

Remarks by Commissioner James H. Quello
Before The Media Institute
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I want to congratulate the Media Institute for the strong First Amendment leadership that it has provided on many public policy issues that are being debated at the FCC and in the courts.

It is critical for independent organizations like the Media Institute to be able to defend the First Amendment for the sake of the public -- and the Republic. Otherwise, these points of view are not always heard. It is not that those in corporate positions do not believe in defending their First Amendment rights. But those who depend on the FCC for licenses and other regulatory approvals are not always free to advocate a strong principled position in the face of some government opposition. As Napoleon Bonaparte said, "A man will fight harder for his interests than for his rights."

I am disappointed that some current and former public officials have disparaged those in the industry that have raised First Amendment questions. A former, well-known FCC Chairman, for instance, has said that if ever a word were in need of a rest, "censorship" is that word. Others have castigated broadcasters for hiding behind the First Amendment.

Personally, as a long-time public official, I think such views are either outdated or unseemly. Every FCC Commissioner and every employee of the agency takes an oath to uphold the Constitution of the United States upon taking office. It is simply not right to treat the First Amendment as an inconvenient impediment to regulatory empire building. I think it is more becoming for public officials, who would use the force of regulation to dictate what speakers should say, to at least be sensitive to the idea that they are treading on Constitutional turf.

Quite frankly, Constitutional rights are deliberately meant for people to hide behind. The framers of the Constitution designed the Bill of Rights as a shield to protect the people from dictatorial government decisions or zealous officials. Assuming that all FCC Commissioners (or government officials) will automatically show restraint is not the answer. There is always the possibility that someone vested with power will inadvertently (or verterntly) cross the line. That is what the First Amendment wants to prevent.

Actually, if there is a word in need of a rest, it is not the word "censorship," it is the word "voluntary." It is fantasy to suggest that corporate officials with billions of dollars on the line and who must come to the FCC as supplicants can effectively resist the well-timed urgings of government officials who have persisted in well-articulated programming demands. Acquiescence to such urgings is hardly voluntary.

I think it behooves all of us in government to remember that the Constitution is the law that the government must obey. No government official, and no federal agency, is above that law. As former Chief Judge David Bazelon of the U.S. Court of Appeals for the D.C. Circuit said 20 years ago, "the use of 'raised eyebrow' tactics presents serious issues which should at least engage our undivided attention as we review communications policy and the Constitution."

It certainly engaged my attention because I supported Chairman Dick Wiley in our controversial FCC "Family Viewing Hour" years ago. It received harsh court reviews and was placed in limbo. At that time, I preferred "jawboning" or "raised eyebrow" to direct government mandates which offend Constitutional rights. I once explained it as the fine line between exhorting or extorting . . . It is a matter of timing and situations. Certainly, strong exhortations at a license transfer time on a contested, undecided FCC issue, raises justifiable concerns of impropriety and possible governmental extortion. A basic question comes to mind: "Do you think government should tell broadcasters what kind and amount of programming to air?"

But, let's get back to the principal contention in government-mandated program requirements -- Constitutionality.

The Media Institute filed pertinent comments with the FCC. It stated:

The Commission probably echoed Congress in listing specific examples of government approved educational programs for children. The legislative history provides a wealth of examples of children's programming that is educational and informational. These include "Fat Albert and the Cosby Kids" (dealing with issues important to kids, with interruptions by host reinforcing purpose of show), "CBS Schoolbreak Specials" (original contemporary drama educating children about the conflicts and dilemmas they confront), "Winnie the Pooh and Friends" (show based on books designed to encourage reading), "ABC Afterschool Specials" (everyday problems of youth), "Saved by the Bell" (topical problems and conflicts faced by teens), "Life Goes On" (problems of a retarded child, emphasizing pro-social values), "The Smurfs" (pro-social behavior), "Great Intergalactic Scientific Game Show" (basic scientific concepts), and "Action News for Kids" (weekly news program for and by kids). Where determinations of whether a program qualifies as "educational and informational" are in doubt, we will expect licensees to substantiate their determinations.

Then, in what many lawyers considered a First Amendment affront, the Commission volunteered that the specifically named programs have received the government stamp of approval for broadcast.

Listen to what the Commission said:

We will rely on the guidance given in the legislative history, including the specific examples cited above, in ruling on the sufficiency of such demonstrations [of whether a program qualifies as educational and informational].

Thus, an illustrative list has, in the wink of a bureaucrat's eye, been transformed into a laundry list of government approved shows -- something that was never intended by Congress and something that would never be approved by any court.

The programs listed above and many others are among the many children's programs scheduled by broadcasters. Some reporters or exponents of advocacy journalism single out examples of listed programs of questionable educational or informational value while conveniently forgetting to mention that broadcasters also list many more programs that definitely are educational or informational. For example, it is relatively easy for a broadcaster in listing seven or eight qualified programs to list one that an opposing advocacy group might find unqualified. After all, it is a very subjective judgment. It is also a judgment that must be questioned when a leading proponent of "market failure" and the need for more children's programming has characterized "It's Academic" as a game show rather than a children's educational program. But, FCC Commissioners casting judgments on what constitutes acceptable children's television programming for government approval constitutes a First Amendment intrusion in itself.

However, it is time to balance a one-sided Washington Post article (10/13/95) that selectively presented 14 questionable children's programs listed by broadcasters to the exclusion of many others. None of the 72 programs listed below that are currently being broadcast appeared on the Washington Post list. These programs include many mentioned in the legislation and in legal filings at the FCC. They provide a more balanced, positive view of numerous educational/informational programs available to children.

Fat Albert and the Cosby Kids	Syndicated
It's Academic	WRC-TV Washington & other stations
CBS Schoolbreak Specials	CBS
ABC Afterschool Specials	ABC
Great Intergalactic Scientific Game Show	Syndicated
Action News for Kids	"
Where on Earth is Carmen Sandiego	Fox
Saved by the Bell	NBC
Bill Nye the Science Guy	Syndicated

Winnie the Pooh and Friends	Syndicated
The Smurfs	Syndicated
The Magic Adventures of Mumfie	Fox
Jim Henson's Animal Show	Fox
Johnson and Friends	Fox
Rimba's Island	Fox
Budgie the Little Helicopter	Fox
Free Willy	ABC
Fudge	ABC
The New Adventures of Madeline	ABC
ABC Weekend Specials	ABC
Beakman's World	CBS
National Geographic's Wild Animals	CBS
Life Goes On	Syndicated
California Dream	NBC
Hang Time	NBC
The Fox Cubhouse	Fox
Taking It Out	Fox
Watch This	Local, Seattle, WA
The Magic Door TV Theatre	Channel 2, Chicago
Hang on to the Dream	WDIV, Detroit
News to Use (for kids)	KTRV, Tampa
Talk Box	WISC-TV 3 Madison, WI
Know TV (weekly magazine/12-16 age group)	Wish TV Orlando, FL
KCNC-TV News for Kids	Denver, CO
Captain Bob	WCVB-TV, Boston
A Likely Story	WCVB-TV, Boston
News 4 Kids	Syndicated
Fast Forward	WPVI Philadelphia
Capelli and Company	Hearst Broadcasting
Nick News	Syndicated
Real News for Kids	Syndicated
Jack Hanna's Animal Adventure	Syndicated
Madison's Adventure, Growing Up Wild	Syndicated
Sesame Street	PBS
Kid's Songs	PBS
Story Time	PBS
National Geographic Television	All NBC stations
Specials on African Americans--	
Hispanics and History	NBC
Feed Your Mind	Fox Syndicated
Not Just News	Fox Syndicated
Animal Adventures	WPLG/ABC
Growing Up Wild	WCIX/CBS

Name Your Adventure	WTVJ/NBC
Gladiators 2000	Syndicated
Dial-A-Teacher	PBS
Jack Houston's Imagineland	PBS
Magic School Bus	PBS
Mr. Roger's Neighborhood	PBS
Puzzle Place	PBS
Barney	PBS
Reading Rainbow	PBS
By Kids, For Kids	WPLG/ABC
Adventures in Wonderland	Syndicated
Blinky Bill	Syndicated
Captain Planet	"
Zoo Life	"
Pick Your Brain	"
World of National Geographic	"
What's Up Network	"
Peppermint Place	"
Sing Me a Story	"
Happy Ness	"
Jelly Bean Jungle	"

Along with the 73 educational/informational programs listed above, there are many local short vignettes with positive educational or pro-social messages that are not included in the list.

Today, there is a superabundance of program choices -- over 1500 full power television stations, including 4 networks, 2 additional emerging networks, 363 noncommercial educational stations, and more than 1600 low power community stations. The 1600 community stations claim that 90% broadcast children's programs and 74% carried extensive children's programs.

Broadcast television is not the sole dominant player in the video marketplace any more. Today, cable television reaches 97 percent of all television homes and 63 percent of households subscribe. Cable's 135 program networks, with 60 more in the planning stages, have brought an undreamed-of diversity of programming that responds to virtually every conceivable want and wish. DBS, MMDS, and, soon, video dialtone systems will augment and extend this array of programming. Also vying for the hearts and minds and eyes of the viewer are the Internet and VCRs, which are now in 82 percent of all homes.

The notion of a general marketplace failure in children's programming is further refuted by the public's willingness to subscribe to cable services like the Learning Channel, Discovery, Nickelodeon, Arts and Entertainment, the Disney Channel and others. In addition, Children's Television Workshop has announced plans to form a new cable channel. Also, most networks have announced future plans for increasing both children's and family value programming.

Then too, let's not forget that numerous educational and informational children's programs are available on VCR tapes, which can be played over and over in the 82% of homes that now have VCRs.

With this incredible menu of program choices, the main legislative and regulatory thrust today must be toward competition and deregulation -- not program regulation and First Amendment intrusion. In fact, we are fast approaching the millennium when competition will replace the need for regulation -- a long-term goal sought by both Congress and the FCC.

However, deregulation doesn't seem to be what some government officials have in mind. One recently equated the public interest with, and I quote, "specific, concrete, and meaningful duties" imposed on broadcasters. These are, of course, code words for specific quantitative programming requirements. If this is a deregulatory "new regime" at work, thank God for Congress, the federal courts of appeal, the Supreme Court, the Media Institute, the Radio-TV News Directors Association and editorial pages of newspapers and magazines.

Broadcasting & Cable and Electronic Media Magazine have been especially supportive in defending media First Amendment rights. An editorial in this week's issue of Broadcasting & Cable Magazine is right on point. The last paragraph reads "Come to think of it, considering all the children's fare available in all TV media, perhaps the time has come to repeal the Children's Television Act of 1990 rather than ask the FCC to make it worse. This may be the moment to declare victory and get out."

Any activist claim of a "marketplace failure" in children's programming is a farcical notion in today's multichannel, multi-faceted era and represents only the viewer's failure to locate the desired programs.

Thus, it is increasingly more difficult, both logically and legally, to justify legislation or additional regulation imposing program restrictions or quantitative children's educational requirements on broadcasters when a great and ever-increasing variety of program choices are available to the public for just a twist of the dial or the insertion of a VCR tape.

The most recent NAB survey of 559 TV stations, the most comprehensive survey to date, indicate that broadcasters are now averaging 4 hours programming weekly and that there has been a significant increase in children's programming from 1990 to 1994. For its research purposes, the NAB used the government's definition of educational/informational TV programming as "programming originally produced and broadcast for an audience of children 16 years old and younger which serves their cognitive/intellectual or social/emotional needs."

For all practical purposes, the fight over additional children's programming is over. It is counter-intuitive and counter-factual to believe that licensed broadcasters, ever sensitive to government requirements, would not willingly comply with the Children's Television Act. The significant increases were achieved without objectionable First Amendment encroachments of government-mandated, quantitative program encroachments or social contracts.

Overall, there is one all-important, overriding principle that transcends the problem of mandating an additional three hours per week of TV children's programming in the existing multichannel superabundant TV program universe in which broadcasters already exceed three hours per week. It also transcends the minor arguments over the relative merits of conflicting program surveys. This all-important principle is whether a government agency, controlled by political appointees, should have the power to impose its quantitative and qualitative programming will on the most influential news and entertainment media in the nation. The answer is a resounding First Amendment "No" -- particularly when the government-mandated quantitative requirement is measured by broadcasts of government-approved programming or type of programming.

The Supreme Court in the summer of 1994 issued a most significant broad First Amendment ruling that quantitative program advocates avoid like vampires shunning the cross. In ruling on the 1992 Cable Act, the Supreme Court stated, and I quote:

The FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations. The Commission may not impose upon them its private notions of what the public ought to hear.

An implausible counterargument to this Supreme Court statement seems to be that the courts have supported time constraints to provide children a safe harbor from indecent programming. However, it is a quantum First Amendment leap from time constraints to provide a safe harbor for children to specific, government-mandated quantitative program requirements for government approved programming.

I closed my speech to the Chicago FCBA with the statement: "Ignoring the surveyed facts of a substantial increase in children's programming, lacking Congressional approval or Court precedent, the regulatory activists are playing the emotional C (children's) card for all it's worth. From a First Amendment perspective, they are dealing from the bottom of the deck."

And that's the way it is, at least with me and I trust with you.

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