Fine Tuning the Federal Government's Role in Public Broadcasting

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Introduction

In 1967 the federal government assumed a key role in the development and support of noncommercial broadcasting. Recognizing the substantial benefits that Americans could derive from adequately funded noncommercial television and radio broadcasting, Congress joined the President in a commitment to make the federal government a prime supporter of enlightening and entertaining programs, but decidedly different from those offered by commercial stations.(note 1) The principal legislative vehicle for this increased support was the Public Broadcasting Act of 1967 (Act).(note 2)

Under the Act, both existing and new noncommercial stations could qualify for grants from the Corporation for Public Broadcasting (CPB),(note 3) the entity established to receive and distribute most of the federal appropriations for this activity. CPB was expected to provide a large portion of the funds used to produce programs and to establish interconnection facilities for qualified entities rendering noncommercial broadcast services to the public.(note 4)

Although local station independence and responsibilities were legally protected, the federal government, through CPB, would be able to influence programming generally by its decisions concerning the purposes and qualifications for grants.(note 5) The federal government's importance to the enterprise has exceeded its share of the total cost of operating the system.(note 6)

Changes in the executive and legislative branches have subjected the stream of federal funding to challenges and threats that undercut creativity and some of the lofty goals of public broadcasting.(note 7) In 1992 statements in Congress and the press regarding proposed funding authorizations raised issues that will demand more attention in the future.(note 8) Some political conservatives argued that federal funding of public broadcasting is unnecessary and inappropriate. They argued that such funding has been used to support politically biased and, occasionally, indecent programming. Some critics fault the system for being elitist, and for failing to serve the diverse needs and interests of all Americans.(note 9) The system's failure to achieve diversity in employment is another lingering irritant.

Although there are statutory provisions addressing most of these issues--at least in general terms--a narrower and more directed role for the federal government (via CPB) would eliminate some of the perceived problems. Currently, federal funds are used for a wide range of activities and facilities. Given the variety of responsibilities imposed on CPB, and the substantial costs associated with each such activity, reexamination of the nature and limits of federal participation in public broadcasting is appropriate.(note 10)

With nonfederal sources providing more than 80 percent of the system's financial support,(note 11) and with major portions of the federal funding's being funneled directly to local stations for general purposes,(note 12) it appears that CPB could be required to restrict its program grants to services designed to serve children, minorities, and other underserved groups.(note 13) By so restricting the use of federal programming funds, CPB would have less reason to be involved in questions regarding the use of nonfederal funds for other creative and informational programming. The constitutional issues raised by the 1992 authorization legislation would be avoided. Nevertheless, all such programming would remain subject to the standards of decency and fairness imposed on all public broadcasters by local supporters, relevant statutes,(note 14) and implementing regulations of the Federal Communications Commission (FCC or Commission).(note 15) Further, clarification and enforcement of station obligations regarding equal employment opportunities would help the system achieve its stated objective of diversity.(note 16)

Competing demands for federal funds will continue. Suggestions that revenue be raised by levying taxes on the sale of radio and television receivers or by imposing fees on spectrum use or assignments, however, deserve new attention only if major increases in federal contributions to public broadcasting are contemplated.(note 17)

I. Background

For fifty years, beginning in 1917, noncommercial broadcasters served the special interests of academic, religious and other nonprofit institutions, and private groups.(note 18) These stations operated without the benefit of network arrangements for access to, and timely broadcast of, suitable programming.(note 19) While the potential of over-the-air broadcasting as an educational and cultural tool was well recognized, programming, interconnection, and national organization were underfinanced or nonexistent.(note 20) For the public to derive maximum benefits from the noble efforts of pioneering educators and others, more federal attention and support were needed.(note 21)

Although too late to allot specific segments of the AM band to noncommercial broadcasting,(note 22) the FCC did allocate portions of the FM band(note 23) and specific television channels for that purpose.(note 24) Thus, applicants for noncommercial FM and television licenses were not required to compete with commercial interests for frequency assignments, resulting in a substantial growth in the number of noncommercial stations. Such expansion, led by educational and community organizations, was further encouraged by the Educational Television Facilities Act of 1962, which authorized federal matching grants for the construction of educational TV stations.(note 25)

As more broadcasting facilities became available, the need for programming that satisfied the missions of noncommercial broadcasters grew more compelling. The use of the stations to broadcast classical music, instructional programming, and local cultural or community events fell far short of the aspirations of Americans who sought a meaningful alternative to the entertaining, but generally uninspiring, programs offered by commercial stations or networks. To achieve the desired alternative programming, larger sums of money were required. At this juncture, the Department of Health, Education, and Welfare, already involved in administering direct federal support to educational television, sponsored a conference entitled *National Conference on Long Range Funding of Educational Television Stations*, organized by the National Association of Educational Broadcasters.(note 26) Subsequently, actions by participants in that conference led to the formation, in 1965, of the Carnegie Commission on Educational

Television.(note 27)

In 1966 the Ford Foundation, responding to an FCC inquiry regarding the domestic use of communications satellites, submitted a dramatic proposal recommending the creation of a nonprofit corporation to operate domestic satellite facilities for use by all television broadcasters.(note 28) Some of the savings derived from using satellite facilities, rather than terrestrial facilities, would benefit commercial broadcasters in the form of lower interconnection rates. Another part of the savings would provide free interconnection services to noncommercial networks. Any excess would support programming for educational television.(note 29) Although the FCC did not adopt the Ford Foundation's proposal, it drew important national attention to the potential of noncommercial television and the substantial funding that would be needed to realize that potential.

Notwithstanding the dominant position of educational institutions in early noncommercial radio and television, the concept of educational broadcasting was expanding.(note 30) With increased involvement of community groups, state and local governments, and audiences, a broader vision of desirable alternative programming was being adopted by interested leaders and contributors.(note 31)

In short, many individual and group efforts culminated in the January 1967 report issued by the Carnegie Commission, *Public Television: A Program for Action*.(note 32) The report contained recommendations that looked toward the establishment of "a well- financed and well-directed educational television system, substantially larger and far more pervasive and effective than that which now exists in the United States."(note 33) The Carnegie Commission called for cooperation among federal, state, and local authorities;(note 34) establishment of a Corporation for Public Television to receive and disburse federal and private funds;(note 35) and congressional support through authorizing legislation and appropriations.(note 36) The report also proposed a manufacturers' excise tax on television sets to support the Corporation's television programming,(note 37) station facilities,(note 38) interconnection facilities,(note 39) research and development,(note 40) technical experimentation,(note 41) training,(note 42) and recruitment.(note 43) The independent, nongovernment corporation would protect the stations' creative and political freedoms from federal interference; the public would obtain the real benefits of national network arrangements, including ready access to programs of broad interest.

The Carnegie Commission probably adopted the term "public television"(note 44) in place of "educational television"(note 45) to gain a perceived public relations advantage and to avoid creating the impression that the activity would be limited to instructional television or formal education. Educational radio was effectively ignored.

Whatever form and detail might eventually emerge from a favorable congressional response to the Carnegie Commission's report, it was clear that substantial financial contributions would be expected from the federal government.(note 46) President Johnson and Congress responded promptly with the Public Broadcasting Act of 1967.(note 47)

II. The Public Broadcasting Act of 1967

The combination of the Johnson presidency's commitment to improving American education, the receptiveness of Congress, the sponsorship of the Ford Foundation, the Carnegie Commission's report, and the persuasiveness of several highly regarded educators across the country created an opportunity for a major advancement. The advance would change a growing number of loosely allied educational television and radio stations into an interconnected system of local noncommercial broadcast stations serving a variety of public needs. The public would obtain access to national and local programming that could be superior in many ways to the lowest-common-denominator offerings of commercial broadcasters. Using the 1967 Carnegie Commission report as a base,(note 48) the Administration submitted a proposal to Congress.(note 49) The legislative result, the Public Broadcasting Act of 1967, has been amended several times since,(note 50) but generally without significant adverse impact on the public broadcasting enterprise.

Using an expansive definition of public radio and television services and technologies, Congress declared that the growth and development of these resources would be in the public interest and that the federal government should assume a significant share of the responsibility for such endeavors.(note 51) Anticipated benefits included program

"diversity and excellence"(note 52) and "programming . . . that addresses the needs of unserved and underserved audiences, particularly children and minorities."(note 53) Further, Congress decided that a private corporation would be the proper vehicle to distribute broad financial support to appropriate public telecommunications entities.(note 54) Since judgments would be necessary concerning program content and the nature and location of facilities, a private corporation would shield such decisions from the political interference that might result if control of appropriated funds were placed in the executive branch. Accordingly, Congress authorized the establishment of CPB,(note 55) and directed it to "facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation . . . will be made available to public telecommunications entities."(note 56)

In addition, Congress directed CPB to support the establishment and development of interconnection systems and the grouping of public telecommunications entities,(note 57) exercising minimum control of "program content or other activities."(note 58) CPB was authorized to use a rather full range of business means and practices to carry out its mission.(note 59) The Corporation is prohibited, however, from owning or operating any of the primary facilities used in broadcasting, and it is not permitted to produce, disseminate, or schedule programs.(note 60)

Although CPB is a private corporation, the President, with the advice and consent of the Senate, appoints the members of the Corporation's bipartisan board of directors to serve for limited, staggered terms.(note 61) Generally, meetings of the board and its committees are open to the public,(note 62) and the Corporation's financial management and records are subject to various public reporting and auditing requirements.(note 63)

Although federal contributions to public broadcasting via CPB are based on a matching grant formula, the limitations on such funding are currently determined by the amounts of federal funds authorized and appropriated for specific fiscal years.(note 64) Moreover, the allocations of such funds have been increasingly controlled by legislative formulas and directions that have severely narrowed the discretion of CPB.(note 65) The Act, with minor exceptions, protects the Corporation from interference or control by federal departments or agencies, especially in matters affecting program content or distribution of programs and services.(note 66)

Among the many detailed changes made in 1988, Congress added a reporting requirement regarding the provision of services to "minority and diverse audiences"(note 67) and the use of "radio and television . . . to help these underrepresented groups."(note 68) Targeted groups included "racial and ethnic minorities, new immigrant populations, people for whom English is a second language, and adults who lack basic reading skills."(note 69) This obligation supplements earlier equal employment opportunity provisions that authorize and direct the Secretary of Health and Human Services to prescribe and enforce rules applicable to most public broadcasting entities.(note 70)

Thus, in the first twenty-five years of *public* broadcasting, the legislative scheme relied primarily on the interposition of a *private* corporation and other organizational arrangements to preserve the independence of public broadcasting entities and to promote inclusiveness, rather than elitism, in the programs and activities of those entities. Legislative and executive control of a significant portion of the funding for public broadcasting, as well as federal regulation of all broadcasting, however, leaves room for some political influences to operate in the enterprise.

III. Legislative Responses to Current Issues

Insofar as federal legislation is concerned, a serious challenge to public broadcasting arose in 1991 when the Senate began hearings on a bill to authorize appropriations for fiscal years 1994, 1995, and 1996. Several conservative senators, encouraged by other conservative public figures, argued that some programming was nonobjective, unbalanced, indecent, or elitist, and that federal funds should not be contributed thereto.(note 71) Supporters of the enterprise argued just as vigorously that the bulk of available programming was informative, educational, objective, and balanced.(note 72) The supporters also argued that, in any event, the choice of programs was subject to local control as contemplated by the original legislation.(note 73) The resulting legislation, enacted in 1992,(note 74) incorporated compromises designed to mollify the challengers, at least temporarily.(note 75)

An amendment of the Communications Act required the Federal Communications Commission to prohibit both commercial and noncommercial broadcasting of indecent programming during specified hours of the day.(note 76) The

amendment, however, did not change the FCC's definition of indecency.(note 77)

With respect to objectivity and balance, the legislation effectively gave CPB's board of directors the regulatory duties to receive public comments,(note 78) review "national public broadcasting programming,"(note 79) take necessary steps to facilitate objectivity and balance,(note 80) "disseminate" information that would address CPB's concerns,(note 81) and submit annual reports on the subject to the President for transmittal to Congress.(note 82) Further, under the heading "Consumer Information," the legislation requires credits in public television programs disclosing when CPB funding is involved. When such credit is necessary, it must also disclose that CPB is partially funded from federal tax revenues.(note 83)

The charge of elitism appears to have been addressed by new emphasis on educational programming,(note 84) services to underserved audiences,(note 85) and new requirements (backed only by certifications and reports) that most stations comply with FCC equal employment opportunity regulations.(note 86)

The legislation assigned CPB two new initiatives. Finding that "many of the Nation's children are not entering school `ready to learn,'"(note 87) Congress directed CPB to propose the most effective means to implement a "ready-to-learn" television channel.(note 88) Similarly, CPB was called upon to promote "distance learning projects in rural areas" in order to "provide schools in rural areas with advanced or specialized instruction not readily available."(note 89)

In essence, Congress chose to deal with difficult issues by making minor adjustments, restating broad goals, and then delegating the responsibility for achieving those goals to CPB--a better-informed organization. CPB may well be in the best position to undertake a few of these tasks, but there are good reasons to question the constitutionality or feasibility of other very important assignments.

Objectivity, balance, and diversity are words that evoke visions of fairness and inclusiveness when implementation is placed in the "right hands," (our own, or the hands of other "right- thinking" individuals). Unfortunately, objectivity, balance, and diversity are vague goals. Also, even though many positions are labeled "conservative" or "liberal," disagreements abound within those broad classifications. Beyond such simplistic partisanship, there are numerous other overlapping or contradictory positions to be considered. Although this country is governed under a two-party system, other groups and special interests are becoming more vocal; accordingly, fairness may be exceedingly difficult to achieve. Fairness cannot be fully accommodated and protected by an underfunded public broadcasting system that is charged with responsibility for supporting a variety of noncontroversial presentations.

Perhaps more to the point, there are some serious conflicts that cannot be avoided. Objectivity in a given controversy may actually favor a particular protagonist. Balance in national programming may be honestly perceived as unfair to audiences in certain localities. Any attempt to impose national standards on noncommercial radio and television licensees interferes with their rights and obligations to address the needs and interests of the communities in which they operate.(note 90)

Lacking statutory definitions of objectivity, balance, and diversity, their meanings and influence on future programming now depend largely on the ad hoc determinations of CPB(note 91) and, ultimately, on the strongest voices in Congress. Thus, it is entirely possible that no clear standards will ever emerge or that interpretations will shift without notice as CPB's board members and staff personnel change. On the other hand, if these key words were understood to have the same meanings that they have acquired in common usage, then one would be forced to return to the problem of vague and inconsistent directions.

A. Objectivity and Balance

Can objectivity, the quality of being free from personal feelings or prejudice, always be harmonized with balance, the state of equilibrium? Certainly balance, as perceived by Congress, suggests presentation of the significant sides in a controversy, not simply the elimination of biased contentions. Nonetheless, balance must be regarded as something less than "equal time." If equal time were intended, Congress would have used the terminology applicable to broadcasts by candidates for public offices, that is, "equal opportunities"(note 92) for other competing views of a controversial

subject. Objectivity, which relies on demonstrable facts, may actually be one-sided; it may defeat an honest attempt to produce a balanced presentation of important ideas, opinions, or prejudices.

Moreover, decisions regarding balance in programming, when made by a national board, diminish local station independence, a cherished privilege of all noncommercial and commercial station licensees.(note 93) As such balancing is done on a national basis, the relevance of resulting programming to the needs and interests of individual communities will likely suffer.

Apart from these basic incongruities, the responsibility of CPB is to:

> *facilitate the full development of public telecommunications* in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, *with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature*.(note 94)

This goal is multifaceted and may well exceed the reach of the best-intentioned decisionmakers. In *Accuracy in Media, Inc. v. FCC*,(note 95) this language was described as "hortatory"(note 96)--a congressional charge to CPB, unenforceable by any government agency. Because CPB and the public broadcasting enterprise are still dependent on Congress for future authorizations and appropriations, they must strive to minimize objections based on alleged failures of the system to satisfy any of the ideals contained in the quoted guideline or in any other part of the Public Broadcasting Act that may receive congressional attention.(note 97)

In the Senate debate regarding the Public Telecommunications Act of 1992,(note 98) several senators, by expressing very strong objections to the content of some programs that the system had broadcast, were able to negotiate an enhanced role for CPB regarding content control in public broadcasting. Now, rather than merely "facilitating" the idealistic legislative mission assigned to public broadcasting,(note 99) CPB is obliged to receive public comments on the system's performance.(note 100) Based on these comments and its own review,(note 101) CPB must "take such steps in awarding programming grants . . . [as] it finds necessary to meet the Corporation's responsibility . . . including facilitating objectivity and balance in programming of a controversial nature."(note 102) To achieve this objective, CPB must engage in a form of jawboning(note 103) and report to Congress.(note 104)

By performing these functions, CPB has become a regulatory arm of the federal government. Lamentably, this new regulatory scheme is not limited to federally funded programming. It covers all "national public broadcasting programming."(note 105)

Though this legislative effort to assure neutrality in public broadcasting may appear to be a justified constraint on the use of tax revenues, the new regulatory scheme raises important constitutional issues. By establishing CPB as the objectivity-and- balance enforcement agent for the federal government, the nexus between government and CPB is closer than ever. Assuming that CPB is now a state actor,(note 106) its coercive powers over public broadcast programming must be subjected to constitutional scrutiny under the First Amendment.(note 107)

Courts have ruled that Congress could not prohibit editorializing by public broadcasters,(note 108) that public television licensees could not be compelled to broadcast a particular program (previously scheduled and canceled),(note 109) and that noncommercial stations receiving federal assistance could not be required to "retain an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed."(note 110) Accordingly, when CPB threatens to deny or withhold program grants to pressure station licensees to present or refrain from broadcasting particular programs or series of programs, a conclusion that such coercion is unconstitutional would be fully consistent with prior decisions in this arena.

If such control of public station licensees were required to deal with controversial programs, whether or not such programs were directly subsidized by CPB, the rationale for such control would almost certainly apply to commercial licensees. The failure to include all broadcasters in any such regulation raises equal protection problems;(note 111) however, if this new regulation were not designed to protect radio and television audiences, then it would qualify as an unconstitutional condition.

In these circumstances, CPB (or any other proponent of CPB's added role as enforcer) must be prepared to justify this exercise of coercive influence over programming not directly funded by CPB. The Corporation must also be prepared to explain why still-to-be- defined interpretations of objectivity, balance, excellence, high quality, diversity, creativity, and innovation should be applied to programming funded by a variety of nonfederal sources, with or without federal assistance. If Congress intends to support only balanced programming, then CPB's content controls should be limited to federally funded programs. But if, as it appears, the intention were to exercise control over *any* program distributed or disseminated by *any* entity receiving federal funds for public broadcasting purposes, consideration of the constitutionality of such control would be in order.(note 112)

Considering CPB's obligation to facilitate objectivity and balance, the U.S. Court of Appeals for the D.C. Circuit, in *Accuracy in Media*, found such "hortatory" language to be unenforceable by the FCC.(note 113) However, the court noted that if such language were intended to be enforceable, even by CPB, constitutional issues would arise.(note 114) Acknowledging the limited acceptance of content control approved by the Supreme Court in *CBS, Inc. v. Democratic National Committee*,(note 115) the Court of Appeals for the D.C. Circuit noted that constitutional doubts "may be raised on vagueness grounds. Such words may require `all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego' their First Amendment rights."(note 116)

Encouraging or facilitating objectivity by CPB's own funding decisions may not violate anyone's First Amendment rights provided such decisions do not affect unfunded activities of the recipients. Precedent suggests, however, that the constitutional line is crossed if a condition affecting freedom of speech is imposed on the *receipt* of governmental benefits. In *Rust v. Sullivan*,(note 117) Chief Justice Rehnquist, writing for a majority of the Supreme Court, declared, "[O]ur `unconstitutional conditions' cases involve situations in which the government has placed a *condition on the receipt* of the subsidy rather than on a particular program or service, thus *effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program*."(note 118)

The 1992 legislation directed CPB's Board of Directors to review the Corporation's existing efforts, solicit public comments, and on the basis of such information, use its grant-making powers and jawboning tactics to achieve the idealistic goals assigned to CPB.(note 119) By that assignment of regulatory and supervisory functions (to be implemented with as yet undetermined conditions) CPB became a federal "agency" for the purpose of imposing vaguely prescribed content controls on grants to public telecommunications entities. Presumably, whenever the system output fails to achieve the desired objectivity and balance, CPB would be expected to adjust or shift its emphasis, ever seeking ideal balance. Even its new role as a righteous super-editor would not make CPB immune from shifts of political balance as the CPB Board membership changes or as congressional or popular interests and trends vary. In truth, CPB has been given a political peacekeeping assignment in public television and radio, armed with the power to deny program grants to those entities that ignore its "concerns."(note 120)

In apparent disregard of the failed attempt to ban editorializing by noncommercial station licensees that received grants from CPB,(note 121) this new scheme may be a more insidious incursion on the rights of those licensees. From a First Amendment point of view, the latest effort to assure political neutrality in broadcast programming runs counter to the experience of the FCC. The Commission found that even the lower standards of fairness contained in its Fairness Doctrine chilled, rather than facilitated, free expression on controversial subjects.(note 122)

In a case arising from very similar congressional motivations,(note 123) a U.S. district court examined a legislative attempt to preclude the use of federal funds for artistic endeavors "which in the judgment of the National Endowment for the Arts . . . may be considered obscene."(note 124) To implement this statutory requirement, the National Endowment for the Arts (NEA) required its grantees to certify that grants would be used in compliance with the terms of the statute.(note 125) The court found that notwithstanding NEA's stated intention to use the well-established definition of obscenity found in *Miller v. California*,(note 126) the "certification requirement is unconstitutionally vague because it leaves the determination of obscenity in the hands of NEA."(note 127) Furthermore, the court held that such vagueness would "cause a chilling effect in violation of the First Amendment. The facts . . . go well beyond a simple decision not to subsidize obscene speech."(note 128) In rejecting "the government's defense, that its certification requirement is merely part of a subsidy decision"(note 129) that leaves the artist free to seek funding from other sources, the court found that NEA's grant decisions do affect an artist's ability to obtain private support and that a denial is "the type of obstacle in the path of the exercise of fundamental speech rights that the Constitution will not

tolerate."(note 130) From motivation to implementation, the parallelism of the NEA's certification requirement and the new CPB objectivity-and-balance conditions is evident.

Congress's vague directions authorize CPB directors, including some broadcast entity representatives(note 131) (whose interests may conflict with the interests of other potential grant recipients) to define, judge, and reward or penalize applicants.(note 132) Such authorization could be seen as an unlawful delegation of legislative power.(note 133) Although the ends--quality, excellence, balance, objectivity, and diversity--may be justified, the means must be reconsidered with more attention to the constitutional issues raised by the 1992 legislation.

Assuming that a court could find that the threat of withholding federal funds is not coercive and that the new scheme is merely demonstrative of the importance that Congress attaches to its own goal of fairness, the interested parties must recognize the chilling effect on all active participants. In the current statutory environment, the safest course for CPB or any other entity wanting to ensure a continual flow of federal funds to public broadcasting will be to avoid controversial subjects.(note 134) That consequence will not serve the public, the ultimate beneficiaries of First Amendment protections relevant to this enterprise. Seeking to promote fairness in the output of a system that is entitled to a large measure of freedom of expression, Congress's latest adjustment encroaches on the rights of the operators and users of public television and radio facilities.

Beyond any problem raised by the aforementioned constitutional issues, the wisdom of transferring responsibility for judgments regarding quality and fairness from local station licensees to nine or ten(note 135) politically appointed CPB directors is dubious. Certainly, CPB can make some important contributions to a viable, inclusive system of noncommercial broadcasting, and these contributions should meet the highest achievable standards of quality, diversity, and fairness. By focusing CPB's programming efforts on its own output and by directing its attention to subjects inadequately addressed by nonfederal sources, government funding could be used more effectively to fill gaps left by other contributors to the enterprise. The pursuit of excellence, balance, objectivity, and diversity in federally funded interstitial programming, for example, would be well within CPB's province.

Since the 1992 legislation already includes tentative, commendable steps in this direction,(note 136) Congress's only remaining task is to require CPB to explore other possible uses of television and radio facilities to address unmet needs. Assuming that government funding of telecommunications services is not intended to be competitive with commercial services,(note 137) Congress should direct CPB to be creative, innovative, and specific in using federal funds for truly noncommercial programming.

While public broadcasting has been expected to serve a variety of instructional, educational, and cultural interests, typically with programming that is not commercially viable, important subjects in the noncommercial arena have not attracted much financial support from traditional donors. Corporate and individual sources favor programs that appeal to those most able to contribute. State and other local government resources--much needed for continued operation of many stations--are generally insufficient for the production of national programming, particularly the kind of programming that is unlikely to generate significant private support. The resulting void can best be filled with the aid of federal funding.

Some have suggested that Congress let the nonfederal funding (more than 80 percent of the total), and that portion of federal funding now allocated to general purposes of qualifying stations,(note 138) be used for the general activities (including programming) of noncommercial stations. Such stations would, of course, remain subject to reasonable federal regulation by the FCC, not to mention the nonconflicting local controls or influences extant in their communities. Final editorial decisions regarding quality, diversity, objectivity, and balance should be made by the licensees. CPB, acting for the federal government or as a trustee of public money, should facilitate and encourage efforts to achieve these idealistic goals through public reports on the successes and failures of specific programs or series of programs. To whatever extent CPB participates in the funding of programs, such productions should fill significant gaps in broadcast services available to the public. CPB grants should promote "telecommunications services . . . which will constitute an expression of diversity and excellence . . . [and] encourage the development of *programming that involves creative risks and that addresses the needs of unserved and underserved audiences*."(note 139)

Much of the justification for federal funding of public broadcasting comes from the continuing failure of commercial broadcasting to address adequately the above-mentioned critical needs with enlightening and uplifting (as well as entertaining) programs. Regrettably, this underfunded system--surviving with meager federal support--has had to rely largely on repeat presentations of its most popular programs in order to garner audience support. Survival of public broadcasting may even depend on the syndication of popular programs to commercial stations and the crossover of commercial network shows to public broadcasting.(note 140)

As we watch and listen, the vision of "alternative telecommunications services" is fading. Much more than expressions of dissatisfaction with particular programs and claims of political imbalance is necessary. If federal funding is going to continue at current low levels, Congress (with CPB assistance) should identify the unmet needs of underserved audiences and require CPB to contract for programming that will serve those needs. That programming should be offered first to noncommercial stations and networks without charge, and second to commercial stations for reasonable charges.

Although the drift toward commercialization of public broadcasting raises other serious policy questions, the legitimate concerns regarding balance, objectivity, quality, and diversity are also applicable to commercial broadcasting, cable, and other media. Let the government lead by good example, not by coercive conditions. The role of CPB should be positive, uplifting, and broadening, particularly for audiences that lack economic power or political muscle necessary to command attention to their unique requirements. Let the local communities and underwriters of other programming guide the station licensees in their selection of programs designed to serve more general interests.

B. Program Diversity

Although another public broadcasting goal is diversity, "elitism" is a recurring complaint leveled at the programs emanating from public television and radio.(note 141) This charge finds support in the patent efforts of public broadcasters to please contributors who, taken as a group, are probably not representative of the overall audience. It is quite reasonable for financially strapped stations to present and repeat programs that are favored by the largest contributors. Another possible reason for the apparent bias toward "high-brow" programming is that many stations are sponsored by universities and similar institutions that have special obligations to serve the interests of their well-educated constituents. Such uses of the medium are not inappropriate in a system intended to meet the special needs of limited, underserved audiences. Unfortunately, the overriding problem of scarce funding also drives program directors to rely heavily on relatively inexpensive use of prerecorded material and foreign productions.

In the interest of services to limited audiences, the system should not be faulted for its selection of high-quality, inexpensive productions. Nonetheless, it should be acknowledged that program variety and innovation have suffered. Rather than curse the good productions that attract the viewers most likely to support their local stations, a way should be found to increase program diversity and to assure that less fortunate or neglected segments of the public also receive excellent, enlightening broadcast services.

C. Diversity in Employment

If the goals of diversity, creativity, and innovation are to encompass more than partisan political issues, the system should be offering "alternative telecommunications services for all the citizens"(note 142)--promoting educational values and opportunities and providing information about the peoples and cultures of the United States and other parts of the world. The access to, and understanding of, such information benefits from a diversity of human resources. Thus, added to the usual considerations of equal employment opportunities, public broadcasting has a special obligation to diversify its production, reporting, and editing personnel. Diverse human resources are essential to achieving the idealistic goals set for this enterprise.

In the 1992 legislation, Congress sent another signal of its desire to promote equal employment opportunities by requiring certification of station compliance with relevant FCC regulations, plus detailed reports thereon to CPB and by CPB to Congress.(note 143) This new requirement, in addition to preexisting equal opportunity employment provisions,(note 144) should finally cause all public broadcasting entities to appreciate the importance of diversity to

the future of public radio and television.

Performance, to date, by the Secretary of Health and Human Services and her predecessors of their assignment to enforce the equal employment opportunities provisions can only be found wanting. Near complete neglect of the statutory directions(note 145) to the Secretary has marked the last fifteen years. Current incentives, including a rapid increase in the diversity of the U.S. population, could foster more attention to diversity in programming and personnel. Moreover, adoption of the proposal herein, which would direct more attention to services that address "the needs of unserved and underserved audiences"(note 146) would also prompt greater attention to the need for diversification of talent in the future.

D. Source of Federal Funds

When the Carnegie Commission on Educational Television considered possible sources of federal funding for public television, it proposed a manufacturer's excise tax on television sets, with revenues made available through a trust fund for the proposed Corporation for Public Television.(note 147) This financing mechanism was designed to distance the activity from political control and to "permit the funds to be disbursed outside the usual budgeting and appropriation procedures."(note 148) Instead, Congress chose to use general tax revenues and traditional authorization and appropriation procedures.(note 149)

A variety of federal funding source proposals have been advanced,(note 150) most of which seek to insulate the sources from programming judgments. In addition to, or in place of, appropriations from general tax revenues, proposed revenue sources include taxes on profitable commercial communications entities and taxes on assignments and transfers of broadcast licenses. Granting tax credits to donors might be a fruitful means of increasing audience and underwriter support. Spectrum use fees or a share of revenues derived from anticipated auctions of upcoming spectrum assignments would avoid the need for traditional taxes by requiring spectrum users to pay for the valuable resources they obtain from the government.

Dedicating these taxes or fees to funding public broadcasting could be justified in light of the benefits returned to the public by the system. But each proposal has disadvantages. Spectrum use fees and taxes on particular communications enterprises or activities may unfairly place the entire federal funding burden on selected taxpaying groups. Tax credits favor those who support the enterprise while penalizing those who must cover any resulting revenue deficiencies affecting other areas. Any new taxes or fees could reduce voluntary contributions without assurance of greater independence for the system. Money, though, is rarely provided without important conditions. In the end, the use of general tax revenues, based primarily on a progressive income tax system, seems most compatible with the purposes of the system. In other words, grants that support a system of local stations serving all areas in the nation and program grants designed to meet the needs of underserved audiences should be favored.

Absent a new consensus that public broadcasting should be given very large increases in federal funding to achieve much more of its potential, the current means of financing a gap-filling public service is satisfactory. It encourages the general public to express its concern and to be heard regarding national programming. Assuming that station licensees' First Amendment rights continue to receive court protection, and that contributors, underwriters, and local communities exercise their prerogatives with respect to the major portions of the total funding that they provide, no correction of the federal funding mechanism is necessary. Presumably, complaints (regarding alleged nonobjective or imbalanced treatment of controversial subjects, indecency, elitism, or lack of diversity in programming) reflect the opinions of citizens with rights to communicate with their elected representatives, who would bear ultimate responsibility for any unwise allocation of tax revenues. Certainly, if the political branches act irresponsibly on this subject, the problem will not be limited to the relatively small sums being appropriated for public broadcasting.

IV. Recommendations

Concerns regarding objectivity and balance in public television and radio programs financed by nonfederal funds should not influence CPB grant decisions related to specific programs. Although commercial and noncommercial programming should be considered in federal (CPB) choices regarding types of activities or programs that need federal

support, Congress should repeal that portion of the Public Broadcasting Act of 1992 that uses grant powers and jawboning tactics to control national public broadcast programming without regard to the funding sources.(note 151)

CPB grants for national programming should be used to fill gaps in the services offered by public broadcasting entities. Special attention should be paid to the needs of underserved audiences, particularly children and minorities. In other words, CPB should forego participation in the more popular, underwritten, audience-supported programs in order to experiment and lead in the creation of diverse services that are worthy alternatives to other noncommercial, as well as commercial, productions.

The Secretary of Health and Human Services should fulfill her obligations to delineate and enforce the equal employment opportunity provisions of the Act. Such action should foster both program diversity and fair employment practices in entities receiving federal funds for operations or programming.

Conclusion

In the 1992 legislation relating to public broadcasting, Congress unwisely directed CPB to trespass on the constitutional rights of public station licensees by instructing CPB to define and enforce notions of quality, objectivity, and balance by effectively conditioning grants on satisfactory responses to CPB's "concerns."(note 152) A better plan would be to authorize CPB to identify and fund activities and services that will benefit underserved audiences, leaving questions of political objectivity and balance to the local station licensees, who are subject to the control of their constituencies.

After twenty-five years, public broadcasting does not need to be saddled with a federal bureaucratization of editorial decisionmaking that is already subject to FCC regulation and local community influence. Federal funding and leadership are most needed for advancing highly desirable projects that are least likely to be tackled by financially insecure, noncommercial broadcast entities.

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Notes

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The Author was a member of the boards of directors of the Corporation for Public Broadcasting, 1979-86, and of National Public Radio, 1986-92. The research assistance of Honor Fleming and Christine R. Abbenda, students at St. John's University School of Law, is gratefully acknowledged.

1. *See* George H. Gibson, Public Broadcasting: The Role of the Federal Government, 1912-76, at 119-44 (1977). Return to text

2. Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C.A. secs. 390-399b (West 1991 & Supp. 1994)). Other direct support from the federal government has been authorized in the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64 (codified as amended at 47 U.S.C. secs. 390-397 (1988)); the Educational Broadcasting Facilities and Telecommunications Demonstrations Act of 1976, Pub. L. No. 94-309, 90 Stat. 683 (codified at 47 U.S.C. secs. 390-392a, 395, 397, 399 (1988)); and Children's Television Act of 1990, Pub. L. No. 101-437, secs. 201-203, 104 Stat. 996, 997-98 (codified in part at 47 U.S.C. secs. 393a, 394 (Supp. III 1991)). Return to text

3. 47 U.S.C.A. sec. 396(g)(2), (k) (West 1991 & Supp. 1994). Return to text

4. *See* Carnegie Comm'n on Educ. TV, Public Television: A Program for Action 68-79 (1967) [hereinafter Carnegie I]. Return to text

5. 47 U.S.C. sec. 396(g) (1988). Return to text

6. Twentieth Century Fund Task Force on Public TV, Quality Time? 12 (1993) [hereinafter Twentieth Century Report]. In 1990 the federal government provided 16% of CPB's overall funding, compared to 19% contributed by state governments as a group. *Id.* Return to text

7. *See* Oscar G. Chase, *Public Broadcasting and the Problem of Government Influence: Towards a Legislative Solution*, 9 U. Mich. J.L. Ref. 62, 76-78 (1975); *see also* William E. Porter, Assault on the Media: The Nixon Years 145-54 (1976). Return to text

8. *See, e.g.*, Walter Goodman, *A Running Debate About Public TV*, N.Y. Times, May 18, 1992, at C18; John Wilner, *Senate Spurns Freeze, Reauthorizes CPB*, Current, June 8, 1992, at 1. Return to text

9. *See, e.g.*, 138 Cong. Rec. S7399-454, S7461-72 (daily ed. June 3, 1992); Laurence Jarvik, *Making Public Television Public*, Heritage Found. Backgrounder, Jan. 18, 1992, at 1, 8-11; George F. Will, *Who Would Kill Big Bird?*, Wash. Post, Apr. 23, 1992, at A23. Return to text

10. *See* Carnegie Comm'n on the Future of Public Broadcasting, A Public Trust (1979) [hereinafter Carnegie II]; Twentieth Century Report, *supra* note 6. *Carnegie II* and *Twentieth Century Report* are the two major studies of public broadcasting completed since the enactment of the Public Broadcasting Act of 1967. Return to text

11. Bill Carter, *Conservatives Call for PBS to Go Private or Go Dark*, N.Y. Times, Apr. 30, 1992, at A1, C15. Return to text

12. *See* 47 U.S.C.A. sec. 396(k)(3)(A) (West 1991 & Supp. 1994). Return to text

13. *See* 47 U.S.C.A. secs. 396(a)(6), (k)(1)(E), (k)(3)(B)(i), (m) (West 1991 & Supp. 1994). Return to text

14. *See, e.g.*, 18 U.S.C. sec. 1464 (1988) (prohibiting use of obscene language in broadcasting). Return to text

15. 47 U.S.C. sec. 303(g) (1988). Return to text

16. 47 U.S.C. sec. 390 (1988); *see also* 47 U.S.C. sec. 398(b) (1988). Return to text

17. *See* Carnegie I, *supra* note 4, at 8, 68-73; Carnegie II, *supra* note 10, at 118-27; Twentieth Century Report, *supra* note 6, at 28-34. Return to text

18. *See* Gibson, *supra* note 1, at 3. Return to text

19. *See id.* at 119. Return to text

20. *See id.* at 88-92, 119-22. Return to text

21. *See id.* at 122. Return to text

22. *Id.* at 45. Return to text

23. *Id.* at 51-52. Return to text

24. *Id.* at 76-78. Return to text

25. Pub. L. No. 87-447, 76 Stat. 64 (1962) (codified as amended at 47 U.S.C. secs. 390-397 (1988)). Return to text

26. Gibson, *supra* note 1, at 122-23. Return to text

27. *Id.* at 123. Return to text

28. *Id.* at 120-22. Return to text

29. *Id.* at 121. Return to text

30. Carnegie I, *supra* note 4, at 21-22. Return to text

31. *See id.* at 23-24. Return to text

32. Carnegie I, *supra* note 4. Return to text

33. *Id.* at 3. Return to text

34. *Id.* at 33. Return to text

35. *Id.* at 36. Return to text

36. *Id.* at 36-37. Return to text

37. *Id.* at 8, 70. Return to text

38. *Id.* at 33-35. Return to text

39. *Id.* at 53-58. Return to text

40. *Id.* at 61-65. Return to text

41. *Id.* at 59-60. Return to text

42. *Id.* at 66-67. Return to text

43. *Id.* Return to text

44. *Id.* at 1. As defined in the report, public television "includes all that is of human interest and importance which is not at the moment appropriate or available for support by advertising, and which is not arranged for formal instruction." *Id.* Return to text

45. *Id.* (explaining that "educational television" included "instructional television" that was "directed at students" in some formal arrangement and "public television"). Return to text

46. *Id.* at 68-69. Return to text

47. Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C.A. secs. 390-399b (West 1991 & Supp. 1994)). Return to text

48. *See* Carnegie II, *supra* note 10, at 36. Return to text

49. Kathy Gregolet, *FCC v. League of Women Voters: Freedom of Public Broadcasters to Editorialize*, 39 U. Miami L. Rev. 573, 576 n.23 (1985). Return to text

50. *See, e.g.*, Public Telecommunications Act of 1988, Pub. L. No. 100-626, sec. 6, 102 Stat. 3207, 3208 (codified as amended at 47 U.S.C.A. sec. 396 (West 1991 & Supp. 1994)); Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, sec. 1234(a), 95 Stat. 357, 736 (codified as amended at 47 U.S.C. sec. 396(g) (1988)); Public Telecommunications Financing Act of 1978, Pub. L. No. 95-567, 92 Stat. 2405 (codified as amended at 47 U.S.C.A. secs. 390-397 (West 1991 & Supp. 1994)). Return to text

51. *See* 47 U.S.C.A. sec. 396(a) (West 1991 & Supp. 1994). Return to text

52. 47 U.S.C. sec. 396(a)(5) (1988). Return to text

53. 47 U.S.C. sec. 396(a)(6) (1988). Return to text

54. *See* 47 U.S.C.A. sec. 396(a)(10), (g)(2) (West 1991 & Supp. 1994). Return to text

55. 47 U.S.C. sec. 396(b) (1988). Return to text

56. 47 U.S.C. sec. 396(g)(1)(A) (1988). Return to text

57. 47 U.S.C. sec. 396(g)(1)(B)-(C) (1988). Return to text

58. 47 U.S.C. sec. 396(g)(1)(D) (1988). Return to text

59. 47 U.S.C. sec. 396(g)(2) (1988). Return to text

60. 47 U.S.C. sec. 396(g)(3) (1988). Return to text

61. 47 U.S.C.A. sec. 396(c) (West 1991 & Supp. 1994). Return to text

62. 47 U.S.C. sec. 396(g)(4) (1988). Return to text

63. 47 U.S.C.A. sec. 396(i) (West 1991 & Supp. 1994). Return to text

64. 47 U.S.C.A. sec. 396(k)(1)(B)-(C) (West 1991 & Supp. 1994). Return to text

65. *See* 47 U.S.C.A. sec. 396(k)(3) (West 1991 & Supp. 1994). Return to text

66. *See* 47 U.S.C. sec. 398(c) (1988). Return to text

67. 47 U.S.C. sec. 396(m)(1) (1988). Return to text

68. *Id.* Return to text

69. *Id.* Return to text

70. 47 U.S.C. sec. 398(b) (1988). Return to text

71. *See, e.g.*, 138 Cong. Rec. S7399-454, S7461-72 (daily ed. June 3, 1992) (debate on Public Telecommunications Act of 1991); Jarvik, *supra* note 9, at 3; Will, *supra* note 9, at A23. Return to text

72. *See* 138 Cong. Rec. S6034-36 (daily ed. May 5, 1992) (Sen. Timothy Wirth (D-Colo.) inserting Sharon Percy Rockefeller, *Big Bird: Someone Didn't Do His Homework*, Wash. Post, Apr. 28, 1992, at A15 (responding to Will, *supra* note 9), and Marshall Turner, *The Difference Is That Public TV Serves a Country, Not a Market*, Current, Mar. 2, 1992, at 14). Return to text

73. *Id.* Return to text

74. Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (codified at 47 U.S.C.A. secs. 303b(a), 391, 393(b)(4), 396 (West Supp. 1994)). Return to text

75. *See, e.g.*, 138 Cong. Rec. S7471 (daily ed. June 3, 1992) (statement of Sen. Robert Dole (R-Kan.)); *id.* at S7449 (statement of Sen. John H. Chafee (R-R.I.)); *id.* at S7462-63 (statement of Sen. Daniel K. Inouye (D- Haw.)); *id.* at S7343 (statement of Sen. Ted Stevens (R- Ark.)); 138 Cong. Rec. S7304-05, S7330 (daily ed. June 2, 1992) (statements of Sen. Daniel K. Inouye); *id.* at S7305 (statement of Sen. Ted Stevens). Return to text

76. Public Telecommunications Act of 1992 sec. 16, 106 Stat. at 954. The Court of Appeals for the D.C. Circuit said in November 1993 that the time restriction was not sufficiently narrowly tailored to survive constitutional scrutiny, although the court acknowledged that the government had a compelling interest in protecting children from indecency; however, the decision was vacated when the court granted a rehearing en banc. Action for Children's TV v. FCC, 11 F.3d 170 (D.C. Cir. 1993), *vacated and reh'g granted en banc*, No. 93-1092, 1994 WL 50415 (D.C. Cir. Feb. 16, 1994). Return to text

77. The FCC defines indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., N.Y., *Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 12 (1975), *quoted in* FCC v. Pacifica Found., 438 U.S. 726, 732 (1978). Return to text

78. Public Telecommunications Act of 1992 sec. 19(2)(A), 106 Stat. at 956. Return to text

79. *Id.* sec. 19(2)(B). Return to text

80. *Id.* sec. 19(2)(C). Return to text

81. *Id.* sec. 19(2)(D). Return to text

82. *Id.* sec. 19(3). Return to text

83. *Id.* sec. 20. Return to text

84. *See id.* secs. 17-18, 106 Stat. at 954-55. Return to text

85. *See* 47 U.S.C.A. sec. 396(k)(1)(E) (West Supp. 1994). Return to text

86. *See* 47 U.S.C.A. sec. 396(k)(11) (West Supp. 1994). Return to text

87. Public Telecommunications Act of 1992 sec. 17(a)(1), 106 Stat. at 954. Return to text

88. *Id.* sec. 17(b), 106 Stat. at 955. Return to text

89. *Id.* sec. 18. Return to text

90. *See* 47 U.S.C. sec. 326 (1988) (prohibiting the FCC from censoring radio communications). Return to text

91. Public Telecommunications Act sec. 19(2)(C)-(D), 106 Stat. at 956. Return to text

92. 47 U.S.C. sec. 315(a) (1988). Return to text

93. *Cf.* 47 U.S.C. sec. 326 (1988) (prohibiting the FCC from censoring radio communications). Return to text

94. 47 U.S.C. sec. 396(g)(1)(A) (1988) (emphasis added). Return to text

95. *Accuracy in Media*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). Return to text

96. *Id.* at 297. Return to text

97. *See* Carnegie I, *supra* note 4, at 36-37; Carnegie II, *supra* note 10, at 56-57; *cf.* Rocio de Lourdes Cordoba, *To Air or Not to Err: The Threat of Conditioned Federal Funds for Indecent Programming on Public Broadcasting*, 42 Hastings L.J. 635, 640 (1991); Craig Alford Masback, *Independence v. Accountability: Correcting the Structural Defects in the National Endowment for the Arts*, 10 Yale L. & Pol'y Rev. 177, 200 (1992) (noting the difficulties faced by both the CPB and the NEA in balancing their artistic ideals with their financial dependence on the federal government). Return to text

98. *E.g.*, 138 Cong. Rec. S7399-454, S7461-72 (daily ed. June 3, 1992). Return to text

99. *See* 47 U.S.C. sec. 396(g)(1)(A) (1988). Return to text

100. Public Telecommunications Act of 1992 sec. 19(2)(A), 106 Stat. at 956. Return to text

101. *Id.* sec. 19(2)(B). Return to text

102. *Id.* sec. 19(2)(C). Return to text

103. *See id.* sec. 19(2)(D). Return to text

104. *Id.* sec. 19(3). Return to text

105. *Id.* sec. 19(2)(B). Return to text

106. *See* Note, *Freeing Public Broadcasting from Unconstitutional Restraints*, 89 Yale L.J. 719, 724-27 (1980). Return to text

107. FCC v. League of Women Voters, 468 U.S. 364, 380 (1984). Return to text

108. *Id.* at 398-99. Return to text

109. Muir v. Alabama Educ. TV Comm'n, 688 F.2d 1033, 1042 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). Return to text

110. Community-Service Brdcst. of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1105 (D.C. Cir. 1978). Return to text

111. *Id.* at 1123. Return to text

112. *See* William C. Canby, *The First Amendment and the States as Editor: Implications for Public Broadcasting*, 52 Tex. L. Rev. 1123, 1152-53 (1974) (discussing the overbreadth of an early prohibition on editorializing). Return to text

113. Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 297 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). Return to text

114. *Id.* Return to text

115. *CBS*, 412 U.S. 94, 119-21 (1973), *cited in Accuracy in Media*, 521 F.2d at 297 n.41. Return to text

116. *Accuracy in Media*, 521 F.2d at 297 n.41 (quoting Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting)). Return to text

117. *Rust*, 111 S. Ct. 1759 (1991). Return to text

118. *Id.* at 1774 (emphasis added). Return to text

119. *See* Public Telecommunications Act of 1992 sec. 19(2), 106 Stat. at 956 (referring to goals set forth in 47 U.S.C. sec. 396(g)(1)(A) (1988)). Return to text

120. *Id.* sec. 19(2)(D). Return to text

121. *See* FCC v. League of Women Voters, 468 U.S. 364 (1984). Return to text

122. *In re* Inquiry into sec. 73.1910 of the Commission's Rules, *Report and Order*, 102 F.C.C.2d 143, para. 69 (1985)

(proceeding terminated). Return to text

123. Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991). Return to text

124. Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 101-121, sec. 304(a), 103 Stat. 701, 741-42 (1989) (expired Sept. 30, 1990), *quoted in Bella Lewitzky Dance Found.*, 754 F. Supp. at 776. Return to text

125. *Bella Lewitzky Dance Found.*, 754 F. Supp. at 776. Return to text

126. *Miller*, 413 U.S. 15, 24 (1973). The test for determining obscenity is "(a) whether `the average person, applying contemporary community standards' would find that the work, taken as whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether, the work, taken as whole, lacks serious literary, artistic, political, or scientific value." *Id.* (citations omitted). Return to text

127. *Bella Lewitzky Dance Found.*, 754 F. Supp. at 781-82. Return to text

128. *Id.* at 785. Return to text

129. *Id.* Return to text

130. *Id.* Return to text

131. *See* 47 U.S.C. sec. 396(c)(3) (1988). Return to text

132. *See* 47 U.S.C.A. sec. 396 (k)(3)(A)(i)(II), (3)(B)(i), (3)(B)(iii)(VI), (6)(A) (West Supp. 1994). Return to text

133. *See* Carter v. Carter Coal Co., 298 U.S. 238, 310-12 (1936); *cf.* Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 204-06 (1937) (asserting that government is not allowed to grant industry authority to regulate wages). Return to text

134. *Cf.* Speiser v. Randall, 357 U.S. 513, 526 (1958) (applying due process to prevent chilling effect on speech created by state requirement that to receive tax exemption taxpayer must prove nonadvocacy of governmental overthrow). Return to text

135. 47 U.S.C. sec. 396(c)(1)-(2) (1988), *amended by* Public Telecommunications Act of 1992 sec. 5(a), 106 Stat. at 949-50. Return to text

136. *See* Public Telecommunications Act of 1992 secs. 17-18, 106 Stat. at 954-55 (proposing education projects to benefit preschool and rural area children). Return to text

137. 47 U.S.C. sec. 396(a)(5) (1988). Return to text

138. *See* 47 U.S.C.A. sec. 396(k)(3)(A)(ii)- (iii)(II) (West 1991 & Supp. 1994). Return to text

139. 47 U.S.C. sec. 396(a)(5)-(6) (1988) (emphasis added). Return to text

140. *See* Elizabeth Kolbert, *For Some Public TV Programs, Syndication to Commercial Stations May Mean Survival*, N.Y. Times, Aug. 16, 1993, at D7. Return to text

141. *See, e.g.*, George F. Will, *$1.1 Billion for Public TV?*, Wash. Post, May 12, 1992, at A19 (arguing that public television benefits "an economically and intellectually advantaged constituency"); *see also* Walter Goodman, *A Running Debate About Public TV*, N.Y. Times, May 18, 1992, at C18. Return to text

142. 47 U.S.C. sec. 396(a)(5) (1988). Return to text

143. 47 U.S.C.A. sec. 396(k)(11)(A)-(C), (m)(2) (West Supp. 1994). Return to text

144. *See* 47 U.S.C.A. sec. 396(m) (West 1991 & Supp. 1994). Return to text

145. *See* 47 U.S.C. sec. 398(b) (1988). Return to text

146. 47 U.S.C. sec. 396(a)(6) (1988). Return to text

147. Carnegie I, *supra* note 4, at 8, 70. Return to text

148. *Id.* at 69. Return to text

149. 47 U.S.C.A. sec. 396(k)(1) (West 1991 & Supp. 1994). Return to text

150. *See, e.g.*, Task Force on Long-Range Financing for Public Broadcasting, Report (1983); Carnegie II, *supra* note 10, at 139-45; Twentieth Century Report, *supra* note 6, at 28-32, 34. Return to text

151. Public Telecommunications Act of 1992 sec. 19(2)(C)-(D), 106 Stat. at 956. Return to text

152. Undoubtedly, Congress anticipates future CPB "concerns" to be reflective of the concerns voiced by key members of Congress. Return to text