How Liberals Rediscovered Free Speech

By Marcus Cohn

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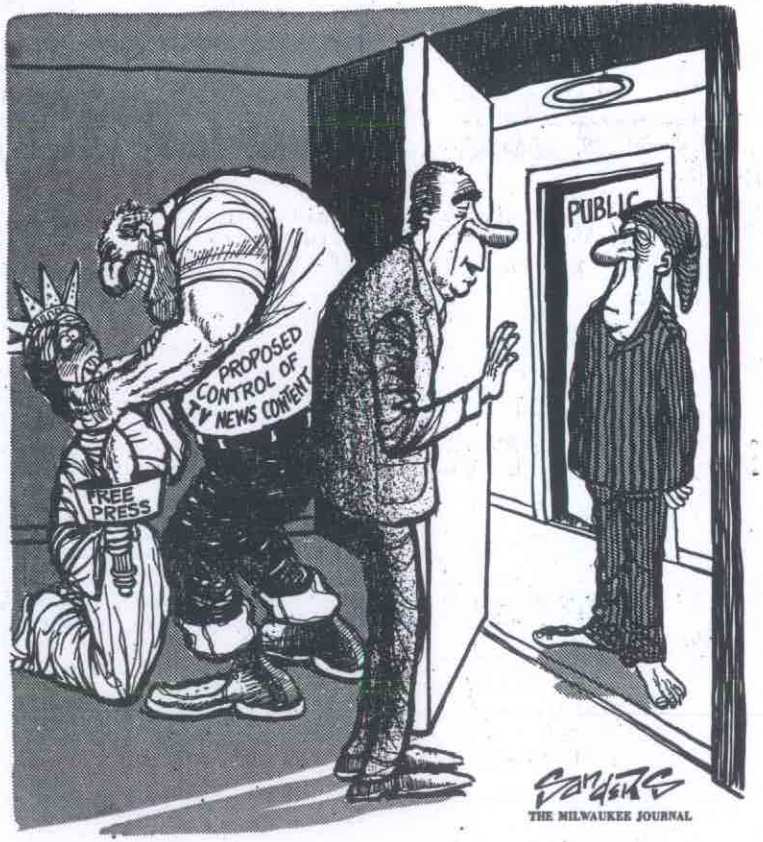


"It's nothing important. Now, you just run along and go back to sleep."

ON SEPT. 25, 1970, Charles W. Colson sent a memo to H. R. Haldeman in which he proposed that the White House get a ruling from the Federal Communication Commission on the "role of the President when he uses TV." This, he argued, would have "an inhibiting impact on the networks." Probably the last thing he ever expected was that this memo—and others—would end up helping to ignite a flurry of judicial and congressional dedication to broadcasters' First Amendment rights.

Broadcasters, of course, have been delighted—indeed, amazed—to find a growing number of liberals as their new defenders. There is, for example, Democratic Sen. William Proxmire of Wisconsin, who 15 years ago played a central role in requiring the FCC to judge how stations handle controversial issues. This Fairness Doctrine notion had been kicking around for a number of years by then, but it was Proxmire who proposed and pushed through the amendment to the Communications Act. Today the same Sen. Proxmire is delivering Senate speeches declaring that the doctrine is unconstitutional. He now describes it as the "unfairness doctrine," an "Orwellian double think" procedure, and the subversion of Voltaire to mean "I will defend to the death your right to agree with me."

Plenty of Company

PROXMIRE IS certainly not alone in his sharp change of heart; he has plenty of company among federal judges, other liberal members of Congress and intellectuals who have similarly reversed course in the wake of Watergate and other events on a wide range of issues.

Historian Arthur Schlesinger Jr., for example, has spent a good deal of his career supporting a strong presidency, illustrating his case with studies of President Franklin Roosevelt, and then growing even more enthusiastic about the strong, activist President when he actually got the chance to play a role in the Kennedy White House. In those days, Prof. Schlesinger has written, President Kennedy was too often deflected from noble purposes by reluctant bureaucrats and elected congressmen who checked his power. Now, however, Schlesinger argues in his book "The Imperial Presidency" that the President has too much power.

Similarly, when conservative State Department employee Otto Otepka tried to tell Congress a few pertinent facts about how the department was doing its business, many distinguished liberals—who happened to think Otepka and his congressional allies were on a Communist witchhunt—cried out that the State Department should exercise "executive privilege" and withhold Otepka's information. Many of those same liberals had very different ideas about our last administration's right of executive privilege.

Then there is the case of scholar-politician-diplomat Daniel Patrick Moynihan, who once stridently warned the country that scholars are at their weakest in prescribing massive government programs and have, in fact, sold the country large amounts of "snake oil." Scholars should stick to studying results, said Moynihan. But within a year or so after he wrote this warning, Moynihan became the czar of domestic policy in the Nixon administration and proposed what he said was the most far reaching social reform (a guaranteed annual income) since the 1930s.

These and other turnabouts can be explained in a number of ways. We all know that a foolish consistency is the hobgoblin of little minds. It is also possible, and hopefully true, that men learn by experience and change their preconceptions.

But there is yet another potential explanation: Is it possible that despite some of the most scholarly formulations about the relationships within government and between government and the governed these matters are really decided, perhaps unconsciously, on the basis of just who has the power? More bluntly, do some people think that lots of government power is fine when the "good guys"—their people—are in office, but government power must be drastically reduced when the "bad guys"—the "other" people—get elected?

Judicial Sanctification

OBVIOUSLY, OUR fundamental rights should be decided on firmer ground than whether politicians to our liking are in command at the moment. The Constitution and our laws are not so easy to change that we can alter our notions on the basis of who won the last election. And yet, as Prof. Philip Kurland, a constitutional scholar at the University of Chicago Law School, has pointed out, "When it is a President with what has come to be called 'charisma,' a Franklin Delano Roosevelt or a John Fitzgerald Kennedy, some of us have applauded the seizure of power by the President. When that office is occupied by one whose objectives are less to our tastes, we deplore the power that has become his to exercise."

One of the most striking examples of

this phenomenon has occurred in the area of freedom of speech, and particularly the use of the air waves. Suddenly liberals have begun to argue that broadcasters should have the same First Amendment rights enjoyed by newspapers, and that the FCC should stay out of programming matters—a far cry from their earlier position.

In the 1940s, such FCC commissioners as James Lawrence Fly, Clifford Durr, Paul Walker, Paul Porter and Frieda Hennock—all devoted New Dealers—constantly urged greater government involvement in programming. They argued that radio stations had a responsibility to engage in more non-entertainment; it was euphemistically called "meaningful" programming.

Those were the days when Louis G. Caldwell, a determined and brilliant conservative, represented the interests of the Chicago Tribune and other violently anti-Roosevelt licencees. He argued repeatedly that the commission was violating the First Amendment when it stepped into the programming area. But the commissioners and the staff scoffed at such a notion.

The commission position received judicial sanctification from some general and gratuitous language that Justice Frankfurter included in a 1940 opinion on behalf of a unanimous Supreme Court. He said the commission not only had the duty to act "as a kind of traffic officer policing the wave lengths to prevent stations from interfering with each other," but that it was Congress' intention to place upon it the obligation of "determining the composition of (the) traffic." Although this reference was not required by the issues involved in the case at hand, it was immediately used by the FCC and by other courts as a definitive interpretation of the commission's powers and a congressional command that it aggressively involve itself in programming.

The Blue Book

UNTIL 1946, THERE were no federal guideposts outlining what actually constituted programming in the public interest. However, on March 7, 1946, the commission issued a 50-page brochure which had a blue cover and immediately became known as "The Blue Book."

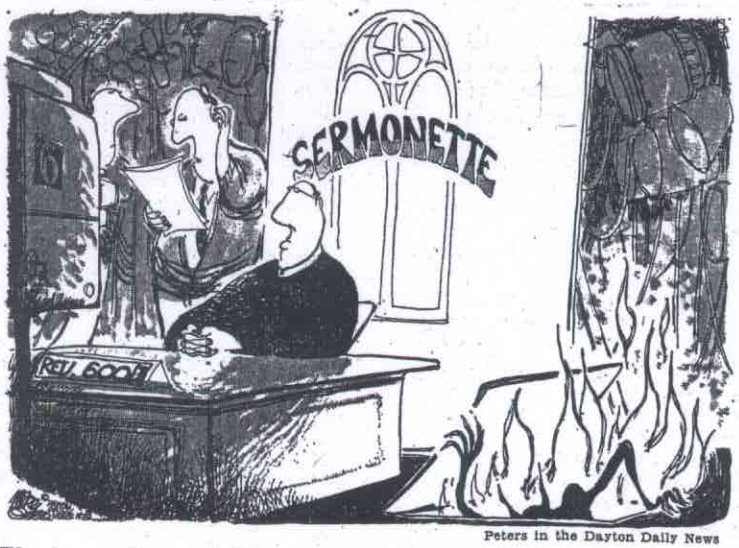
The Blue Book required each station to report in its license renewal application the amount of programming it had carried in each of several categories—for example, education, news, discussion, and religion. In addition, the station was required, and still is required, to include in its application promises about the programming it would carry in the three-year license period. Then, each time a license renewal application was filed, the commission weighed how well the promises had been kept.

The Blue Book acknowledged that the Communications Act prohibited the FCC from censoring programs. But the commission, after reviewing the congressional history of the Communications Act and the judicial review of its powers, concluded that it not only had the right to make such judgments, but, indeed, it was "under an affirmative duty . . . to give full consideration to (the) program service" of every licensee at renewal time.

During the next quarter century the U.S. Court of Appeals for the District of Columbia (to which practically all FCC decisions are appealed) encouraged the commission's programming activity. In case after case, the court brushed aside First Amendment whimpers and not only approved the commission's right to make programming judgments, but even scolded the commission when it shirked this task.

For example, in 1962 Chief Judge David L. Bazelon, on behalf of a unanimous court which then included Judge Warren Burger, held that "the commission may impose reasonable restrictions upon the granting of licenses to insure programming designed to meet the needs of the local community."

Until November of 1969, we had



Peters in the Dayton Daily News

"Thank you, Reverend. Now, in compliance with an FCC ruling, here to represent the opposition. . ."

very few hard facts showing that the White House had ever used the FCC to pressure stations—and particularly the networks—to assure a friendly attitude toward the President and his programs.

We do know that President Roosevelt sent a memorandum to FCC Chairman Fly on Oct. 3, 1940, in which he said: "Will you please let me know when you propose to have a hearing on newspaper ownership of radio stations." We also know that during the Eisenhower years rumors were rampant that Sherman Adams and other members of the White House elite recommended to the FCC what the outcome should be in contested hearings, where there were two or more applicants for the same facility.

But neither the Roosevelt inquiry nor the interference by the Eisenhower White House were designed to intimidate the networks or stations or newspapers because of program content that was critical of the administration. That was a Nixon administration invention, and its history is by now familiar.

There was FCC Chairman Dean Burch's phone call to CBS president Frank Stanton on Nov. 4, 1969, requesting a transcript of the network's news analysis that had followed a Nixon address the night before. There was Vice President Agnew's Des Moines speech nine days later castigating the networks' news coverage and reminding them that they held licenses through the sufferance of the FCC. There were, according to CBS' Stanton, a number of White House phone calls over the next three years expressing displeasure with news broadcasts. There was the Colson memo to Haldeman. There was the December, 1972, Indianapolis speech by Clay T. Whitehead, director of the White House's Office of Telecommunications Policy, condemning the "ideological plugola" and "elitist gossip" of network news. And there was President Nixon on tape telling Haldeman that "The main thing is The Post is going to have damnable, damnable problems out of this one. They have a television station . . . And they're going to have to get it renewed."

Some late recanted their positions; Burch subsequently said he never should have made the Stanton call, that he didn't realize its implications, and Whitehead later termed the Fairness Doctrine "the mark of a totalitarian society . . . government enforced journalism . . . a total incongruity with freedom of expression in this counrty . . ."

Whitehead found himself in strange company. For once the Nixon White House's involvement in FCC programming matters became a matter of public record, a number of liberal senators and judges change their tunes as well.

On Sept. 25, 1972, for example, Judge Bazelon joined two of his colleagues in an opinion sustaining the FCC's denial of a license renewal on a programming issue, and stated that he would file, at a later date, a concurring opinion. But during the following 40 days he had second thoughts. On Nov. 4, 1972, he issued instead a 39-page *dissenting)* opinion in which he argued that FCC involvement in programming violated the First Amendment; he said that the commission had no constitutional right to deny a station its license because of its programming.

Bazelon repeatedly referred to the "chilling effect" that FCC programming intervention and supervision has on freedom of speech and thought. He noted that "highly respected members of newspaper and broadcasting corps" had warned us "that governmental regulation of broadcasting has been more pernicious than any group of private censors." He went on to say that there was "some question as to what the FCC may constitutionally ask of applicants with respect to programming plans . . ." And more recently, in a speech to the Federal Communications Bar Association, he urged the "broadcast media . . . (to) strenuously resist all government attempts to interfere with their wide legitimate decisions."

A Joyous Tremor

WHEN Supreme Court Justice William O. Douglas said on May 29, 1973, that he had concluded that "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines," and when Justice Potter Stewart concurred, a joyous tremor went through the broadcasting industry.

While the courts—and particularly their liberal members—were showing determination to curtail the FCC's power over programming, such other liberals as Sens. Proxmire and George McGovern and former Sen. Eugene McCarthy began to urge that station owners' program judgments be cloaked with First Amendment rights.

On March 14, 1972, for example, McCarthy issued a "Statement on Freedom of Broadcasting" which warned of the dangers which occur when power is given to the White House/FCC to interfere, criticize or evaluate whether the content of broadcasting serves the public interest. He stated, "We cannot continue government efforts to regulate the quality and substance of broadcasting." He saw no reason at all why the government "should impose quality standards on radio and television broadcasters when we have no such government controls on newspapers." His absolutist position arose from the fact that those who wanted to increase the regulation of broadcasters were doing so "in the hope of getting them to do what they want . . ."

Watergate then, has helped validate the thesis that our dedication to the basic philosophy behind the First Amendment is inversely related to our confidence that the White House understands its values and purposes. When we are convinced that the presidential political process recognizes and respects the First Amendment's purpose and sanctity, the less nervous and anxious we are about its vitality and values. The more we doubt the President's commitment to it, the more eager we are to implement and strengthen it. Bad presidencies have the effect of giving the First Amendment a charge of adrenalin.