

lic domain and operate pursuant to a license. These justifications stand up under neither analysis nor analogy.

I had always understood that one of the primary purposes of public facilities was to promote commerce and communication among our people. I have never understood that our liberties depended upon our avoiding use of the public domain.

If use of public domain deprives a communication medium of its right to be free from Government censorship, then what medium today has the right to be free? All use the publicly owned postal system; many besides broadcasting use radiofrequencies; all to a greater or lesser degree use public highways, streets, and airways; all do this under Government regulation and many pursuant to licenses.

With the explosion of electronic and space satellite developments, it is not too far-fetched to suggest that in a few years no substantial communications medium will be able to function without using the public's radiofrequencies to a substantial degree.

I never have understood that, where government uses the licensing mode as its instrument of regulation, its power in areas circumscribed by the Constitution is increased. The printed media operates in large measure pursuant to a permit to use second-class mails. City streets, parks, and alleys in many cities cannot be used for meetings or speeches without licenses from city authorities. In a number of States and cities, motion pictures cannot be exhibited except pursuant to government license.

Under no precedent that I can find has the fact that they were licensed been used as a justification whittle away their rights under the first amendment. As a matter of fact, in nearly all of the cases, the very fact that the licensing mode of regulation was used, which by definition is a prior restraint, has caused the courts to be extraordinarily diligent in making certain that the instrument was not used to abridge liberty of press, speech, or religion. If communication media cannot use the public domain pursuant to a license and still maintain their freedom from government dictation of the things they communicate, then we have to say that the first amendment died at the beginning of the radio and space age; that these liberties were intended only for the days when communication was infrequent, difficult, and relatively ineffective; that such liberties cannot be indulged in this modern world of technology. If we believe these things to be true, it seems to me that we have accepted a major element of the philosophy of Marx and Lenin.

The foregoing reasons for Commission interference in programing have been legally justified by the contention that the Commission has judicial approval for what it has done and is doing. I have to concede that it has the better of it in the precedents. The Federal Radio Commission's power to deny renewals of licenses because it disapproved of past program performance was approved by the Court of Appeals in two cases, now 30 years old.<sup>1</sup>

In one case Dr. Brinkley used his radio as a business adjunct and to prescribe for his patients. In the other case a Reverend Shuler used the facilities to obstruct justice and make defamatory attacks. Mr. Shuler had a newspaper counterpart, by the name of Near, who had been doing about the same thing at about the same time in Minnesota, but through a newspaper instead of a radio station. A year before the Shuler

case was decided by the Court of Appeals, the Supreme Court denied, as unconstitutional, an injunction against Near's continued publication of the newspaper<sup>2</sup> and this decision was cited in the Shuler briefs and cited in the Court's decision. What Minnesota did was held, by the Supreme Court, to be a prior restraint, but what the Commission did was held by the Court of Appeals not to be a prior restraint.

I cannot reconcile Near and Shuler except on the grounds that the First Amendment applied to newspapers but not to broadcasting. At that time this belief was quite generally held. Not until 1948 did the Supreme Court unequivocally state that broadcasting was within the protection of the first amendment.<sup>3</sup>

Both of the applications, Brinkley and Shuler, could have been denied on grounds that would have raised no question of censorship.

In other court of appeals cases, the court has upheld the Commission's right to use its evaluation of programing proposed in comparative applications as one of the deciding factors.<sup>4</sup> But the questions have never been squarely presented to the Supreme Court, although there is dictum to support my contention and other court expressions which can be interpreted contrary to my position.

I do not believe that, in the light of the first amendment cases decided in the last score of years, the precedents upon which my opponents rely are trustworthy. That is to say that, if broadcasting is protected by the first amendment, as the Supreme Court says it is, then by analogy to cases in other media, the Commission cannot use its licensing power to previously restrain broadcast communications in the manner that the Commission has been doing and proposes to do. I believe the court would so hold in a case squarely presenting the issue upon a complete record.

Moreover, I believe that attempts to achieve standardization of public tastes and broadcaster's response through centralized control by the NAB is only somewhat better than censorship by the Commission. Each seeks the concentration of control over programing and the standardization of tastes that is an anathema to diversity and liberty. NAB is more acceptable because it lacks the coercive power of government, and there is always the probability that there will be some nonconformists in the industry.

It should be apparent to all at this point that I am not speaking for the industry. Indeed, many in the industry probably find censorship and control a more comfortable way of life than being constantly confronted with competitors who just do not conform to the standard pattern.

These are only my opinions—ill-qualified ones at that, compared to the qualifications of some of those who hold contrary views. But, at a time when we are locked in a life-and-death struggle with the Communist world, when that external threat is going to require many sacrifices, including the loss of many of our peacetime liberties, should we concede that the enemy's creed of cultural censorship and control must at long last replace our historic and yet to be perfected liberties of speech and press? If these American liberties are thus to be blithely discarded, what is there left to fight for except narrow, selfish, materialistic and nationalist ambitions?

<sup>1</sup> *Near v. State of Minnesota* (283 U.S. 697 (1931)).

<sup>2</sup> *U.S. v. Paramount Pictures, Inc.* (68 S. Ct. 915, 933 (1948)).

<sup>3</sup> *Johnston Broadcasting Co. v. F.C.C.* (175 F.2d 351 (1949)).

## FACILITATION OF CONDUCT OF BUSINESS OF FEDERAL COMMUNICATIONS COMMISSION—CONFERENCE REPORT

Mr. PASTORE. Mr. President, I submit a report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2034) to amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions. I ask unanimous consent for the present consideration of the report.

The PRESIDING OFFICER. The report will be read for the information of the Senate.

The legislative clerk read the report.

(For conference report, see House proceedings of Aug. 18, 1961, pp. 15244-15246, CONGRESSIONAL RECORD.)

The PRESIDING OFFICER. Is there objection to the present consideration of the report?

There being no objection, the Senate proceeded to consider the report.

Mr. PASTORE. Mr. President, in my judgment, this legislation will serve to increase the efficiency of the FCC as well as permit the utilization of new procedures that may serve as a guideline for other administrative agencies.

In view of the procedures developed in this legislation, I intend to obtain an early report from the FCC as to its effects.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The report was agreed to.

## AMENDMENT OF WATERSHED PROTECTION AND FLOOD PREVENTION ACT

Mr. ELLENDER. Mr. President, I ask the Presiding Officer to lay before the Senate the House amendment to S. 650.

Mr. CLARK. Mr. President, reserving the right to object—and I shall not object—does the Senator desire to set aside the pending bill for a conference report?

Mr. ELLENDER. I simply wish to request that the Senate concur in a House amendment.

Mr. CLARK. I have no objection.

The PRESIDING OFFICER laid before the Senate the amendment of the House of Representatives to the bill (S. 650) to amend the Watershed Protection and Flood Prevention Act to permit certain new organizations to sponsor works of improvement thereunder, which was, to strike out all after the enacting clause and insert:

That the last paragraph of section 2 of the Watershed Protection and Flood Prevention Act is amended by inserting immediately before the period at the end thereof the following: " or any irrigation or reservoir company, water users' association, or similar organization having such authority and not being operated for profit that may be approved by the Secretary".

<sup>1</sup> *KFB Broadcasting Assn. v. F.R.C.* (47 F.2d 670 (1931)); *Trinity Methodist Church South v. F.R.C.* (62 F.2d 850 (1932)).