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Breeding a press of water carriers, or the "Age of Aquarius"

Part III: "Borking" the Fairness Doctrine"

By James Higdon

August 3, 2001—When George W. Bush moved into the White House, he named Colin Powell's son, Michael, to head the Federal Communications Commission. And Powell is diligently carrying on the work, begun by the prior Bush administration, and the Reagan administration before that, to highly limit the free flow of information.

The purpose is simple and obvious. For a contingent of right wing ideologues, who are unable to sway public opinion through the strength of their arguments in open debate, and thereby garner support in the ballot box, they are attempting to restrict dissent, to the extent that only one viewpoint will be heard. This is the second of a two pronged attack upon regulations designed to free our news sources for vital public and national discourse, and to prevent them from becoming institutions of propaganda.

Powell's refusal to enforce FCC regulations that prohibit a single corporation from controlling vast segments of the news market, regulations designed to insure that a diversity of voices would always be heard, is now allowing Rupert Murdock's News Corp., an avid supporter of the radical right wing, to reach an astounding 41 percent (up from the regulatory limit of 35 percent) of the nation's news market, through Murdock's bid to buy out television owner Chris-Craft. The refusal to engage "the rule of law" affects not only the broadcast media, but the print media as well.

Prior to the tampering by the Republican right, broadcasters were also forbidden to hold ownership in a newspaper located in the same market in which they owned a television or radio station. In New York City alone, Murdock will now hold two television stations, and the New York Post, the newspaper with the second largest circulation in that city. Powell has offered Murdock a two-year window to violate FCC regulations, in order to provide time for Murdock to hold hands with the Bush administration in lobbying Congress to overturn them. At the end of that two-year window, Powell offers, the regulations will either be dispensed with entirely, or Murdock will be forced to sell assets in order to come into compliance.

But this story cannot adequately be told without offering a gift (such as it is) to Rush Limbaugh and others, who complain that we critics of the radical right never find anything upon which we are willing to level criticism against Bill Clinton and Democrats. Well, frankly Rush, you never really give us the time. You put us in the position of constantly defending Clinton and the rest against your wildly hypocritical comments, unsubstantiated allegations, misinformation, and your outright lies. And the criticism that I level at Clinton and Democrats here, is the one issue upon which you would find their only praise.

In 1993, Bill Clinton signed into law, with much fanfare, a telecommunications bill that lifted many of the restrictions against the corporate concentration of broadcasting ownership, and by so doing, he essentially loaded the gun that that was used to shoot him. The bill had the enthusiastic support of many of his Democratic friends in Congress, and thereby lies the folly of the "New Democrats," who felt that the best way to maintain Democratic control of Congress was to shake the hands of the major corporations that opposed them. And so, the Democrats lost control of the Congress in 1994. This is but a small piece of historical irony.

But while the concentration of the news media in corporate hands has a devastating effect on the distribution of truthful information to the public, it would not have prevented dissent from being voiced to the public without the destruction of what Limbaugh enjoys referring to as the "Hush Rush" law. The Fairness Doctrine would never have had the effect of silencing Limbaugh's expulsions of gas as long as his corporate sponsors were willing to fill his trough, but it would have demanded the opportunity for responsible spokespersons to expose him as a reeking propagandist. Here, the *inaction and ignorance* of "New Democrats" is as nearly responsible for the loss of this vital regulation as the *action and calculation* in the marriage of corporate power and the radical right.

Immediately after the Reagan administration succeeded in killing the doctrine, Congress voted 3–1 in order to restore it. Reagan vetoed the bill, and the Republican right was successful in preventing an override. Congress began work on the bill again during the Bush I administration, but the threat of another presidential veto caused the bill to die on the vine. During his campaign in 1992, Bill Clinton promised to sign the bill once it was presented to him, but after the Republican take over of congress in 1995, a new bill never materialized, and Clinton never submitted his own. Bill Clinton failed to demonstrate the foresight that should have predicted the devastating effect that corporate concentration, coupled with limiting public access would have on his own administration.

There are three legal cases that are highly representative of the rise and fall of the Fairness Doctrine. The earliest case states in clear terms why the doctrine was created, and why it is necessary. The latest, a DC Circuit case, shows the malicious logic used by the right to castrate the doctrine, when Robert Bork used dicta from previous cases to fashion an argument that neither litigant presented; and the middle case provides, in dissent by Justice Stevens, an explanation as to why every broadcast reporter's integrity is drawn into question whenever his/her paycheck is weighed in the argument.

***Red Lion Broadcasting Co. v. FCC* (395 US 367 (1969)**

In the 1960s, Fred J. Cook wrote a nonfiction work entitled "*Goldwater–Extremist on the Right*." In those days, Barry Goldwater was considered to be a member to the Republican Party's far right wing. Today, Goldwater would sit among Republican moderates. And in the 60s, attacking a member of the far right carried similar consequences from the extreme religious right wing. As part of a series of religious broadcasts called the "Christian Crusade," Reverend Billy James Hargis broadcast a 15-minute sermon in November 1964 that was carried on Pennsylvania's WGCB, owned by Red Lion, that made personal and false attacks on Cook that were similar in design as those leveled at Bill Clinton by Reverend Jerry Falwell in the 1990s. Although Hargis' allegations seem quaint and tame by today's standards of smear.

Among the charges that Hargis made against Cook to his television "flock," were that Cook had been fired from a newspaper for making false allegations against public officials; that Cook's publisher had "Communist" affiliations; that Cook had defended Alger Hiss, but was critical of J. Edgar Hoover and the CIA; and that his new book was a scurrilous attempt to "smear and destroy Barry Goldwater."

The Fairness Doctrine, and its attendant amendments pursuant to attacks against individuals, required that Red Lion send a tape, transcript, or summation of the broadcast to Cook, and to allow him to respond on the same station; and that if Cook could not, or would not pay for the reply time, that it must be provided at Red Lion's expense. Red Lion never sent Cook a notice, but he heard about the broadcast anyway, and demanded to be given an opportunity to reply. When Red Lion refused, Cook went to the FCC, which ordered Red Lion to comply with the regulation. When Red Lion still refused, the matter was then taken to court, and eventually worked its way up to the United States Supreme Court, where the order to allow Cook to respond was upheld.

In that decision, the court made very clear why the broadcast media differs from any other media, in such a way as to make the Fairness Doctrine reasonable and just, and was not an abridgment of free speech. Few are more eloquent than Justice White.

"Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves."

"A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."*

"Rather than confer frequency monopolies on a relatively small number of licensees [note: that while technology has increased the number of frequencies, because of deregulation the number of licensees are vastly fewer], in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. *[T]he First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.*"

***FCC v. League of Women Voters of California,* (458 US 364, (1984))**

When Congress created The Public Broadcasting Act of 1967, because commercial television failed to provide any significant culturally relevant or educational broadcasting, Congress included a provision to forbid government funded broadcasters to editorialize. They did this largely out of the reasonable fear that government would one day use this resource for the purpose of propaganda. When Pacifica Foundation (a CPB recipient), the League of Women Voters of California, and a private individual brought suit to challenge the constitutionality of this provision, it was overturned by the Supreme Court, reasoning that forbidding any to state an opinion, even those who are receiving government funds, quite simply amounted to "prior restraint."

I offer no opinion on the substance of this case. Its outcome is what it is. I present the case here because Justice Stevens offered a dissenting opinion in this case, and his words ring with truth. While addressing, in this instance, the government, he made a statement that is of immense importance when viewing the ownership by one corporation, the limited available resource of a broadcast frequency in conjunction with owning other news media in the same market. For those "think tanks" that offered studies showing that this or that broadcast personality has a "liberal" point of view, and therefore argues that the broadcast media is, by and large, "liberal" in its presentation, they should read his statement carefully.

"The court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. The child who wants a new toy does not preface his request with a comment on how fat his mother is. Newspaper publishers have been known to listen to their advertising managers. Elected officials may remember how their elections were financed . . . [A] sophisticated group of legislators expressed a concern about the potential impact of . . . funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of Adolf Hitler over Radio Berlin to appreciate the importance of that concern."

Complete power is a corrupting influence, whether it lay in the hand of government, or a financial institution. When the two combine to speak with one voice, the result can only be fascism, or something like it.

***Telecommunications Research and Action Center and Media Access Project v. FCC,* (255 US App. DC 287 (1986))**

In the face of the Reagan administration's constant corporate deregulation, and its refusal to enforce existing regulation, TRAC and MAP joined forces seeking court orders to force Reagan's FCC to govern broadcasting as prescribed by law. In this instance, TRAC and MAP brought suit to force the FCC to regulate the new technology of "teletext" under the Fairness Doctrine. Teletext is that technology that provides news text to scroll across the bottom of your television screen while regular broadcasting is in progress. At particular issue in this case was the FCC requirement that broadcasters allow equal opportunity for political candidates to purchase advertising. Teletext advertising for a particular candidate would scroll across the bottom of television screens, but the broadcast owner would deny the opposing candidate the opportunity to purchase the same media.

At the time, both Robert Bork and Antonin Scalia sat on the U.S. appellate court in DC, along with Senior Circuit Judge MacKinnon. While TRAC and MAP essentially argued that

broadcasting was broadcasting, and teletext sent signals out over the same limited resource that the courts had previously identified as belonging to all citizens, therefore subject to the regulations that had been previously upheld by the Supreme Court, Reagan's FCC argued that teletext was new technology, creating an increase in that limited resource, and therefore exempt from the Fairness Doctrines standards.

For those who don't understand the legal term of art, "dicta," it is language that a judge or justice uses to support his ruling that is not legally binding and does not set any kind of precedent. All that it may do is provide an indication of the author's train of thought, or deference to some future issue that may, or may not come before the court.

Writing the opinion in this case, Judge Bork, with the concurrence of Judge Scalia, used the dicta from a handful of cases to fashion an argument that neither side in *TRAC* made, and then he ruled in favor of it. Simply, TRAC argued that the Fairness Doctrine applied to teletext and the FCC was required to enforce it, and the FCC argued that the doctrine did not apply to teletext, and therefore they were not required to enforce it.

In a lengthy decision, Robert Bork carefully stripped apart the FCC's argument that teletext was not subject to regulations under the fairness doctrine. And in that much of the analysis, Scalia and MacKinnon concurred. Then Bork went through a collection of dicta from various justices in various cases, discussing the mandate of the FCC. As many justices had noted the latitude given the FCC, they viewed this as a positive element because the FCC had been historically careful to avoid any infringement on the First Amendment rights of the broadcaster, while enforcing that which was necessary to the success of the goals of the Fairness Doctrine.

Then Bork dropped the hammer. He ruled that since the FCC, with the support of the courts in their dicta, had used their discretion as to when to push, and when to let go, while enforcing Fairness Doctrine regulations, that the Fairness Doctrine was not a law (as intended by Congress), but little more than a guideline. He then handed the power to enforce, or not to enforce, purely into the hands of the FCC and the administration that controlled it. This, of course, was a better result than what the Reagan administration had argued for, and it subsequently announced that the FCC would drop Fairness Doctrine "guidelines." Since neither side had argued, at any stage of the litigation, whether or not the Fairness Doctrine was actually a law, the issue could not be appealed to a higher court.

In order to reinstate the doctrine, Congress would have had to create a new law. The two attempts to do so could not surpass a veto by Ronald Reagan, and a threatened veto by George H. W. Bush. And this stunning piece of right wing judicial activism was one of the larger reasons that Bork's nomination to the United States Supreme Court was denied by Congress.