stimulated new studies of the whole allocation structure in 1936 and 1938. As a result, twenty-five frequencies were set aside for Class I-A stations. In 1941, this number was reduced to twenty-four by duplicating two stations at night on 850 kc. After the war, the question of clear channels was combined with the problem of super power and the Commission announced that it will reach a decision on both at the same time. Hence, the *status quo* prevails on this engineering issue, also.

The FCC, by this decision, is frankly recognizing the inter-dependence of these two problems. Exclusivity must be maintained or the door to super power will be closed. Moreover, the conflicts of interest within the industry are identical on both controversies. High power advocates, like CCBS, defend Class I-A exclusivity and the 50 kw advocates, like RBC and Network Affiliates, urge duplication. Desire for economic advantage and fear of economic injury motivate the two sides.

Both make claims of a superior public service. CCBS, backed by the National Grange and the Federal Farm Bureau, have pointed out that Class I-A stations under present conditions extend out about 150 miles daytime and have a nighttime skywave coverage of 700-720 miles or more. In some instances, therefore, farmers and small towns must rely upon these stations, and a duplication of stations would ruin some of this coverage by interference. In pushing this argument the FCC's breakdown of 850 kc is cited as evidence. When

WHDH, Boston, was authorized to increase its power and extend its daytime operation to fulltime on this frequency, KOA, Denver, protested that its coverage east of the Mississippi was ruined.[45]

In opposition, Class I-B and regional stations have boasted of their rural service. A Class I-B station, with 50 kw, provides the same daytime coverage as a Class I-A station, and regionals, using up to 5 kw, reach out over sizeable areas. Going farther, these people have challenged the claims of the CCBS to extensive, national coverage by pointing out that Class I-A stations are located in urban centers, where broadcasting is the most profitable, and hence merely increase radio service in areas already over-served. While East and West Coasts and the Middlewest centers of population get excellent service from these stations, they are not meeting the needs of the underprivileged areas. It has even been argued that duplication might improve service. By the use of directional antennas a second station on a frequency could lay down more reliable signals for some listeners than is being provided by a single occupant of the frequency. KOA's complaint was answered by pointing out that its signals east of the Mississippi were so inferior that listeners could not and did not rely on them. Instead, the public in this area turned to stations located nearer, for example in Chicago, which gave clearer and more reliable reception. As a result, the duplication did not deprive the public of service. To the contrary, many Eastern homes were given service from WHDH, a new station whose programs had been previouly unavailable. KOA's coverage west of the Mississippi was unaffected, and this was a service upon which those listeners were dependent.

After the war, CCBS injected a new engineering question into the controversy by alleging that there was some evidence of a daytime skywave. Previously, a skywave was thought to exist only at night. FCC rules and regulations, therefore, did not recognize a daytime skywave and made no allowance for a consideration of interference from this source in granting licenses to new secondary stations on clear channels.

The question was brought to a head in 1946 when WCKY, Cincinnati, protested a grant of a construction permit for a new daytime station in Philadelphia on the grounds of "skywave interference for approximately two hours after sunrise and approximately one hour before sunset" and asked the FCC to allow WCKY to produce evidence to this effect. The Commission denied the petition to intervene on the grounds that there would be no interference as defined by its Standards of Good Engineering Practice and granted a construction permit without a hearing.[46] WCKY thereupon went into the courts.

The United States Court of Appeals for the District of Columbia held that WCKY was entitled to a hearing.[45] This decision meant that every time the FCC undertook to pass on an application for a secondary station on a clear channel it could become involved in long and complex hearings. As a result, it decided that a better procedure would be to determine, first, whether its engineering rules should be amended; legislation should precede adjudication.[46] After exhaustive hearings and study, the Commission agreed that there were varying degrees of objectionable interference by a skywave shortly before sunset and after sunrise.

When it proposed to change its engineering rules, however, the FCC found the task difficult because the issue was not exclusively an engineering one. Broadcasters were also concerned about the effects of new engineering rules upon their economic welfare. The clear channel stations wanted protection of their service areas out to the limits of the super power they were seeking;[47] the Daytime Broadcasters Association wanted their hours of operation expanded at both ends of the day; and local stations were asking for an increase of their power from 250 w to 1,000 w. The interrelation of all these questions meant that none could be settled unless all were. Furthermore, whatever decisions might be made would be affected by what could be done under the new North American Regional Broadcasting Agreement and the new Mexican Treaty on international allocations, and these treaties were still pending in the Senate. As a result, the issues were postponed. As pointed out above, the FCC has been fully occupied with the problems of the rising television industry which were more pressing and upon which decisions could not be delayed.

In 1957 the Commission was again subjected to Congressional pressure. The Senate Committee on Small Business undertook a hearing into the petition of the Daytime Broadcasters Association for an increase in their hours of operation. The Senators were completely sympathetic with these small broadcasters and thought that the FCC showed a tendency "to favor the dominant members of the industry." The Committee admitted that the whole problem is complicated by engineering considerations, international allocations and the economic consequences within the industry which any decision would have. Nevertheless, the FCC was castigated by the accusation that its inaction is "unwarranted and inexcusable." In conclusion, the Senators directed the FCC to act "as expeditiously as possible" and to report back on its progress.[47A] As a result, this change was made and a modification of exclusivity appears probable.

Newcomers

Once radio broadcasting started, it grew rapidly. The first licenses were issued in 1921 and by March, 1922, there were 60 stations on the air. By November, 1925, this number had increased to about 600 and many newcomers were looking for opportunities. Broadcasters began to ask Secretary Hoover not to grant any more licenses but he was unable to carry out these recommendations. As already shown, the courts held that he could not deny any application. As a result, the number continued to grow, becoming approximately 723 at the time the FRC came into power in 1927. Immediately, the new regulators were faced with demands that they reduce the number. It was said that this was one of the specific purposes for which the Commission had been created.

The FRC found the task distasteful. When it did not move fast enough to satisfy the complainants, they carried their demands to Congress. The strongest pressure was exerted by Southern and Western interests which were discontented with the sectional mal-distribution of facilities, as has already been described.

In 1928, the Commission issued Order 32, citing for hearings 164 stations which its files showed to be so poor as to create a "doubt" that they were performing any service meriting renewal of the licenses. The result was to reduce the number of stations by only 62. Four of these voluntarily surrendered their licenses and 32 lost theirs by default in not appearing in their defense. The remainder, 26, were eliminated by order of the Commission. In addition, 12 stations were reduced in power and 4 were placed on probation. Out of the original 164, all weak, 81 escaped unscathed.[48] For the rest of the year, however, the number continued to decline, reaching approximately 600. In addition to those deleted by the coercive action of the FRC, others voluntarily gave up the ghost.

The number of stations remained fairly stable for a few years. Again, however, the tendency to grow had its way. Although some licenses were lost for failure to meet the Commission's standards of performance, technical or otherwise, and for inability to survive the depression, newcomers were swelling the total. By November 1, 1941, shortly before the United States entered the war, there were 915 standard broadcast stations in operation or under construction.

Many factors were at work. About 25 per cent of the stations were using directional antennas. There was also a great increase in daytimers and local stations. Applications were coming in from communities previously without their own stations.

The war placed a hiatus on new construction. At the end of the emergency, the FCC's files were bulging with pending requests. After a brief break, therefore, the expansion continued. The wartime freeze on peacetime electronics was lifted on October 8, 1945 and within a year there were over 1,000 stations licensed or authorized. The principal stimulus for newcomers was the rosy picture of profits. Also, there were more people with money. Government was giving aid to veterans and the war had resulted in accumulations of capital due to restraints on spending.

Discontent within the industry was renewed. Broadcasters were afraid of the increasing competition for advertising dollars. In many small markets it was thought that there were not enough sponsors with advertising budgets large enough to support more than one or two stations; existing stations declared that an additional broadcaster would spread the limited income so thinly that financial loss, and even bankruptcy, would be the lot of one or the other. Moreover, they thought that an intense struggle for sponsors would degrade program service; they would be forced to cater to the kind of popular offerings which sponsors were willing to support. Income would not be enough to enable stations to give public service through sustaining programs. Another reaction charged the FCC with degrading its engineering standards. "I can come to Washington, get a license, erect a station, and have a coverage of 100,000 potential listeners in an area within a radius of twenty-five miles. I make my plans, spend money for equipment, and then for programs, and eventually establish an audience. Then one morning I wake up and find I am working with an entirely different property. Some other station has been put on my frequency, and in place of being protected for twenty-five miles, the signal from my station is protected only fifteen miles, and I have lost a substantial portion of my listening audience."[49] Congressmen expressed the fear that the FCC was "heading back" to the chaotic conditions of 1926.

The Commission answered the attacks. It insisted that it was enforcing its Standards of Good Engineering Practice with "increasing rigidity."[50] It opposed the enactment of new legislation which would require it to consider the ability of a community to support an additional station. It urged that the existing system of free, competitive enterprise be maintained and recognized that many newcomers were going into the industry with closed eyes. Many failures could be expected, but that was the price which had to be paid. Just as important, the FCC did not want the difficult job of deciding when to protect stations from competition. To do this the Commission

would have to decide such factors as: the potential advertising revenue in each market, the comparative efficiency of stations, the amount of a fair profit, and a uniform system of accounting. "The result inevitably would be to require the Commission to concern itself with the details of the business activities of the broadcasters even to the point of saying what their income should be."[51]

Discontented broadcasters tried to get the NAB to help them get governmental protection of the opportunity to make money. These efforts also failed. While the trade association expressed sympathy, it took a position much like that of the FCC.[52]

So the industry continued to grow. By the end of 1950, there were approximately 2230 stations on the air. Since then, the number of AM licences has gone over 3,000, with pending applications numbering in the hundreds.

During these years, the demands for protection continued. As a result, in 1952 Congress amended Section 309 of the Communications Act to require the FCC to give a hearing to "parties in interest."[53] By interpretation, a station which alleges economic injury is such a party.

Since its enactment, there have been many cases under this amendment. In none, however, has the Commission denied a license to a newcomer solely on the ground of economic injury to an existing station arising out of the increased competition. The legislation was interpreted merely to give a right to a hearing. As a result, the demand for protection was again directed to the FCC; in two cases, stations WSTV-TV, Steubenville, Ohio (1956) and WBAC, Cleveland, Tennessee (1957) challenged new applications. The Commission held, by a divided vote, that under the statutes it did not have authority to deny a license on this ground alone.[54]

FM Moves Upstairs

Frequency Modulation is the product of years of search for a "staticless" radio which the Commission fostered by grants of experimental licenses. By 1940, there were two important developments. FM did not have enough room in the spectrum; there were 20 stations on the air and 100 applications were pending. Secondly, it had outgrown the experimental stage. As a result, in 1940 the band was expanded to 40 channels concentrated from 42 to 50 mc and commercial licenses were authorized. FM stations could thereafter operate as business enterprises, carrying advertising and selling time to sponsors. In making these regulations, the FCC followed the advice of the industry's engineers.

After the war, the regulatory path became rough. In the FCC's 1944 hearings on postwar allocations, interference in FM was admitted by the engineering testimony. The witnesses, however, disagreed on its seriousness; some thought it was negligible, while others feared that it would jeopardize the development of FM into a major broadcast service. Two engineers of nationally recognized authority were pitted against each other. Dr. Edwin H. Armstrong, Professor of Electrical Engineering at Columbia University and the inventor of FM, maintained that his offspring was in its natural habitat. On the other hand, the FCC's Chief Engineer, E. K. Jett, who was later to become Commissioner and then an executive in the industry, was one of those who feared for the future. The FCC concluded that the evidence showed the interference to be severe enough to endanger FM.[55]

The engineers were asked to consider a move to the higher frequencies. Hearings were held on this proposal and again the experts differed. The FM Committee of the Radio Technical Planning Board (RTPB), a group of engineers which the industry organized to work on postwar allocation problems, divided 19 to 4 against the proposal. The broadcasters also split. Among the supporters of the FCC were CBS, ABC, and the Cowles Broadcasting Company. Among the opponents were FM Broadcasters Inc. (FMBI), and Zenith Radio Corporation. As a result of this hearing, the FCC reasserted its previous conclusion that interference was too severe in the prewar band. A decision to go upstairs was not made, however, because the testimony declared that interference could also be expected on these frequencies.[56] Furthermore, a decision was not necessary. The wartime freeze was in force and no one could see its end. The FCC therefore decided that more evidence should be gathered; in particular, evidence from actual operation was desired. To this end, a committee of engineers, headed by the FCC's Chief Engineer, was set up to conduct experiments. The industry was asked to cooperate.

Within a short time, the whole situation changed. The War Production Board announced that the war might come to a sudden end, thus preventing it from giving any advance notice of the end of the freeze. Broadcasters and manufacturers thereupon urged an immediate decision.

The FCC responded. Additional hearings were held and the Commission again found that the evidence of serious interference in the low band was conclusive. Furthermore, "practically without exception all persons appearing at the hearing" either "agreed" or were

"willing to assume" that interference on the high band would be less. "In those cases where exception was taken, no substantiating data was offered." Upon these findings, therefore, a final order moving FM to 88—106 mc was issued in the spring of 1945.[57] Within a few months, the band was expanded to 108 mc.[58]

The FCC's decision was influenced by economic considerations as well as engineering ones. The downstairs advocates ran into head-long collision with television. Both were demanding frequencies in the same general area of the spectrum and the FCC could not satisfy both and still give FM enough room to enable it to support enough stations to become a nationwide service.[59] Each FM channel took 200 kc and the downstairs band provided room for only 40 channels. In the high band, on the other hand, there are 100 channels which have room for several thousand stations.

In addition, the time for change was propitious. Due to the fact that FM had had only a few years to grow, there were only 400,000 receivers in the homes of the country. The FCC thought that if the number went much beyond this figure, as could be expected in a postwar buying spurt, the upstairs move might become blocked. Even though engineering considerations might make the change desirable, the Commission would not want to destroy a large public investment in receivers.

On the other hand, an economic hurdle was created by the desire of manufacturers to reap quick profits. Obsolescence of equipment during the war and a war-created purchasing power provided a big and ready market. If FM were kept downstairs, manufacturers were ready to produce new equipment immediately. If FM were moved up-stairs, the change-over would create a delay in production. These arguments influenced the opposition of FM broadcasters. Only with large audiences could they make money and audiences would grow only if the manufacturers produced sets.

The FCC frankly asserted that the engineering advantages out-weighed this economic obstacle. More important, the Commision pointed to the fact that its decision was being made far enough in advance of peacetime production to give manufacturers plenty of time to get ready. If any delay should occur, therefore, the FCC thought that it would not be long and that it could be due only to a shortage of materials caused by the war.

The FCC's final order did not end all the opposition. Within six months, Zenith Radio Corporation petitioned for a re-hearing. General Electric Company and Professor Armstrong joined in the petition. Specifically, the FCC was asked to give FM both bands; in

case of a decision against dual-band operation, the petition asked for the low band. The FCC ordered new hearings.

Zenith introduced data to show that the downstairs frequencies were superior. The FCC countered this evidence with its own. The testimony of manufacturers split on the question of the quality of two-band receivers. While some joined Zenith in maintaining that they would be good, others thought they would be inferior to single-band sets. The Television Broadcasters Association (TBA), joined by DuMont Laboratories, did not want to lose any of the downstairs TV channels and therefore opposed Zenith. Some FM operators also appeared in defense of the *status quo;* they thought the continuation of the controversy was creating an injurious uncertainty.

The petition was denied.[60] The FCC found that Zenith had failed to prove its case. The report asserted that the engineering evidence supported the upstairs location. FM's band was finally fixed.

The diehards, however, still did not give up. Again, an engineering controversy reached the halls of Congress. Shortly after the FCC denied the Zenith petition, Representative William Lemke introduced bills into the House to require downstairs FM.[61] Senator Charles W. Tobey asked the Senate to investigate the FCC.[62] Rumors in industry circles declared that the pressure was motivated by personal friendship between Tobey and Armstrong, and between Lemke and Zenith's president McDonald. The attempts to invoke Congressional coercion of the FCC did not get any farther than the committee hearing stage.[63]

During the first postwar years, FM grew rapidly—from forty-six prewar stations to six hundred seventy-six at the end of 1950. All was not serene, however. Only ten applications were pending; as the backlog disappeared, few new ones were coming in. More important, some licensees were quietly giving up the ghost and returning their grants to the Commission. The slowness in the growth of an FM audience meant a longer period of deficit financing than they could weather. At first, there was merely a deceleration in FM's growth; then there was a shrinkage in size. At the end of 1953, there were approximately 570 stations on the air, 600 authorizations of all kinds, and 95 applications pending. At this time, there was a rumor that FM's failure to use all of its frequencies was putting it in danger of losing some of them; the report said that industrial interests were asking the FCC to assign part of the band for point-to-point communication.

FM was not behaving the way its enthusiasts expected; its prophets had predicted that it would replace most of the AM service within

a decade. They thought that it would attract listeners because its performance is of higher quality than AM; as well as eliminating electrical and atmospheric noises, it transmits a greater range of tones both up and down the scale. They thought that broadcasters would be attracted by the lower costs, fulltime operation for all, wider coverage than for many of the AM stations, and omni-directional antennas.

The disappointment produced a search for a cause and numerous scapegoats were found. Among them was the FCC. Armstrong, McDonald, and some of the engineers continued to charge that because the upstairs band was the wrong place in the spectrum for FM the Commission had stifled its full development. There was a dispute over the effect of the FCC's permission for dual operation of AM-FM stations. Some argued that as listeners discovered they could get better reception of their favorite programs by FM, they were stimulated to buy sets. Others, however, thought that so long as FM stations carried programs that listeners could also get on their AM sets, there was no inducement to spend money for new receivers. The FCC was also said to retard FM by issuing "regulatory road-blocks"—for example, prohibiting the ownership of more than seven stations, regulating programs, and reserving for a short period every fifth Class B channel in the large cities for newcomers.

Blame was also put on the AM industry. While many standard broadcasters were not, as a matter of fact, enthusiastic about FM, some were said to look upon FM as a dangerous threat to their businesses. They therefore did everything they could to depreciate FM. Complainants also charged that the NAB did little to promote FM because its AM members were more numerous and therefore controlled policy. (An FM Association was organized to perform this task.) In support of their accusations, these critics could point to the fact that AM continued to grow at the same time that FM was backsliding.

A production bottle-neck was another cause for discontent. During the immediate postwar years, many manufacturers took the position: "FM can wait—right now there is a lush market for cheap AM receivers and I'm going to get my share."[64] As a result they were charged with deliberately sabotaging the development of FM.[65] The Radio Manufacturer's Association denied all guilt. The low production was explained on the grounds of the scarcity of materials, the necessity to change production techniques as a result of the upstairs move, governmental price controls, and patent restrictions. That there was considerable truth behind the charges, however, seems

clear. Those manufacturers who were solidly behind FM did turn out FM sets in volume. In subsequent years, the other companies increased their production (including AM-FM combinations) but FM has always lagged behind AM.

Television was clamoring for attention simultaneously with FM. Video also had its prophets; enthusiasts thought that TV, rather than FM, was destined to be the major broadcast service of the future. Some FM people, therefore, charged that TV interests were holding FM back—if not deliberately, then by ignoring it. The principal target was RCA; its motive was alleged to be a stronger patent position in TV than in FM. RCA denied the charges, and the controversy became heated [66] before it died down.

Since 1953, the number of stations, after a slight further decline, has remained quite steady. No signs of growth are evident. Despite this sad picture, however, hope is not dead. The prophets are now saying that FM will come into its own in a generation instead of a decade.

TV's Place in the Spectrum

Engineers had been interested in the transmission of images for many years and were pressing claims to a spectrum assignment when the FCC in 1936 held hearings to decide how the frequencies above 30 mc were to be allocated. Seven channels scattered between 44 and 108 mc were set aside for experimental use. In 1940 the seven were increased to 18, allocated non-contiguously between 50 and 294 mc. At this time, TV asked for commercial status but the FCC denied the petition on the grounds that the experimentors had different methods of transmitting signals and that, in the face of this disagreement, the Commission was in no position to incorporate a particular system in its engineering rules.[67] Within a year the engineers got together and commercial licenses were authorized on July, 1, 1941.

In looking forward to the industry's growth after the war, CBS declared in 1944 that the best place in the spectrum for television was in the ultra high frequencies (UHF) above 400 mc. The proposal was not for an immediate move. All that CBS wanted the FCC to do was to make a high band available so that TV could move up when it was ready. In the meanwhile, existing telecasters would continue to broadcast on the very high frequencies (VHF) but "the public should be kept clearly, fully and frankly informed of the probably temporary nature of their investment."[68] On technical grounds, CBS argued that TV's performance was not good enough and that im-

provements would be facilitated by the upstairs move. On economic grounds, CBS argued that the demands of other services prevented the allocation of enough room to permit the industry to grow into a major, nation-wide service. TV takes a big bite out of the spectrum; each channel is 6 mc wide, around five times the whole AM band. Only the wide open spaces of the UHF provided the necessary number of channels. Joining CBS were Zenith and the Cowles Broadcasting Company; the downstairs FM advocates saw their demands for a low band assignment strengthened if the competition with TV for the same frequencies were relieved. As already pointed out, both broadcasting services were located in the same general area of the spectrum.

The proposal created another major controversy over assignments in the spectrum. In opposition was the bulk of the industry represented by the Television Broadcaster's Association and the Radio Technical Planning Board. Manufacturing interests were predominant; there were only six commercial stations on the air and some of these were licensed to manufacturers. These people argued that TV's performance was good and that the normal processes of improvement by invention and discovery would not be hindered in any way by the downstairs band. On the economic side, there was a desire to get the industry going as soon as the wartime freeze ended; the manufacturers were shocked at the notion that they should voluntarily disregard the fat postwar market.[69] As for the problem of room, it should be faced when it arises; at that time, telecasting might use both the VHF and the UHF or continue in the former until operation in the latter is practical.

The FCC agreed with CBS that the best place for television was upstairs. When the move could be made, however, was uncertain. The propagation characteristics of the UHF were unknown; much research and experimentation by the engineers would have to be undertaken. CBS thought that one or two years would be enough time in which to acquire the necessary data, but its opponents estimated the period at five or more years. In the light of this disagreement among the engineers, the Commission thought that it did not have enough evidence upon which to make a decision. It did not want to obstruct an industry which was ready to go and thereby deprive the public of television service for an indefinite period. As a result, a band from 480 to 920 mc was set aside for experimental use[70] and the commercial stations were kept in the VHF. When the FCC started looking for channels, however, all it could find were thirteen, six non-contiguous from 44 to 88 mc and seven from 174

to 216 mc.[71] Claims of other services to this part of the spectrum had also to be recognized: FM, Navy, Army, Maritime Commission, FBI, and other policing agencies. TV was therefore left with five channels less than it had had before the war. Everybody admitted that the thirteen were not enough, the lowest estimates saying twenty-six; yet nobody could find any more. As a result, the FCC included in its decision an appeal to the industry to concentrate, cooperatively, upon a research program which would speed a move to the UHF.

The Commission's words had overtones of urgency. Commercial video had hardly been established when the war froze the number of receivers at a low figure of about 7,000. The time, therefore, was propitious. The FCC was afraid that if too long a time elapsed before the UHF was standardized, and in the meanwhile the industry continued to grow, it would become so economically entrenched that a move upstairs would become difficult, if not impossible.

Within a few years, events were proving CBS and the FCC to be right. By the summer of 1947 the fixed and mobile services[72] were demanding the lowest of TV's channels. Deletion of channel number one was the result. Even then, the industry could not relax; rumors of an impending loss of channels 2 through 6 stalked abroad. It was becoming increasingly apparent that there was not enough room and the pinch was already painful. Even though the backlog of applications was not high, there were still too many. The scarcity of frequencies made it necessary to neglect too many communities. As a result, by the early months of 1948 the TV people began to eye the UHF in increasing numbers.

That there should be some ruffled feelings, however, was to be expected. Some telecasters and manufacturers disliked the talk of moving television upstairs. They urged their brethren "to soft-pedal" such reports because of their depressing effect on the sale of low-band receivers. Another reaction was to blame the government for the industry's plight. It was said that TV's shortage was due, in part, to a "grab" of too much of the spectrum for use by governmental agencies—for example, the military forces, FBI, Department of Agriculture. Moreover, the government was an "ether road-hog" because it was not using all of the frequencies it had pre-empted.[73]

The industry, however, was coming to accept the idea that TV's salvation rested with the UHF. By the beginning of 1949, the Joint Technical Advisory Committee, a group of electronic engineers which had been organized by the industry to look into the problem, was saying that the use of the band could be worked out. Also, everybody was insisting that the VHF should not be abandoned.

There had been a big sale of VHF receivers, the obsolescence of which the public would resent. Also, the manufacturers did not want to lose the existing market for these receivers and the telecasters' only hope for profits for some time to come depended upon a continued operation in these bands.

In the summer of 1949, the Commission concluded that it could not rule on the UHF independently of a number of other TV questions. Interference had appeared between stations operating on the downstairs frequencies and a wider separation of stations was necessary. This problem, along with the task of opening up the UHF, was therefore consolidated into the same hearing. Next the FCC was called upon to make engineering regulations for the telecasting of pictures in color, and the hearings were expanded to include this subject.[74]

Color TV was taken up first. The hearings were long and complex, as will be explained in the next section, and no decision was reached until the fall of 1950. When this hurdle was cleared, another problem arose to cause delay. Educational interests intervened in the hearing to demand a reservation of frequencies for non-commercial stations. This issue had to be decided before the FCC could know what channels were available for assignment to commercial stations.

The intermixture of all these related problems presented the Commission with a task that took almost four years of hearings and study. It was not until April 14, 1952, therefore, that the Final Order was issued.[75] The FCC decided to use both bands. As a result, commercial telecasting was authorized in the UHF band from 470 to 890 mc in addition to the existing band. The expansion provided for over 2,000 stations (617 VHF and 1436 UHF) on 82 channels in almost 1300 communities over the country.

Television was finally on the way. By the end of 1953, the number of stations on the air increased to about 320, around 550 grants of all kinds had been made, and over 400 applications were pending. Optimism again prevailed. TV enthusiasts said that it would be the major communications industry of the future and that it was already making inroads into the business of radio, movies and publishing.

All was not well, however. TV was beginning to have economic troubles which became worse in the next few years. While some sections of the industry were experiencing a boom, others were in a depression. VHF stations in large cities tended to do well; with some exceptions, the most profitable were those also affiliated with

the major networks. The financial position of UHF stations in markets which also had a number of VHF stations was particularly dismal.

As already pointed out, television made its commercial beginning in the VHF. Hence, the demand from the public was for VHF receivers and the manufactuers produced them exclusively; the first markets were VHF. When UHF stations were added they had no audiences, and there was little inducement to the public to buy sets or tuners. People were satisfied to rely upon the established VHF stations for their programs.

Even where a UHF station was the first in a market, the subsequent addition of a number of VHF stations was often injurious. One cause was the high price of dual-band sets. Inevitably, the manufacturers continued to produce VHF-only sets in abundance, UHF in driblets. The lack of audiences meant a lack of income for the UHF telecasters. Networks were reluctant to affiliate with such outlets and advertisers saw little incentive to buy time. Only in those markets which were exclusively or predominantly UHF was there much of a demand for UHF sets, and these stations tended to do well.

As time passed, numerous newcomers gave up hope; applications were withdrawn and even some grants already processed were returned to the FCC. While most drop-outs were in the UHF, some were VHF stations in small markets and without network affiliation. Four networks were reduced to three when the DuMont chain disbanded because of a scarcity of outlets.

By the summer of 1954, the economic problems of TV were already creating concern in governmental circles as well as in the industry. UHF telecasters began asking the government for help. As a result, two extensive investigations over the next few years were undertaken by the Senate Committee on Interstate and Foreign Commerce.[75A] The Committee also appointed an *ad hoc* committee of engineers and economists to make an independent study. In addition to these elaborate processes, the Senate and House Committees on Small Business and a special House committee investigating monopoly were making side excursions into TV. While all this was going on, the FCC made its own re-examination of its TV allocations regulations,[75B] and the industry organized a committee of engineers to study ways of developing and improving the UHF.

There was no dearth of proposed solutions; some were rather mild, others drastic even to the point of being radical. Many proposals created conflicts of interest, hence stimulating opposition. As time passed and the numerous problems involved in TV's salvation received an airing in these many forums, the idea that the industry

needed governmental assistance acquired increasing support. This task, the FCC undertook.

One approach was to attempt to stimulate the development of the UHF by the telecasting industry. In order to encourage telecasters to operate UHF stations, the FCC increased the number of stations which any one owner could have from five to seven, provided that the additional two were in the UHF. The networks quickly took advantage of this opportunity. In addition, they attempted to foster UHF development at their own initiative. This was done by making their programs available to small market stations without additional cost to the sponsors. It was recognized that network programs of high priced and nationally known talent attract audiences which are then available for local programs.

More drastic proposals to foster utilization of the UHF were also made—for example, the government should regulate the networks so as to compel them to take on UHF outlets. Less drastic was the suggestion that the government should subsidize stations. Needless to say, neither proposal was adopted. Some UHF stations urged the licensing of pay-TV; if advertisers did not provide an income, stations could look to those viewers who were willing to pay for their programs. This proposal stirred up a lively controversy and a vigorous opposition; it also raised the contention that subscription TV, if authorized, belongs in another part of the spectrum because it is point-to-point service and not broadcasting.

The FCC became involved in engineering considerations, as well as economic ones. Experience had shown that UHF stations suffered in comparison with VHF operators in several technical respects: less coverage, existence of shadow spots within the authorized service area, the necessity for higher power to get comparable coverage, less sensitive and selective receivers, greater difficulty in antenna location and installation.

To these engineering problems the Commission proposed long term and short term measures. Again, it appealed to the engineers; as in 1945, the industry was urged to undertake an intensive program of research and development. The primary objective was to secure the improvement of transmitting and receiving equipment in order to adjust to the technical propagation characteristics of the UHF. In addition, the industry was given positive, immediate assistance by new regulations. Maximum power for UHF stations was raised to 5 million watts; licenses for "satellite" or "booster" stations were also authorized. These new regulations were designed to

get higher quality signals, coverage of skip areas, and expansion of markets.

Other engineering proposals involved the TV allocations structure; again, the FCC considered the problems it had struggled with in 1945 and 1952. As immediate moves, the Commission proposed to "de-intermix" thirteen specified markets and to consider petitions for similar action in other markets, on a case-to-case basis. This regulation means the changing of markets into all UHF, or all VHF, or predominantly one or the other. The objective, of course, is to release the UHF from the economic handicaps which have been described.

Proposals were made to de-intermix all markets over the country, but the FCC decided that this solution was impractical as a nation-wide measure. It could be made effective in those cities in which UHF stations had appeared prior to any VHF competition, and which therefore possessed UHF receiving equipment, but VHF stations could not be eliminated in those areas which had VHF set saturation. Yet, many VHF markets could get the additional stations they needed for adequate service only from the UHF. De-intermixture also raised problems of local reception from neighboring communities and the creation of un-served spots within authorized service areas. In other words, de-intermixture alone would not encourage the nation-wide use of the UHF band, nor satisfy the need for more stations in all those markets which have inadequate service.

Another proposal was also rejected—namely, that TV be made exclusively VHF. As in 1945, the FCC could not find enough room to provide a nation-wide industry. In TV, just as in AM and FM, the Commission believes that a large number of stations are desirable for many reasons. For example, it wants to foster freedom of enterprise by giving business opportunities to as many entrepreneurs as possible within the limitations of the spectrum, to serve the public interest by giving audiences variety and choice, and to promote competition. Even VHF telecasters riding the crest of their prosperity were afraid that the restricted band would lead to a government decision that TV is a monopoly, thereby producing more drastic regulations of their economic and business affairs; some even feared that they might be classified as common carriers. When the Commission looked for more room, however, it again ran into opposition. FM broadcasters, whose new upstairs band is contiguous to television's VHF, vigorously objected to surrendering any of their frequencies. Governmental users of frequencies in this portion of the spectrum stood adamant against giving any to TV; for example, the

Office of Defense Mobilization and the Armed Forces declared that their frequencies were vital to the national defense. Proposals to create room for more stations on the existing VHF band by a depreciation of facilities through such regulations as reduced geographical separation, more restrictive limits on power, and use of directional antennas were vigorously fought by stations on these channels. They objected to the degradation of their service areas by a "squeezing in" of stations with a "shoe horn."

The FCC again concluded that TV needed the UHF. Hence, it reiterated its opinion of 1945: television should ultimately move upstairs. This could be done for the whole country, or it could be divided between the two bands. For example, proposals were being made to make stations east of the Mississippi River UHF and those in the West all VHF. Neither change could be made immediately, however. There were millions of VHF receivers in the homes of the country and the public would not stand for a destruction of this investment over night. A transition period long enough to cover obsolescence of the public's VHF receivers and the industry's equipment was indicated. A final decision was therefore postponed. In the meanwhile, Congress was urged to promote the production of UHF receivers by repealing the 10 per cent excise tax.

The proposed re-allocations have been receiving a mixed response. The Senate Committee on Interstate and Foreign Commerce voted approval and some sections of the industry expressed similar reactions. On the other hand, there are many critics. Some telecasters see the proposals as ruinous. Some manufacturers are afraid that the talk of an upstairs move will destroy the existing lucrative market in VHF equipment. In regard to future prospects, the most favorable prediction is that the upstairs move cannot be made for many years—some say 10 or more; the most critical prediction is that the move can never be made.

Video in Color

Probably the most dramatic issue in the history of governmental regulation of broadcasting was precipitated by the request, in 1946, of CBS for commercial licenses to telecast in color. After some years of work, CBS engineers had produced a system which it claimed was ready for practical operation. In opposition, RCA argued that color TV was still in the laboratory stage. Emphasis was placed upon the necessity for more research, for field testing of new equipment, and for further experimentation to determine the propagation characteristics of the UHF. This company had also been doing research and

was developing a different system of transmitting images.[76]

The FCC hearings were primarily an engineer's "battle of charges and counter-charges, claims and counter-claims . . . with the nation's outstanding video authorities slugging toe-to-toe on disputed points."[77] CBS presented its case in great detail and its system was demonstrated under varying conditions. Opponents conducted a vigorous cross examination in order to show defects.

High financial stakes intensified the conflict. CBS had spent around $2,000,000 on research and held patents for its system. Commercial licensing would put it in a position to reap returns from this investment. RCA, on the other hand, had an investment of $15 to $20 millions in black-and-white and was spending millions on color. For this Company, therefore, a decision against CBS would be a boon. RCA could go on with the research on color and in the meanwhile profit from the development of the monochrome industry. When its color system became ready it would then have a chance to become adopted and produce profits on that investment. The bulk of the manufacturers also had economic interests. They saw a big market for black-and-white sets which would return an immediate profit if color were postponed. As a result, the controversy was carried into the pages of the press, where charges of ulterior motivation were hurled back and forth.

Commercial status was denied in March, 1947.[78] The FCC was not completely satisfied with the CBS system and believed that with more work the quality could be improved. Another objection was to the wide channels. If each had to be 16 mc, there was not enough room even in the rarified UHF for enough frequencies to support a very large industry. Precious spectrum space would be wasted by authorizing wide channels if narrower ones—such as 6 mc—were possible. Finally, the Commission wanted to be sure that it was authorizing the best system which could "be expected within any reasonable time in the foreseeable future." The disagreement among the engineers, all of them competent authorities, was too severe to permit this assurance.

CBS took its defeat in good grace. It entered upon an active program of telecasting in black-and-white. As well as acquiring interests in TV stations, it vigorously pushed the organization of a CBS network. At the same time, it quietly continued work on its color system.

Within a short time, the issue again flared into a major controversy. In the fall of 1948, the Commissioners visited New York to observe a demonstration by CBS. Witnesses reported that they were greatly

impressed by the excellence of the pictures which CBS transmitted. The additional years of work had brought improvements. Channel width had been reduced to 6 mc. Governmental officials began to predict color in the near future. A strong advocate in the FCC was Commissioner Robert F. Jones. Senator Edwin C. Johnson, Chairman of the influential Senate Committee on Interstate Commerce, urged action.

In the summer of 1949, the FCC decided to make another study of color.[79] Both CBS and RCA announced that they were ready. Once again, these companies were the primary parties. This time, however, RCA was urging the adoption of its system instead of merely opposing CBS. Other companies, notably Color Television Inc., also presented their work for consideration but it was apparent that if anyone was to get the official nod, it would be either RCA or CBS; there was little doubt as to that.

These new developments gave some of the telecasters, and particularly the manufacturers, nightmares. They were afraid that the revival of interest in color would have a depressing effect on the sale of monochrome sets. Dealers and retailers were also seized by this fear. As a result, RMA went into action. Announcements that television sets could be purchased without fear of obsolescence were advertised widely. Claims that color was still in the laboratory were also made. RMA predicted that even if the FCC should authorize one of the systems of color, much work remained to be done before the public could expect service. The delay might even be for several years.

Again, the hearings were long and thorough. At the end, the Commissioners unanimously agreed that CBS had the best color system. It was as fully developed as black-and-white had been in 1941 when the FCC gave it commercial status. The color pictures were "most satisfactory" in texture, color fidelity and contrast. Both the receiving sets and the station equipment were simple and easy to operate. Receivers would be within the mass price range. On the other hand, the CBS system was "incompatible." That is, existing sets would not receive its signals. Owners would have to buy adapters in order to get the color pictures in monochrome. Converters would have to be attached to the sets in order to make them capable of receiving the pictures in color. In other words, as the new system spread among the telecasters, the public would be put to additional expense in order to prevent their sets from becoming obsolete.

The RCA system was compatible. Its color telecasts could be re-

ceived on existing sets in black-and-white. Owners would have to attach converters only if they desired to receive the pictures in color. The adoption of this system therefore meant that the public's investment would not become obsolete as color telecasting expanded and owners would be put to further expense only if they wanted their pictures in color. On the other hand, the RCA system failed to meet even minimum standards of quality and performance. Color fidelity and texture of the pictures were unsatisfactory. Receiving and transmitting equipment was too complex. In demonstrations during the hearings, trained personnel had difficulty operating the sets, which augured badly for the unskilled public.

Already, the development of the black-and-white industry had created the dilemma that CBS had predicted a few years earlier. The FCC wanted to protect 7,000,000 set owners and therefore thought that compatibility was desirable, but, at the same time, wanted to authorize only the best engineering system.

An "easy" way out was suggested: the FCC should authorize both systems and then "let the public decide." Two obstacles, however, blocked this solution. In the first place, the public could not be depended upon to make the "right" decision; the FCC was, at the time, seeing this fact proved in FM. Secondly, the public would never get the chance to decide. In order to give viewers a choice, there would have to be telecasters using both systems and sets capable of receiving both. If the manufacturers refused to produce CBS equipment, if stations chose one system over the other, if the public failed to make the necessary investment, there would be no testing. It seemed apparent from the attitude of the bulk of the industry that the only system the public would be given a chance to choose would be the RCA system.

Two Commissioners, Hyde and Jones, wanted to approve the CBS system immediately. The majority, however, proposed to postpone the decision.[80] They wanted to see what the compatibility people could do in the way of improving their system. A number of concerns had reported research and progress. RCA should also receive time to cure the defects in its system. In the meanwhile, however, the Commission did not want to increase the economic difficulties in the way of finally approving the CBS system in case it should become the one which must be adopted. Manufacturers were therefore asked to build "bracket standards" in future receivers—that is, to make them capable of receiving CBS color pictures in black-and-white. If this were done, incompatibility would be limited to the existing investment. The FCC also declared that if it received no assurance that

the changes would be made it would adopt the CBS system immediately.

The bulk of the manufacturing capacity of the television industry was either "unable or unwilling" to comply with the Commission's request. Some expressed the desire to cooperate but said that they could not do so within the short time allowed. The response of others was "stinging." One executive said: "This is certainly not a popular decision with the manufacturing industry." Another cried: "How can they do this to us?" More extreme were charges that the decision was "one of the most horrid blunders in the history of the Commission" and was analogous to "an order from the Kremlin."[82] Some blamed it on political pressure.

The FCC concluded that it was not going to get anywhere with the manufacturers. As a result, the CBS system was adopted.[83] The Commission thought that quality in performance was a greater value than compatibility. Commissioners Sterling and Hennock dissented on the grounds that the action was hasty and premature. CBS, of course, was elated. Executives announced that within two months the company would have color programs on the air for twenty hours a week.

The battle was not over, however. Again, an intra-industry conflict was taken into the courts. RCA petitioned a special, three-judge Federal District Court for an injunction to block the FCC from making its decision effective. Both this Court and the Supreme Court sustained the Commission.[84] While the case was pending, however, CBS was prevented from putting its system into operation by an injunction.

Victory in the courts did not end the war; the bulk of the manufacturers remained defiant. Some major companies flatly stated that they would not produce CBS equipment. Some said that they would do so only if the public demanded it. Die-hards continued to predict that color was still years in the future.

Despite this opposition, CBS again started promotional activities. Again it was blocked. In the fall of 1951, the National Production Authority froze the manufacturing of color equipment because of the government's national defense program. The ban lasted until the spring of 1953. For a second time, therefore, RCA was given a breathing period and used it to continue work toward improving its system. Industry support was given by the National Television Systems Committee, a group of engineers set up by the manufacturers to experiment on compatibility.

Early in 1953, the color issue again attracted attention. Congressmen occasionally asked whether there was a "monopoly" or a "con-

spiracy" which was blocking color until the market was saturated by black-and-white equipment. Senator Johnson was again demanding "color now." The House Committee on Interstate Commerce made an investigation into the subject.[84]

In June, RCA petitioned the FCC for approval of its system. A month later NTSC also filed a petition. CBS made no contest. In fact, it declared itself ready to cooperate in promoting the industrial development of the compatible system, if and when approved. It accepted the conclusion that it had been defeated. CBS had failed to win over the manufacturing industry and, although it had acquired a manufacturing subsidiary of its own, it did not believe that it could go on alone. Most important was the continued production of black-and-white receivers according to the old standards. An estimated 23,000,000 in the homes of the country constituted an economic blockage to the practical, business exploitation of the CBS system and greatly enhanced the pressure for compatibility.

Congressmen, Commissioners and other witnesses to RCA demonstrations praised the excellence of the system's performance; improvements had cured the defects which had produced the earlier unfavorable decision. In December of 1953, therefore, the FCC authorized the adoption of the compatible system.[85]

Conclusion

From these cases, a number of conclusions on the nature of the regulatory job in the field of engineering can be drawn. In the first place, the regulators aim to incorporate the best knowledge of the engineers into the rules and regulations. In many instances, however, administrative decisions must be a combination of what is scientifically feasible and what is economically desirable. At some times, ideal engineering standards must be sacrificed to overwhelming economic necessities. At other times, disagreement among the engineers deprives the regulators of a single standard which is acceptable to all, and requires a choice among the disputants. In these cases, economic considerations weigh heavily.

Conflicts in economic interest make the task still more complex and difficult. A particular regulation may help some groups but, at the same time, be restrictive or injurious to others; and both sides may carry their demands to Congress and the Courts. Moreover, the economic interests of the public may also be at stake. Congressmen and Commissioners may press individual opinions of what is good for the public interest. As a result, the process of decision-making in the field of engineering cannot be understood or

explained without taking into consideration the general political picture, the maneuvering of conflicting interest groups, and the predilections of numerous governmental officials.

1. Federal Communications Act of 1934, Sec. 303, 48 Stat. at L. 1064.
2. See Hearings before the Committee on Interstate Commerce, United States Senate, 69th Cong., 1st Sess. on S. 1 and S. 1754, pt. 3, pp. 218–220, 276 (1926).
3. Hoover v. Intercity Radio Co., 286 Fed. 1003 (1923); U.S. v. Zenith Radio Corp., 12 F (2d) 614 (1926); 35 Ops. Attys. Gen. 126 (1926). The Department had been acting under a statute of 1912 (37 Stat. at L. 302) which dealt with wireless communication on the high seas.
4. Radio Control Act of 1927, Secs. 2, 9; 44 Stat. at L. 1162.
5. See Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 70th Cong., 1st. Sess., on H. R. 8825 (1928). Most of this record is devoted to the problem of sectionalism.
6. 45 Stat. at L. 373.
7. FRC, Second Annual Report, pp. 48–50, 170–218 (1928).
8. FRC, Fourth Annual Report, pp. 24, 25 (1930).
9. Hearings before the Committee on Interstate Commerce, United States Senate, 73rd Cong., 2d Sess., on S. 2910, pp. 39, 40 (1934).
10. See Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 70th Cong., 2d Sess., on H. R. 15430 (1929); Hearings before the Committee on Interstate Commerce, United States Senate, 71st Cong., 1st Sess., on S. 6 (1929 and 1930); Hearings on S. 2910, *op. cit.*
11. 49 Stat. at L. 1475, amending Sec. 307 (b) of the Communications Act of 1934. See also FCC, Second Annual Report, p. 56 (1936).
12. FCC, Proposed Report on Allocations from 25,000 Kilocycles to 30,000,000 Kilocycles, Docket No. 6651, Release 79776 (mim.) pp. 82, 83 (Jan. 15, 1945).
13. See FCC Rules and Regulations, Part 3, Subpart E, Sec. 3.606. The Sate of Maryland is selected for illustration:

City	*Channel*
Annapolis	14
Baltimore	2, 11, 13, 18, 24, 30
Cambridge	22
Cumberland	17
Frederick	62
Hagerstown	52
Salisbury	16

For the assignments which were made earlier in FM and TV, see Broadcasting-Telecasting, 1946 Yearbook, pp. 441 ff. This valuable trade periodical has gone through a number of changes in name. Before 1945, it was called simply Broadcasting. In that year, the word Telecasting was added in deference to the new medium. Then, in 1947, the magazine returned to the more convenient title which, its editors explained, is just as accurate because both radio and television are broadcasting. Broadcasting Magazine, Oct. 14, 1957, p. 130.

14. FCC, Sixth (Final) Report and Order, Release 52-294, Docket Nos. 8736, 8975, 9175, 8976. Published by Broadcasting-Telecasting Magazine, April 14, 1952, Part II.
15. Hearings on H. R. 8825, *op. cit.*, p. 312.
16. FRC, Third Annual Report, pp. 5, 6 (1929).
17. 57 Rep. American Bar Association, pp. 484—487 (1932).
18. Hearings before the Committee on Merchant Marine, Radio and Fisheries, House of Representatives, 73rd. Cong., 2d Sess., on H. R. 7800, p. 15 (1934). See also 59 Rep. Am. Bar. Assn. p. 482 (1934).
19. Department of State Treaty Series, 962.
20. Senate committee hearings on NARBA were started in the Fall of 1933 and then indefinately adjourned. In 1957, the hearings on the Mexican treaty were similarly abortive.
21. L. F. Schmeckebier, The Federal Radio Commission, pp. 5-7 (1932).
22. FCC, Proposed Report of Allocations below 25,000 Kilocycles, Docket No. 6651, p. 45, Release No. 82260, (mim.) May 21, 1945.
23. See FCC Rules and Regulations, Part 3, Subpart A, Secs. 3.21—3.27.
24. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 77th Cong., 2d Sess., on H. R. 5497, pt. 3, pp. 1036-1051 (1942).
25. Hearings on H. R. 8825, *op. cit.*, p. 313 (1928). See also pp. 308—317.
26. In 1925, Secretary Hoover told the Fourth Radio Conference: "A year ago we were fearful of the effect of greater power. We were told by some that the use of anything more than 1,000 watts would mean excessive blanketing, the blotting out of smaller competitors, the creation of large areas into which no other signals could enter. Some of the most pessimistic even warned us that our tubes would explode under the impact of this tremendous force. But our experience so far leads to the opinion that high power is not only harmless in these respects, but advantageous." Hearings on S. 1 and S. 1754, *op. cit.*, pt. 1, p. 52.
27. The Engineering Department of the FCC emphasized this point. See FCC, Report on Social and Economic Data, Docket No. 4063 (1937).
28. FCC, First Annual Report, p. 25 (1935). The Federal Communications Act of 1934, 48 Stat. at L. 1064, Sec. 303, directs the Commission to facilitate experimentation for the purpose of improving radio service.
29. FCC, Second Annual Report, p. 61 (1936).
30. Hearings on H. R. 5497, *op. cit.*, pt. 2, p. 695.
31. S. Res. 294, 75th Cong., 2d Sess.
32. 6 FCC 796 (1939).
33. 9 FCC 202 (1942).
34. Crosley Corporation v. FCC, 106 F. (2d) 833 (1939). Petition for certiorari denied, 308 U.S. 605 (1939).
35. Hearings on H. R. 5497, *op. cit.*, pt. 1, pp. 66 ff; pt. 3, pp. 798 fl.
36. Report of the Senate Committee on Interstate and Foreign Commerce on S. 1333, p. 8. Senate Report No. 1567, Calendar No. 1634, 80th Cong., 2d Sess. (1948).
37. S. 2231, 80th Cong., 2d Sess. (1948).
38. Hearings before the Committee on Interstate and Foreign Commerce, United States Senate, 80th Cong., 2d Sess., on S. 2231, pp. 3 ff (1948).
39. Senate Report No. 1567, *op. cit.*, pp. 7 ff. As already explained, what the

FCC can do will depend, in part, on the effects of the concessions made to our foreign neighbors in this treaty. As a result, CCBS has been fighting against ratification; it fears that the concessions will block an authorization of super power.

40. S. Res. 240, 80th Cong., 2d Sess. (1948).
41. Cong. Record, Vol. 95, pt. 12, p. A411 (Jan. 31, 1949).
42. S.491; H. R. 4004, 81st Cong., 1st Sess. (1949).
43. See NBC v. FCC, 132 F (2d) 545, 546 (1942).
44. Wilson v. FCC, 170 F (2d) 793, 797 (1948).
45. Under the Radio Act of 1927 the United States Court of Appeals of the District of Columbia had authority to reverse the regulations made by the Commission and to make new ones in their place. For example, in 1928 the FRC reduced the hours of operation of WGY, Schenectady, New York, in order to protect KGO, Oakland, California—the dominant station on the frequency—but this was reversed by the Court in the next year. The judges in that case ordered a fulltime license for WGY, thus making their own regulation contrary to that made by the Commissioners. General Electric Company v. FRC, 31 F (2d) 630 (1929). The Supreme Court granted a writ of certiorari, 280 U.S. 537 (1929). After argument, this Court dismissed the appeal on the grounds that the statute, by giving the Court of Appeals authority to make regulations, made it an administrative agency and under the Constitution the Supreme Court could not make administrative rules and regulations. FRC v. General Electric Company, 281 U.S. 464 (1930). The result was to weaken the authority of the Commission; it could adopt engineering rules but the Court of Appeals could subsequently make different ones, unchecked by the Supreme Court. As a result, Congress limited the jurisdiction of the Court of Appeals to the mere "affirming or reversing" of the decisions of the Commission. Reversal by the Court is authorized where the Commission's decisions are contrary to the Constitution, or contrary to the statutes passed by Congress, or unsupported by "substantial evidence", or made by an "arbitrary or capricious" procedure. 46 Stat. at L. 844 (1930).
46. See Broadcasting-Telecasting Magazine, Aug. 17, 1953, p. 60.
47. See WJR v. FCC, 174 F (2d) 226 (1948); FCC v. WJR, 337 U. S. 265 (1949).
47-A. Senate Report No. 1168, "Daytime Radio Stations," 85th Cong., 1st Sess., pp. 29, 30 (1957). See also Hearings on 'Daytime Radio Broadcasting—1957", by a subcommittee of the Select Committee on Small Business, United States Senate, 85th Cong., 1st. Sess. (1957).
48. FRC, Second Annual Report, pp. 15, 16, 45, 146 ff. (1928). See also Hearings on S. 6, *op. cit.*, pt. 2, pp. 68 ff. (1929).
49. Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 80th Cong., 1st Sess. on S. 1333, p. 543 (1947). See also pp. 36–38.
50. *Ibid.*, p. 37.
51. *Ibid.*, pp. 33 ff.
52. See the letter of Executive Vice President A. D. Willard, Jr., to a complaining broadcaster, printed in Broadcasting-Telecasting Magazine, Sept. 9, 1946, p. 17.
53. 66 Stat. at L. 711, 715 (1952). In 1954, this section was again amended;

68 Stat. at L. 35. The change gives the FCC more control over procedure and does not affect the question herein discussed.

54. See Broadcasting-Telecasting Magazine, Mar. 25, 1957, p. 42.
55. FCC, Proposed Report of Allocations from 25,000 Kilocycles to 30,000,000 Kilocycles, Docket No. 6651, Release 79776 (mim.) Jan. 15, 1945.
56. "The best place in the spectrum for the FM broadcast band is somewhere between 42 and 108 megacycles. Within that range, there is no band which is ideally suited for FM Broadcasting. In the vicinity of 42 mc, F2 layer and sporadic E layer transmission will cause a substantial amount of interference. On the other hand, in the vicinity of 90 or 100 mc there is some increased tropospheric propagation. Also, in this upper region the problem of shadows appears somewhat worse." FCC, Report in the above docket, Release 82387 (mim.) p. 81, May 25, 1945.
57. FCC, Report of Allocations from 44 to 108 Megacycles, Docket No. 6651, Release 83095 (mim.) June 27, 1945.
58. FCC Release 84374 (mim.) Docket No. 6768, Aug, 24, 1945. FCC, Rules and Regulations, Part 3, Subpart B, Rules Governing FM Broadcast Stations, Sec. 3.203, n. 3.
59. Hearings before the Committee on Interstate Commerce, United States Senate, 78th Cong., 1st Sess., on S. 814, p. 835 (1943).
60. FCC, Report in Docket No. 6651, Release 90423 (mim.) Mar. 5, 1946.
61. H. R. 6174 and H. R. 7095, 79th Cong., 2d Sess. (1946).
62. S. Res. 307, 79th Cong., 2d Sess. (1946).
63. See Hearings before the Committee on Interstate and Foreign Commerce. House of Representatives, on H. J. Res. 78, 80th Cong., 2d Sess. (1948).
64. FCC Chairman Charles R. Denny, quoted from Broadcasting-Telecasting Magazine, Oct. 28, 1946, p. 44.
65. Special Committee to Study Problems of American Small Business, United States Senate, 79th Cong., 2d Sess., Report No. 4: "Small Business Opportunities in FM Broadcasting", pp. 20, 21 (1946).
66. Hearings before the Committee on Interstate and Foreign Commerce, United States Senate, on "Certain Charges Involving Development of FM Radio and RCA Patent Policies," 80th Cong., 2d Sess. (1948).
67. FCC Chairman James Lawrence Fly testified: "If we can become convinced, after all these years of study, that we have got the best system, and we will be greatly influenced by the preponderate engineering testimony of the industry, we will step in and set a standard gauge and give the thing our blessing." Hearings before the Committee on Interstate Commerce, United States Senate, 76th Cong., 3rd Sess., on S. Res. 251, p. 53 (1940).
68. See CBS Brief in Docket No. 6651, pp. 19, 20 (1945).
69. See TBA Brief in Docket No. 6651 (1945).
70. FCC Report in Docket No. 6651, *op. cit.*, pp. 97 ff (May 25, 1945).
71. FCC Report in Docket No. 6651, *op. cit.*, p. 5 (June 27, 1945).
72. For example: police, fire, highway maintenance, special emergency, transit utility, and forestry conservation.
73. See Broadcasting-Telecasting Magazine, July 12, 1948, p. 52; Nov. 29, 1948, p. 44. Sec. 305 of the Communications Act gives the President authority to set aside air waves for governmental agencies. In 1922, the First National Radio Conference urged the creation of a Committee composed of repre-

sentatives of those governmental agencies which found radio useful in the performance of their functions and proposed that this committee assign channels for such service. Secretary Hoover put the idea into effect by creating the Interdepartmental Radio Advisory Committee. It has, since, been continued by every President and he gives its decisions legal effect by executive order. In practice, this has usually been a formality.

74. 14 Fed. Reg. 2957 (June 4, 1949).
75. FCC, Sixth (And Final) Order, *op. cit.*, pp. 4 ff.
75A. Hearings before a Sub-Committee of the Committee on Interstate and Foreign Commerce, United States Senate, 83rd Cong., 2d Sess., on "UHF Television" (1954).; Hearings before the same Committee, 84th Cong., 2d Sess., pursuant to Sen. Res. 13 and 163 (1956).
Television" (1954); Hearings before the same Committee, 84th Cong., 2d
75B. FCC, In the matter of Amendment of Part 3 of the Commission's Rules and Regulations Governing Television Broadcast Stations, Docket No. 11532, FCC Release 56-687 (June 25, 1956). The Report and Order are published verbatim by Broadcasting-Telecasting Magazine, July 2, 1956, pp. 91 ff.
76. For a description of the two systems, see FCC Report, in the matter of the Petition of Columbia Broadcasting System, Inc. for Changes in Rules and Standards of Good Engineering Practice Concerning Television Broadcast Stations, Docket No. 7896, Release 5466 (mim.) p. 1, Mar. 18, 1947.
77. Broadcasting-Telecasting Magazine, Feb. 17, 1947, p. 15.
78. FCC Report in Docket No. 7896, *op. cit.*, p. 3.
79. 14 Fed. Reg. 2957, June 4, 1949.
80. FCC, First Report on Color Television, Release 50-1064 (min.) Sept. 1, 1950.
81. Broadcasting-Telecasting Magazine, Sept. 11, 1950, pp. 61, 75; Oct. 2, 1950, pp. 4, 94.
82. FCC, Second Report on Color Television, Release 50-1224 (mim.) Oct. 11, 1950.
83. RCA v. U. S., 95 F. Supp. 660 (1950); RCA v. U. S., 341 U. S. 412 (1951).
84. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 83rd Cong., 1st Sess., on "The Present Status of Color Television." (1953).
85. In the Matter of Amendment of the Commission's Rules Governing Color Television Transmissions, Docket No. 10637, Dec. 17, 1953. The Report and Order are published by Broadcasting-Telecasting Magazine, Dec. 21, 1953, pp. 58-A ff.

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