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A Question of Fair Air Play

Can current remedies for media bias handle threats like Sinclair's aborted anti-Kerry program?

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Amid all the furor over the Sinclair Broadcast Group's plan to air a blatantly partisan documentary attack on John Kerry just before the presidential election, relatively little attention was paid to the tough line-drawing involved in deciding whether Sinclair would, in fact, have broken the law.

As things turned out, public pressure and a precipitous drop in the value of Sinclair stock caused the media company to back off. The program it eventually aired in place of the attack film "Stolen Honor" was a reasonably balanced news special called "A P.O.W. Story: Politics, Pressure and the Media."

But intriguing questions remain about how the law would have responded, or should have responded, to Sinclair's original decision—questions that are likely to arise more frequently as standards for investigative journalism decline in our sound-bite culture, and as ever larger media companies wield their power to shape the information that most Americans receive. Although the laws now on the books provide some answers, our country should also be looking at longer-term, structural solutions to the growing problem of media bias.

KIND TO THE CAMPAIGN

Two different sets of laws are at issue in the Sinclair scenario. First, federal campaign finance law prohibits corporations from funding "electioneering communications" and from making "in-kind contributions" to federal election campaigns using general corporate resources. In a complaint to the Federal Election Commission, the Democratic National Committee argued that airing "Stolen Honor" so close to the election would have violated both prohibitions, because it would essentially have been an electioneering communication intended to help President George W. Bush retake the White House.

There is a "media exemption" in the campaign finance law that would ordinarily allow the airing of a biased documentary. But the DNC contended that Sinclair wasn't entitled to the exemption because "Stolen Honor" was not produced as a legitimate journalistic enterprise, and because the company's plans for airing it were so unusual—ordering all of Sinclair's 62 TV stations around the country to pre-empt their regular programming. Those 62 stations—many in swing states—reach almost 25 percent of the national TV audience.

Sinclair's decision-making certainly smacked of partisanship, but the problem is: Where does the FEC draw the line in deciding that the circumstances surrounding an ostensible news broadcast are so disreputable as to deprive the broadcaster of the media exemption?

While campaign finance law does treat broadcast advertising differently from print journalism, the media exemption is the same in both cases. Newspapers and magazines, for their part, have published exposés and investigations of candidates for as long as there have been elections. While some of those reports have been highly biased, non-paid content in regular newspapers and magazines has never been viewed as violating campaign finance law. The FEC is a governmental agency, after all, and there is always the danger that it could strip dissenting journalists and muckrakers of the media exemption just when they are trying to present important information to the American people.

Points of View

Some details about Sinclair's original plan to air "Stolen Honor" remain murky, but would be relevant to a determination of whether the plan violated campaign finance law. Paid infomercials are regulated as commercials, not as editorials or commentary, so if Sinclair had been paid to broadcast the documentary, it would have been regulated. And if Sinclair had coordinated its actions with the Bush campaign or the Republican Party, the film might also have been a prohibited corporate contribution. But if Sinclair's original plan turned out to be simply a decision of corporate management to run a documentary without ads, the company wouldn't have violated campaign finance law, regardless of how partisan, inaccurate, or unfair the program was.

PRESENTING ALL VIEWS

The other federal law that bears on Sinclair's conduct is the Communications Act, which requires broadcasters "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." This would seem to apply perfectly to Sinclair's original plan: The company could have aired "Stolen Honor," but it then would have been obliged to give the Kerry campaign a "reasonable opportunity" to present its "conflicting views."

Unfortunately, the Federal Communications Commission and the courts have stripped this reasonable-opportunity requirement of any real clout.

The requirement was part of a 1959 amendment to the Communications Act that was assumed to codify the FCC's "fairness doctrine"—the basic principle, dating back to the early days of radio, that in exchange for a valuable license to use the airwaves, broadcasters undertake "public interest" obligations to cover important issues and provide a reasonable opportunity for the presentation of contrasting views. But in 1985, responding to Ronald Reagan-era pressures for "de-regulation," the FCC began to unravel the fairness doctrine; in 1987, the agency repealed it entirely.

Two federal appeals courts followed suit by declaring that the reasonable-opportunity provision really wasn't intended to write the fairness doctrine into law. The courts said the doctrine was simply a matter of FCC discretion. That is, although the reasonable-opportunity provision is identical to the fairness doctrine, those courts simply decided that the law didn't impose a specific obligation on broadcasters to comply. Essentially, they ruled that it was up to the FCC, in its discretion, to decide whether to enforce this particular obligation.

In abandoning the fairness doctrine, the FCC and the courts undermined a major premise of the American broadcasting system—that the public owns the airwaves, and that broadcasters are public trustees. As the Supreme Court explained in its famous 1969 decision, *Red Lion Broadcasting Co. v. FCC,* upholding the fairness doctrine:

"A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others. . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

Although armies of free-market theorists have attacked *Red Lion* over the years, the Supreme Court has repeatedly reaffirmed it—as recently as 2003 in *McConnell v. FEC,* which upheld the McCain-Feingold campaign finance law. Citing both *Red Lion* and the reasonable-opportunity provision of the Communications Act, the Court said that particular requirements of McCain-Feingold would "help assure broadcast fairness" and were consistent with the FCC's "broad mandate to assure broadcasters act in the public interest."

This does not mean that broadcasters have no First Amendment rights, or that equal-time requirements do not burden those rights. But in contrast to other media—where equal-time or access requirements are usually considered unconstitutional—the airwaves are a public trust, and the fact remains that there are many fewer licenses to go around than there are people who would like to have them.

Particularly given today's highly conglomerated media-ownership structure, requiring broadcasters to offer a reasonable opportunity for reply is a necessary, if imperfect, remedy for biased reporting. Television is, for better or worse, the medium on which most Americans rely for political information. And although fairness rules have never applied to cable television—only to broadcast TV (and radio)—this is hardly an argument for abandoning the fundamental principle that for democracy to function, citizens must have access to "the discussion of conflicting views on issues of public importance."

BREAK UP THE POWER

Which leads to the most important point about Sinclair's planned, but failed, use of its enormous power to reach voters and influence elections: Having a government agency decide what is unfair enough to trigger equal-time requirements is tricky and carries the potential for abuse.

The far better solution would be to create more opportunities for diverse viewpoints to be heard—on both broadcast and cable television—by breaking up the media conglomerates, opening up more licensing opportunities for independent nonprofit programmers, and thus depriving media giants like Sinclair of their exceptional power over information. On a level playing field, government intervention in the content of broadcasts would not be necessary.

Thus, the real solution needs to be structural. In the early days of broadcasting, policymakers recognized the public-interest potential of the airwaves, and there were vigorous debates over how much, if any, of the broadcast spectrum should be licensed to commercial companies. Unfortunately, the system soon became overwhelmingly commercial, with results that have only become more clear in recent years, as the quantity and variety of public affairs programming have shrunk. A highly consolidated media industry, driven by profits and responsive to the desires of advertisers, does not supply the breadth of information and debate needed for a healthy democracy.

Structural remedies for this dilemma should include more full-power and low-power broadcast licenses for independent, community-based, nonprofit media, as well as access rules that require commercial broadcasters to share some of their valuable air time with local nonprofits. Funding mechanisms are also crucial to build up the nonprofit media sector so that it can begin to redress the current imbalance between commercial and nonprofit broadcasting, and disseminate alternative political and cultural views.

Public demand and nonlegal solutions can also play an important role. In the case of Sinclair, as it happened, nonlegal sanctions changed the company's original plan. It was not fear of FCC or FEC action, but the unexpected volume of public outrage and the consequent loss of advertising and stock value that caused Sinclair to cancel "Stolen Honor" and replace it with more-balanced fare. This kind of powerful public reaction is another way Americans can further the goals of diverse speech and fair elections.

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