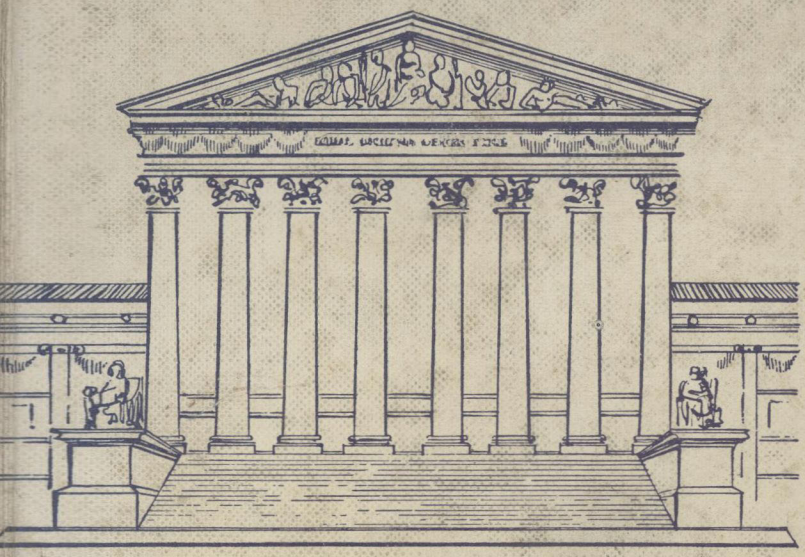

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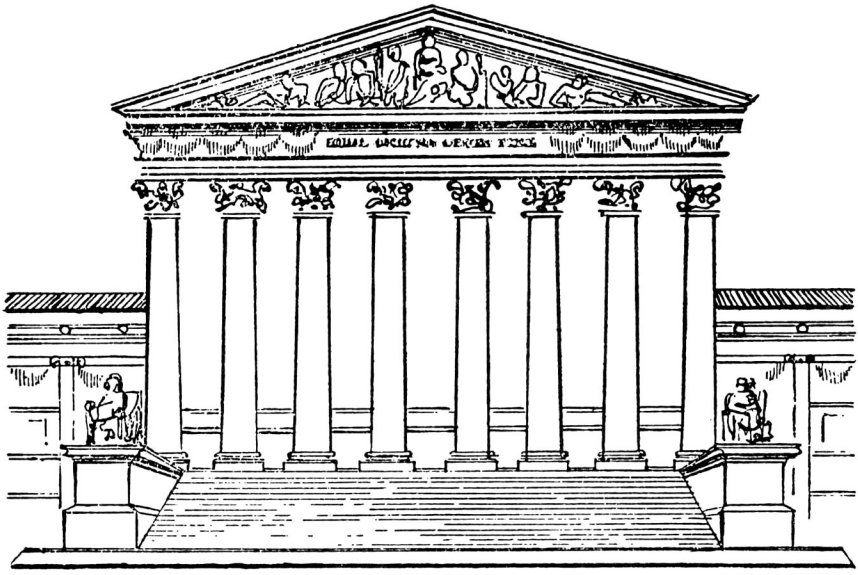

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"Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions . . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."
—Felix Frankfurter

". . . while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. . . . Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them."
—Learned Hand

TO

HANNA C.

For as you were, when first your eye I ey'd,
Such seems your beauty still.

CONTENTS

DANIEL D. POLSBY

F.C.C. v. NATIONAL CITIZENS COMMITTEE FOR BROADCASTING AND THE JUDICIOUS USES OF ADMINISTRATIVE DISCRETION

I. Partnership Shares

To judge from the Supreme Court opinion, *F.C.C. v. National Citizens Committee for Broadcasting* (NCCB),[1] was an ordinary case of judicial review of an administrative agency rule. The Federal Communications Commission (FCC) had decided after a long proceeding that diversity of ownership in the various media of mass communications was important enough to rule that owners of daily newspapers should not, in the future, be licensed to operate

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Author's Note: Several of the cases discussed herein were before the Federal Communications Commission during my tenure as counsel to Glen O. Robinson, who served as Commissioner from 1974 through 1976. Robinson prepared opinions in these cases, usually dissenting. My participation in drafting those opinions was substantial, and the reader should discount for my bias. Grateful acknowledgment must be made to Professor Robinson and to J. Roger Wollenberg and Joel Rosenbloom of the District of Columbia bar for sharing with me their private correspondence concerning a thesis of Robinson's, published as *The Judicial Role*, in Communications for Tomorrow: Policy Perspectives for the 1980s 415 (G. Robinson ed. 1978). William T. Lake of the District of Columbia bar helped me to clarify and formulate a number of the points made herein. The Aspen Institute for Humanistic Studies provided the quiet place and studious atmosphere in which this paper was written. None of the foregoing is chargeable with anything said herein. Indeed, Robinson would probably demur to almost all of it as "rest[ing] simply on verbal filigree." *The Judicial Role*, *supra*, at 420.

[1] 98 S. Ct. 2096 (1978).

broadcasting stations within the newspaper's community. Consistent with its longstanding practice in similar proceedings, the agency made its rule prospective only. Existing newspaper-broadcasting combinations would not be ordered dissolved (with a few minor exceptions). But no new combinations would be allowed to come into existence under the FCC's rule.

The Supreme Court was unanimous, and, on its face, its opinion is without special interest to administrative or constitutional law. Since the goals of promoting diversity are well within the agency's power and the means chosen to effectuate those goals are not unreasonable, the use of a grandfather clause to avoid the necessity of ordering wide-scale divestitures of broadcast stations by newspapers was not an arbitrary manifestation of administrative discretion. Therefore the order of the agency is affirmed in all respects.

But the case assumes a larger significance when evaluated in context. The judgment which it reviewed, that of the United States Court of Appeals for the District of Columbia Circuit, was of sweeping and ambitious import. The lower court had found the FCC's defense of the status quo to be arbitrary and capricious within the meaning of the Administrative Procedure Act and had remanded the docket to the agency to repair this defect. It left little doubt, moreover, that it did not consider the FCC to be at large either to reconsider the cross-ownership policy or merely to refit the same rule with a tidier or more persuasive memorandum of justification. Rather, the Court of Appeals found in the notion of diversity of communications media ownership—which in a related context Judge Learned Hand had called "closely akin to, if indeed it is not the same as, the interest protected by the First Amendment"[2]—a requirement that the FCC justify on reasonable grounds any departure from actions which maximize diversity of communications media ownership. In short, the grandfather clause must be deleted and newspapers must not continue to be licensed to operate television or radio stations hereafter unless the agency explains why the public interest will be served by such variance from the norm of diversity.

The judgment of the Court of Appeals represented what was probably the boldest extension of judicial power over the substantive rulemaking competence of an independent administrative agency. Had the Supreme Court left this judgment undisturbed, the *NCCB*

[2] United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd 326 U.S. 1 (1945).

case, far from being the footnote that it is, would unmistakably have been a license for the District of Columbia Circuit Court to continue to explore a wider and deeper involvement in the substantive policies of administrative agencies. The involvement of the D.C. Circuit in the burgeoning of administrative government has been pronounced over the past generation and, especially, the past decade. In part, no doubt, this increasing involvement has been brought about by judges who have, for the most part, sought out opportunities to affect the course of public policy by rejecting traditionally narrow constructions of standing, ripeness, mootness, and other similar prudential limitations of the judicial power. But an activist disposition is hardly the entire story. The presence of the federal judiciary—and particularly the D.C. Circuit—in the thick of federal administrative policymaking has often been commanded by Congress. Statutory schemes as diverse as the National Environmental Policy Act, the Occupational Safety and Health Act, the Safe Drinking Water Act, the Endangered Species Act, and numerous other laws have made the institution of judicial review a basic, if not the most important, element in guiding the exercise of administrative discretion.[3] In the narrow sense of the term, there is seldom any "law" to apply in characterizing various exercises of administrative discretion once certain basic considerations, such as the agencies' jurisdiction in a given matter, have been decided. But the courts, and most particularly the D.C. Circuit, have not taken the narrowest possible view of their role in the process. They have developed a conception of themselves that amplifies the congressional judgment that Courts of Appeals do, indeed, have an important part to play in the administrative process.

The District of Columbia Court of Appeals' *NCCB* opinion was an integral part of its developing self-definition. The Supreme Court's reversal must be considered in relation to that self-conception. Especially when read in light of a case decided only two months earlier, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[4] the *NCCB* case is an important event in the evolution of the judicial role in administrative government. The Court of Appeals had gone too far, had done (or tried to do) too much, according to the Supreme Court.

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[3] See McGowan, *Congress and the Courts*, 62 A.B.A.J. 1588 (1976).

[4] 435 U.S. 519.

In one sense, to reflect on the proper role for the courts in administrative government is a sterile scholastic exercise. However hard we try, we are not likely to find the theorem which justifies the exercise of judicial or administrative discretion. But, by looking closely at the principles by which discretion is parceled out, we may at least discover the limits of principle fixing the perimeters.

There are, conventionally, two broad questions here. One of them deals with the proper judicial role in the formation of substantive policies; the other concerns the function of a reviewing court in shaping and determining the administrative procedures through which these policies are made. Congress has contemplated and the courts have recognized that in each of these spheres, the reviewing court is entitled to a measure of authority. What the measure of that authority should be in each sphere is debated with vehemence. For the debate is one about political power. One of the assumptions commonly entertained in administrative law (and one that I share) is that the exercise of administrative discretion is a zero-sum game. If more discretion is allocated to the agency, the scope of the judicial function is necessarily less. The converse is necessarily equally true.

In the procedural sphere the most important text is *Vermont Yankee*, which very complexly combines reasons of policy and principle with supposed congressional purposes—either to deprive the Court of Appeals of its long asserted role in influencing agency procedures in the interest of fundamental fairness[5] or, a related congressional concern, to promote the interest of the fundamental political legitimacy of the agency's ultimate product.[6] But the procedural role of a reviewing court is one which I propose to discuss only briefly here. My purpose is to sketch the substantive role that the Court of Appeals has staked out for itself in the formation of administrative agency policy. In particular, I am concerned with the relationship of the FCC with the D.C. Circuit, where most of that agency's review petitions are filed. The give and take between these two branches of government often concerns what both recognize as freedom of speech issues of unfeigned constitutional

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[5] See Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); International Harvester Co. v. Ruckleshaus, 478 F.2d 615 (D.C. Cir. 1973).

[6] See Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (1977); Aeschliman v. United States Nuclear Regulatory Comm'n, 547 F.2d 622 (1976), reversed sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

stature. How the pie of discretion is divided between them will often decide how these issues will be determined. My conclusion is that the court can seldom, if ever, defensibly upset the agency's decisions on how the First Amendment relates to communications policy. And, because the shaping of constitutional policy seems to be a place where a legislative role for the judiciary could most logically be thought to exist, the implication is that the judicial role in all substantive policymaking by agencies should be small. The *NCCB* case carries the seeds of this conclusion. It also suggests that the judicial role should be almost indeterminately small. I assert that these consequences would be an unfortunate development.

II. The Agency and Court Opinions

To understand the larger meaning of *NCCB*, it is helpful to attend first to its smaller meaning. Here one must not only look carefully at the proffered basis for the agency's action but also contextually locate that action within the complex of related FCC policies.

The FCC's concern with "diversification"—*i.e.*, placing limits on the amount of concentration of control in the commercial broadcast industries—goes back almost forty years. In 1941, the Commission enacted its so-called chain broadcasting rules which forbade any one person from operating more than one network at the same time.[7] In the same year, the Commission published rules which forbade anyone from owning more than one AM radio station in a single market.[8] In 1953, the Commission imposed an absolute limit on the number of broadcast properties that a single person might own, regardless of whether any of these were located in a single city. In 1964 and again in 1970, the multiple ownership rules were changed again to favor increasing diversity of ownership. The 1970 rule prohibited common ownership of a radio station and a VHF (Channels 2 through 13) TV station in the same community. All of these decisions proceeded, more or less explicitly, upon two

[7] See National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[8] The rule, generally stated, forbade the licensure of the same person to more than one frequency in a given "service." AM, FM, and TV are each different "services." This would have prohibited one licensee from operating two FM or TV stations as well. At that time, however, these services were still embryonic and of small practical consequence.

related but different premises, one rooted in antitrust policy and the other in First Amendment theory.

In 1970 the Commission issued the *First Report and Order* of the multiple ownership docket in which the *NCCB* matter became the second.[9] The 1970 order announced the so-called one-to-a-market principle which, as eventually modified on reconsideration,[10] prohibited a single applicant from being licensed to operate a VHF TV station in the same market where it was licensed to operate a radio station. Consistent with the Commission's invariable past practice in multiple-ownership rulemaking, the 1970 order was prospective only—*i.e.*, it allowed all existing television-radio combinations to remain in place indefinitely and required that they be broken up only if the ownership of the combined entity changed hands. The Commission explained its 1970 order on two grounds: to foster maximum competition in broadcasting and to promote diversification of programming sources and points of view. Moreover the Commission was concerned with these objectives both in local markets and on a national scale.[11]

If both antitrust principles and First Amendment considerations were on the Commission's mind, however, it is fair to say that the free-speech implications of what it was doing were paramount. The Commission said:[12]

> Basic to our form of government is the belief that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Associated Press v. United States, 326 U.S. 1, 20 (1945). Thus, our Constitution rests upon the ground that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power to get itself accepted in the competition of the market." Justice Holmes dissenting in Abrams v. United States, 250 U.S. 616, 630 (1919).
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> These principles, upon which Judge Learned Hand observed that we had staked our all, are the wellspring, together with the

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[9] 18 PIKE & FISCHER, R.R.2d 1735 (1970).

[10] 21 P. & F. 1551 (1971).

[11] Thus the rules contained both "duopoly" prohibitions—forbidding the ownership of more than one station in one market—and "concentration of control" prohibitions, setting an overall limit on the number of stations which could be licensed to a single person or entity.

[12] 18 P. & F. at 1740.

> concomitant desire to prevent undue economic concentration, of the Commission's policy of diversifying control of the powerful medium of broadcasting. For, centralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use.

The nature of the Commission's concern, then, is evident; but the degree of its concern is difficult to overstress. It went on to declare:[13]

> A proper [Commission] objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and that even 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. . . . In our view, as we have made clear above, there is no optimum degree of diversification, and we do not feel competent to say or hold that any particular number of outlets of expression is "enough."

There is more in the same vein, but it is repetitive. The diversity issue, clearly enough in the Commission's analysis, is a "motherhood" issue. It is important in itself and is seen as important to a variety of other fundamental values as well. Nevertheless, the Commission's chairman, Dean Burch, criticized his colleagues for trivializing an important issue. Whatever the value and importance of the underlying public interests at stake in protecting diversity of ownership in the structure of the broadcasting industry, Burch argued, the part of that interest addressed by a concern for television-radio combinations was not very great and, indeed, was perhaps trifling.

While multiple ownership may be a problem in some small markets without many aural services, Burch said, in most large markets —where the majority of the population resides—diversification of ownership in radio is already ample. "In the Washington metropolitan area there are 37 aural services; in New York, 59, in Chicago, 61. . . . There is a plethora of aural services in all significant markets. Thus, while separating TV from AM or FM might make a

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[13] *Id.* at 1741–43.

contribution in a few cases, it is clearly far from the heart of the problem."[14]

The heart of the problem, according to Burch, was the cross-owned VHF-television-newspaper combination:[15]

> There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources.

The Commission issued a further notice of proposed rulemaking on the same day that the *First Report and Order* was published, and it was Burch's lamp which guided the commission's path on the *Second Report and Order*. Prospectively, the owners of daily newspapers would be ineligible for licensure to operate broadcast stations in the community where their newspaper was circulated. This rule was to enhance competition both in economic markets and in the markets for ideas.[16] As with the *First Report and Order*, the free speech values were seen as the greater: "If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible."[17]

As before, however, the Commission's rhetorical commitments considerably overmatched its resolution to act.[18] In particular, its failure to order the generalized retroactive application of the rule

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[14] *Id.* at 1759–60.

[15] *Id.* at 1760.

[16] 50 F.C.C.2d 1046, 1048 (197x).

[17] *Id.* at 1079. Similar sentiments were expressed *id.* at 1074.

[18] It may seem puzzling that not infrequently there is a considerable gap between what the agency purports to be doing and what it actually does. The reason for this gap is simple enough. The Commission's Reports and Orders are drafted in bureaus by lawyers who generally have little direct contact with the decisionmakers, *i.e.*, the commissioners. The draftsmen rely on the general principles which favor one result or policy over another and are almost always aware of, if not sensitive to, the logical implications of the rules they develop for the larger policies of the national government, and some effort is typically made to refer the agency's rules to that larger context. By contrast, the commissioners are generally political in approach. They care for results and not dicta minted "downstairs," which are, often as not, left unread or only skimmed by them. Results are sometimes changed at the last minute with only minimal changes in the underlying Report and Order being made. Hence, the agency's words and deeds do not always make a comfortable fit.

betrayed an awareness that something less was at stake in the cross-ownership arena than the survival of democracy in this hemisphere. And still open was the question, What precisely was moving the Commission to act at all? Was this problem serious? If it was as serious as the Commission's language suggested, how could the divestiture remedy be shunned? And if the divestiture remedy was to be avoided, what was the justification for the Commission's actions? There was in its order a certain unpersuasiveness, as partly reflected in two matters, one small, the other large. The small matter is reflected in a tragicomic exception the Commission made to the general prospectivity of its order. In a few so-called egregious cases, divestiture would be required within five years. While the communications oligopolies in highly concentrated markets like New York, Chicago, Atlanta, San Francisco, and Washington, D.C. were to remain unaffected by the Commission's prodiversity sentiments,[19] no such leniency would be shown to the monopolies in Owosso, Michigan; Norfolk, Nebraska; Effingham, Illinois; and a handful of other similar small communities. The conveyed impression of an administrative agency at its work is decidedly unattractive: It is a bulldog of stern principle toward the weak, a spaniel of complaisance toward the strong.

In a larger sense a feeling of administrative arbitrariness—or at least a failure to have thought the issue through—is conveyed by the explanations put forward by the agency for not ordering wide-scale divestitures. The reasons given by the agency for its diffidence were a fear of impairing the stability and continuity of local broadcasting service and the related concern that large-scale divestiture could do injury to the FCC's expressed policy favoring the local ownership of broadcast stations. But these reasons stand up to analysis very poorly. The local ownership policy, for example, has never been thought of by the Commission as much more than a decision rule for choosing

[19] At the time the Commission spoke, Washington, D.C. was one of the most concentrated large communications markets in the country. One network-affiliated station was owned and operated by the NBC network, the second affiliate was owned by the city's morning newspaper, and the third by the afternoon paper. An independent VHF station was owned by Metromedia, one of the largest group owners. All of the network-affiliated stations had powerful AM radio affiliates as well. Several other major markets were similarly concentrated. The shape of the industry at that time is described and analyzed in BAER, GELLER, GRUNDFEST, & POSSNER, CONCENTRATION OF MASS MEDIA OWNERSHIP: ASSESSING THE STATE OF CURRENT KNOWLEDGE (1974); and BAER, GELLER, & GRUNDFEST, NEWSPAPER-TELEVISION STATION CROSS-OWNERSHIP: OPTIONS FOR FEDERAL ACTION (1974).

between two otherwise identically qualified applicants for the same frequency.[20] Even in this limited application the Commission has all but abandoned local ownership as a criterion on which anything of importance should be allowed to turn.[21] After all, broadcast stations are managed and programmed by full-time staffs. The economic, sociological, and related concerns which are supposed to affect station performance should remain constant no matter where the capital to buy the station came from. This policy then, will bear little weight as a justification for doing anything let alone refraining from implementing a policy whose success is said to constitute a condition for the proper functioning of a democratic society.

The Commission's professed concern with dislocation and discontinuity of operation is likewise difficult to credit. It is hard to see how a divestiture order carrying a five-year grace period, itself subject to protraction by waiver for good cause, would be likely to create any serious disruption in the operation of a broadcast station. Stations are never static affairs: management, programming, sales, and technical personnel change; news and weather people come and go; every fall, winter, and spring, program schedules are shuffled. These normal incidents of change in the everyday life of a station need not be and generally are not disruptive in themselves. Neither does a change in ownership need to be disruptive. Of course it may be. New owners, with their new brooms, could, if they chose to do so, march through newly acquired properties sweeping away all continuity with the past and nurturing new promise for the future. Not surprisingly, few new owners have seen such radicalism to be in their financial interest. There is nothing which compels them to break sharply with the traditions of the past. Yet, if such changes are believed to be in the interest of the new ownership because it will attract a larger or more contented audience or for other similar reasons, this would hardly be "disruptive" but would rather merit being called an "innovation" or "improvement," nothing for the FCC necessarily to abjure in radio or television. The point is not, of course, that creating opportunities for new owners is a good in itself. There is no reason to believe this apart from certain assumptions about the intrinsic goodness of ownership diversity. But neither is it an evil. The Commission's fear of disruption apparently has its

[20] 1 F.C.C.2d 393 (1965).

[21] Cowles-Florida Broadcasting, Inc., 60 F.C.C.2d 372 (1976).