

“POLITICAL” INFLUENCE AT THE FCC

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In March of 1974, when I assumed the Chairmanship of the FCC, relations between the Nixon administration and the nation's leading news organizations were, to say the least, extremely poor. White House insiders reportedly viewed much of the media establishment as “the enemy” and administration spokesmen regularly expressed sharp criticism of what they viewed as a strong anti-administration bias on the part of journalists. The statements of Vice President Agnew were particularly colorful in their attacks on Walter Cronkite, John Chancellor and other “effete intellectual snobs.”¹ In some cases, such criticism was explicitly linked to threats of governmental retaliation against the media.

For example, presidential assistant Patrick Buchanan publicly stated that a 1972 bill that would have increased funding for public television was vetoed because the individuals and programs appearing on PBS were considered to oppose the administration.² Similarly, a White House official took direct aim at the three commercial television networks. In a speech delivered to the Indianapolis chapter of Sigma Delta Chi, Dr. Clay T. Whitehead, the director of the President's Office of Telecommunications Policy, stated that broadcasters had a duty to avoid “ideological plugola” in their newscasts and to correct the situation where “so-called professionals . . . dispense elitist gossip in the guise of news analysis.”³ Dr. Whitehead went on to state:

Station managers and network officials who fail to act to correct imbalance or consistent bias from the networks—or who acquiesce by silence—can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time.⁴

This warning understandably sent tremors of apprehension through the broadcast community and provoked intense criticism of Dr. Whitehead by the press and by the Democratic leadership in Congress.

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1. See Friendly, *The Campaign to Politicize Broadcasting*, 11 COLUM. JOURNALISM REV., Mar.-Apr. 1973, at 9, 10.

2. Phillips, *Killian Sees Watergate as Helping Public TV*, N.Y. Times, May 28, 1973, at L31, col. 2. Mr. Buchanan was especially critical of Sander Vanocur, Robert MacNeil, Elizabeth Drew, Bill Moyers, “Washington Week in Review” and “Black Journal”; he suggested that William F. Buckley had been thrown into the PBS schedule as a “figleaf.”

3. W. PORTER, ASSAULT ON THE MEDIA: THE NIXON YEARS 303, 304 (1976).

4. *Id.* at 304.

As a consequence of these developments, my colleagues and I at the FCC became acutely aware of the fact that Congress expected us to eschew any attempts that might be undertaken by the executive branch to improperly influence our actions. Of course, those who were familiar with the FCC's policies knew that, notwithstanding Dr. Whitehead's comments, there was no danger that the Commission would take retaliatory action against the broadcast media. As Fred Friendly stated at the time:

The FCC, under chairman Burch as well as his predecessors, has consistently stressed that news "bias"—in the Whitehead sense—is never taken into account by the agency at renewal time. Indeed, the Commission will not even consider a charge in this field unless there is independent extrinsic evidence of news slanting by top management.⁵

Nevertheless, in light of the public and congressional outcry over the issue, we were extremely anxious to avoid circumstances that would create even the *appearance* that the agency was subject to improper executive branch influence.

For this reason, I was very concerned to learn, upon assuming the office of Chairman, that one of my first official duties would be to respond to a congressional inquiry into allegations that the executive branch had assumed "control" of appointments to career service positions within the FCC. Congressional investigators informed us that the White House had maintained a program of forwarding numerous referrals of "politically acceptable" job applicants to the various departments and agencies—including the independent agencies. I wanted to be certain that the integrity of the agency's career employee service had not been compromised by such a referral program. However, when my staff completed its examination of the relevant personal memoranda and files, what we found was merely an amusing example of an elaborate program of job referrals that was almost entirely ineffectual.

These records indicated that, out of over one hundred executive referrals to the FCC (in categories marked by the White House as either a "courtesy referral," a "priority referral" or a "must hire"), just one applicant had actually been hired by the agency. Since that individual's name had been forwarded as merely a courtesy referral (and he held a relatively low-level job for a mere six months before leaving the agency), it was obvious that the FCC's personnel department effectively had rejected White House "priority" and "must hire" referrals. When these results were reported to the oversight committee, our staff offered to conduct a similar survey of job referrals that had been sent to the agency from Capitol Hill and assured the investigators that congressional refer-

5. Friendly, *supra* note 1, at 16.

rals likely would represent a much larger number of actual hires. The oversight committee investigator immediately responded that they had *no interest* in such a survey and, for all intents and purposes, that was the end of the matter.

This little episode illustrates what has long been apparent to those who have worked in policymaking positions at the FCC: while public discussion of agency "independence" usually focuses on allegations of improper White House influence, the most powerful and persistent "political" influence over the Commission clearly originates with the congressional appropriations and oversight committees and with other important members of the legislature. This fact is perhaps best illustrated by the famous story of Newton Minow's courtesy visit with House Speaker Sam Rayburn shortly after Minow's appointment as Chairman of the Commission. During this meeting,

"Mr. Sam" put his arm around the new FCC Chairman and said, "Just remember one thing, son. Your agency is an arm of the Congress; you belong to us. Remember that and you'll be all right." The Speaker went on to warn him to expect a lot of trouble and pressure, but, as Minow recalls, "what he did not tell me was that most of the pressure would come from the Congress itself."⁶

It is not difficult to understand why Congress, rather than the President, is the most significant political influence on the FCC's actions and policies. In their excellent book entitled *The Politics of Broadcast Regulation*, Messrs. Krasnow, Longley and Terry correctly state that congressional strategies for overseeing FCC activity cover a wide range of alternatives, including control by statute, the power of the purse, the "spur" of investigation, the power of advice and consent over the appointment of commissioners, the continuing oversight of standing committees, supervision by multiple committees, and pressures from individual members and congressional staff representatives.⁷ Anyone who has served as Chairman of the FCC is well aware of the fact that Senators and Representatives use these supervisory tools with great regu-

6. E. KRASNOW, L. LONGLEY & H. TERRY, *THE POLITICS OF BROADCAST REGULATION* 89 (3d ed. 1982) [hereinafter E. KRASNOW] (footnotes omitted). Other observers have shared Chairman Minow's sense of irony when contemplating the notion that "agencies should be insulated from partisan politics by subordinating them to Congress instead of subordinating them to the President!" E.g., 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2:9, at 91 (2d ed. 1978). Nevertheless, as has been the case with other "independent agencies," a majority in Congress concluded that it was desirable to limit Executive power over the FCC and that this objective could best be achieved by giving the Commissioners fixed terms in office. See 47 U.S.C. § 154 (1982).

7. E. KRASNOW, *supra* note 6, at 87-132. The existence of these supervisory powers is, of course, fully consistent with the constitutional role of the Congress and with democratic principles. Indeed, in cases that do not involve adjudication or other similarly sensitive matters, it is both appropriate and desirable that the Commissioners be in touch with officials of government who are politically accountable.

larity and enthusiasm. As Newton Minow has stated, "When I was Chairman, I heard from the Congress about as frequently as television commercials flash across the television screen."⁸

In contrast, the President and other top leaders of the executive branch rarely have the time or inclination to speak with FCC Commissioners about the day-to-day work of their agency. As a consequence, the administration's oversight of communications policy is typically the responsibility of mid-level officials who are somewhat removed from the center of the executive branch's real "political" power.⁹

To find a really clear-cut allegation of an improper executive branch attempt to influence FCC actions, one would probably have to go back to the Roosevelt administration.¹⁰ Unlike some of his successors, President Roosevelt had an intense personal interest in policy decisions at the Commission. According to University of Texas Professor Lucas Powe, Roosevelt was offended by the fact that he had been opposed by the vast majority of the newspapers in the United States and developed as his "number-one priority" a plan to retaliate by stripping newspaper owners of the ability to hold broadcasting licenses.¹¹ After Roosevelt appointed James Lawrence Fly to head the FCC, he sent the new Chairman a one-

8. N. MINOW, *EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* 36 (1964).

9. Today, this function is carried out in the National Telecommunications and Information Administration (NTIA), which is a part of the Department of Commerce. During the Nixon and Ford administrations, such work was the responsibility of the Office of Telecommunications Policy (OTP), which was then a unit located in the White House. But even with the former White House location, FCC Chairman Burch testified before Congress that he had "absolutely no fear of either an actual or possible undue influence by the White House on the Commission by virtue of this office." *Reorganization Plan No. 1 of 1970: Hearings Before the Subcommittee on Executive and Legislative Reorganization of the House Government Operations Committee*, 91st Cong., 2d Sess. 51 (1970). Based on my own experience with both OTP and NTIA, I fully share Chairman Burch's assessment that there is little danger that either of these offices would improperly influence FCC actions.

10. While there is little evidence that President Roosevelt's successors sought to directly influence the FCC's decisionmaking process, there have been instances where they have utilized the agency's procedures in ways that are, at a minimum, highly questionable. In the mid-1960s, in response to criticism of the Kennedy and Johnson administrations by "right-wing" radio commentators, the Democratic party mounted a campaign of sending "fairness doctrine" complaints to many small rural radio stations in an apparently successful attempt to discourage these stations from ear-ringing programs that the party found to be objectionable. See F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 32-42 (1976). During the Nixon administration, friends of the President filed competing license applications in an ultimately unsuccessful attempt to strip the *Washington Post* of its television stations in Florida (the *Post* was the most prominent newspaper involved in early investigative reporting of the "Watergate" scandal). See L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 121-132 (1987). However, I can personally attest to the fact that there were no White House contacts with the FCC in connection with the filings against the *Washington Post* stations and, so far as I am aware, no such contacts occurred in the case of the Democratic party's attack on "right-wing" radio programming in the 1960s.

11. See generally L. POWE, *supra* note 10, at 68-74.

sentence memorandum that clearly conveyed his interest in this issue: "Will you let me know when you propose to have a hearing on newspaper ownership of radio stations."¹² Soon thereafter, the agency announced that it was initiating a broad-ranging notice of rulemaking looking into the matter of the ownership of radio stations by persons who were associated with newspapers.¹³ Fortunately for the newspapers (and also for those of us who care about first amendment "niceties"), the Commission abandoned this rulemaking after several years, noting the "grave legal and policy questions involved."¹⁴

We should not be surprised at the general absence of evidence of the kind of executive branch communications to the FCC exemplified by this episode. The questionable nature of such communications makes it unlikely that they would be disclosed to the public by the participants. Nevertheless, having had personal knowledge of the views and the character of every FCC Commissioner who has served during the past 20 years, I cannot believe that any of these men and women would have taken instructions from the White House, especially in a politically-charged area that is fraught with extremely serious first amendment implications.¹⁵

Of course, such a personal "testimonial" does not provide a basis for lowering our guard against improper political influence at the FCC—from whatever source. The FCC deals with a wide variety of issues that are of enormous importance to the mass media. All too often these decisions are resolved under criteria that are extremely flexible and subjective and therefore provide ample room for political "favoritism" or "retaliation" if the decisionmakers allowed themselves to be subjected to improper pressure and considerations.

One important safeguard against such abuses lies in the fact that Commission decisions are not made by a single individual but, rather,

12. 2 E. BARNOUW, *A HISTORY OF BROADCASTING IN THE UNITED STATES: THE GOLDEN WEB* 170 (1968).

13. 6 Fed. Reg. 3302 (1941).

14. 9 Fed. Reg. 702 (1944). White House pressures concerning this matter may have continued even after Chairman Fly departed from the Commission. Fly's successor, Paul Porter, reported later that Roosevelt "was constantly leaning on me to get the newspapers out of broadcasting." H. ASHMORE, *FEAR IN THE AIR* 114 (1973). However, in light of "Roosevelt's failing health and the limited time FDR was alive while Porter was chairman," Professor Powe has expressed doubt concerning the accuracy of Porter's recollection. L. POWE, *supra* note 10, at 264 n.18.

15. There have been allegations that, during earlier administrations, commissioners themselves may have been motivated by improper political considerations. *See, e.g.,* Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 690-93 (1959) (asserting that the FCC in the 1950s had a marked tendency to award licenses in comparative television proceedings to newspapers that had supported Eisenhower in the 1952 election while denying the applications of those that had supported Adlai Stevenson).

require a majority of a five-member panel. Such collegial decisionmaking undoubtedly helps to minimize the incidence of improper communications from politicians and to reduce the likelihood that such communications would be successful in achieving their purposes. However, so long as the FCC is given such extensive powers over the operations of the media and such broad discretion in its decisionmaking, our only sure protection is in the selection of men and women of genuine character and integrity to serve on the Commission.

As indicated, I am confident that the Commissioners who have served during at least the last two decades have maintained these high standards. However, while I am optimistic that this will continue to be the case in the future, one must question the soundness of a system that is so heavily dependent on the quality of individual political appointments.