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The Good Guys, The Bad Guys and the First Amendment. By Fred W. Friendly.

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BOOK REVIEWS

THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT. By FRED W. FRIENDLY.* New York: Random House, Inc., 1976. Pp. xvi, 268. $10.00.

*Reviewed by Ben C. Fisher***

Mr. Friendly provides a classic illustration of the perennial confrontation between the government, attempting to assure fairness and equity, and the private sector, here the broadcast media, desiring to let private forces control. The book makes delightful reading and will appeal to the serious student of communications policy as well as to members of the general public concerned with first amendment matters.

The primary focus of Mr. Friendly's book is the Fairness Doctrine, an administrative policy fashioned by the Federal Communications Commission to assure the evenhanded presentation of controversial public issues. While the serious discussion of broadcast fairness normally appears in esoteric articles and essays, this doctrine has been brought to life by a brilliant journalist and scholar.

The Fairness Doctrine requires that broadcasters devote a reasonable amount of time for the discussion of issues of public importance and that they offer a fair amount of time for opposing viewpoints. This seemingly innocuous policy has been, in practice, a constant source of controversy. All too often the zeal of well-meaning bureaucrats has impeded rather than furthered the cause. Perhaps, too, fairness of viewpoint is more "in the eyes of the beholder" than an objective standard. The Federal Communications Commission carefully considers each fairness complaint on a case-by-case basis. The enforcement process, unfortunately, is both cumbersome and ineffective.

One fascinating chapter in the development of the Fairness Doctrine is the case of *Red Lion Broadcasting Co. v. FCC.*[1] Rever-

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1. 395 U.S. 367 (1969).

end John M. Norris, the licensee of Station WGCB, Red Lion, Pennsylvania, was so infuriated by the meddling of government in his private affairs and in his freedom of speech that he launched a campaign to vindicate his rights. The issue was ultimately decided by the Supreme Court.[2] His crusade was triggered when he sold air time to Reverend Billy James Hargis for a short broadcast in 1964. During that broadcast Hargis violently attacked Fred J. Cook, a little-known liberal investigative reporter, labeling him "a professional mudslinger" and "accusing him of dishonesty."[3] This personal attack, which lasted two minutes and for which WGCB received $7.50, was met by Cook's demand for the right to reply.

The *Red Lion* case, however, involved much more than $7.50 of revenue and Cook's demand for time to vindicate his honor. Mr. Friendly suggests:

> What the thirteen jurists on three separate high courts were unaware of at the time of the *Red Lion* decision was that a year earlier, in a climate of hysteria and backlash, a small group of well-intentioned men near the seat of national power had set in motion these forces and events by their determination to utilize the Fairness Doctrine and the FCC's regulatory arsenal to obtain free time, and to inhibit and keep off the air what they considered to be noxious and dangerous views.[4]

The author then recounts a series of horror stories dealing with high-level governmental intrigue, political trickery and manipulation of the administrative process to serve selfish ends. The real instigator of the *Red Lion* dispute was the Democratic National Committee. It began in the administrations of Presidents Kennedy and Johnson, both of whom were concerned about the impact of right-wing fanatics broadcasting daily "hate campaigns" against major Democratic administration programs. The Democrats, seeking a means to counteract the broadcasts, turned to the Fairness Doctrine. Demand was made for free reply time. By so doing, they hoped to frighten the broadcasters into refusing to carry the programs, thereby avoiding fairness demands. In short, the goal was to harass the broadcaster and suppress the offensive speech.[5]

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2. *Id.*
3. P. 5.
4. P. 31.
5. The invocation of the Fairness Doctrine has not been limited to the Democratic

The author exposes the ineffectiveness of the administrative process in resolving these political power plays. The two key players in the drama have been the broadcast industry and the Federal Communications Commission. For the most part, broadcasters have opposed the Fairness Doctrine and have only begrudgingly accepted their responsibilities. The Federal Communications Commission, on the other hand, has voluntarily undertaken the role of super-adjudicator. Extensive and costly pleadings are always filed. Arguments about value content cannot be avoided. Stopwatch comparisons of time for each side frequently ensue. These elements become the grist of the decisionmaking process.

The reader is left with the uncomfortable feeling that this process, at best, leaves the public an uninformed bystander and, at worst, the victim of an intentional plot by special interest groups to stifle the truth. A nation so desensitized by Watergate may not find such practices shocking. Mr. Friendly, however, feels otherwise. His compelling treatment of these conflicts of power focuses upon the inherent dilemma of the Fairness Doctrine: How can the government guarantee that the presentation of public issues will be substantial and fair without, at the same time, so complicating the decisionmaking process so as to discourage any significant discussion at all.

The author, however, does more than merely pose the issue. He proposes a solution which, I suspect, he has liberally borrowed from Henry Geller, former Commission General Counsel and Aspen Institute Scholar. The resolution involves essentially a right of limited access:[6] broadcast time voluntarily offered to those who want to talk back — the broadcasters' equivalent of the Op-Ed page. While this approach clearly would be better than the present painful case-by-case analysis, the real question is whether the industry is willing to commit itself to the initiation and success of such an effort. To date, with some notable exceptions, the broadcasters' efforts to achieve even the most rudimentary objective of carrying controversial public issue programs have been minimal.

Radio and television are, after all, primarily entertainment and news media. They are supported by advertising revenue and, significantly, by advertisers interested in large audiences. Debate

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party. The Republicans and nonpartisan groups, as well, have sought air time under the claim of fairness. *See* pp. 122-24, 127.

6. Pp. 223-36. *See also* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 131 (1973).

on public issues is not profitable. Broadcasters, unlike, for example, the publishers of a newspaper, cannot simply add another section to accommodate new advertisers or expand "Letters to the Editor." Even the network evening news slot, which we have come to rely on so heavily for our knowledge of the world's affairs, offers only 22½ minutes an evening, or only 97 hours a year.[7] How much more time can we realistically expect broadcasters to devote to a noncommercial Op-Ed page? Fred Friendly answers the question in terms of both practicality and necessity:

> [R]adio and television executives are finally aware that thoughtful citizens and powerful forces in government are disturbed by the one-way nature of broadcast speech. First Amendment disciples who for a generation fought for Murrow's and Elmer Davis' right to use the electronic press without pressure from sponsors, nervous networks and heavy-handed government are now willing to listen to those who argue that Fairness Doctrine and even more constricting forms of regulation are inevitable. Even those most insensitive to criticism are mindful of sober voices, conservative and liberal, who are raising questions about access, if not industry-provided, then mandated by government; an Op-Ed page of the air or its equivalent is not unrealistically visionary but almost a condition of survival.[8]

There is strong support for Friendly's position that to continue down the "Fairness" path will have two deleterious results. First, free speech will be inhibited rather than promoted. Second, such an approach will inevitably lead to content analysis by what will become a national super-editor, the Federal Communications Commission. While overall evaluation of performance only once each three years at license renewal time would help, the Commission still could not avoid the chilling effect of its role as an editor-in-chief.

The Supreme Court decision in *CBS v. Democratic National Committee*[9] emphasizes this concern. As Mr. Friendly points out, the Court rejected the demand for access to the media (via paid editorial advertisements) in favor of adhering to the Fairness Doctrine. In so doing, Chief Justice Burger provided a "shield" for the industry against access. Mr. Friendly suggests that it was designed to give the broadcast journalist the power to decide who "should prevail in such crucial matters of access rather than the

7. Pp. 182-83.
8. P. 227.
9. 412 U.S. 94 (1973).

advocate's pocketbook, no matter how noble the purpose."[10] According to the author, however, Chief Justice Burger "fashioned the Doctrine into a double-edged sword"[11] by making access more difficult, but at the same time imposing certain fairness obligations on the broadcaster. Chief Justice Burger outlined the duty of the licensee under the Doctrine as requiring him to

> "present representative community views and voices on controversial issues . . . " and [be] prohibited from "excluding partisan voices and always itself presenting views in a bland, inoffensive manner . . . ." A broadcaster neglects that obligation only at the risk of losing his license.[12]

Since editorial second-guessing always occurs with the benefit of 20-20 hindsight, the natural result is that broadcasters will become increasingly apprehensive over the potential for loss of license.

There is room, however, for some cautious optimism. Strong evidence suggests that the Fairness Doctrine will fall, trapped in its own regulatory tentacles. By the same token, there is no way the doctrine of basic fairness will be totally abandoned. Enough enlightened self-interest exists within the industry to support the belief that good faith alternatives exist. With any form of access to a public platform occasional unfairness will result. But from the Tower of Babel will emerge the synthesis of truth. Are we committed to anything less? The broadcast industry cannot shirk its role. The public will not accept a copout. A nation dedicated to first amendment principles will answer the challenge. *The Good Guys, The Bad Guys and The First Amendment* will help us avoid a few dead ends and will give us a sound basis for traveling a new path.

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10. P. 136.
11. *Id.*
12. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 131 (1973) (citations omitted).

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