IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION, Petitioner	
v.	No. 77-528
PACIFICA FOUNDATION and UNITED STATES, Respondents.	

Washington, D. C.,

Wednesday, April 19, 1978.

The above-entitled matter was resumed for argument at 10:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We resume arguments in Federal Communications Commission against Pacifica Foundation.

Mr. Claiborne, you may proceed whenever you're ready.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF RESPONDENT UNITED STATES

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court:

Perhaps it's first appropriate if I state as accurately as I can the government's position in this case. It is --

QUESTION: You mean of the Department of Justice?

MR. CLAIBORNE: The position of the United States, the Department of Justice, Mr. Justice Brennan.

QUESTION: Well, for whom is the FCC speaking?

MR. CLAIBORNE: The FCC was speaking for itself, as I do for --

QUESTION: Isn't that part of the government of the United States?

MR. CLAIBORNE: I meant the Executive Branch of the Government of the United States, Mr. Justice Brennan.

QUESTION: I see.

QUESTION: Well, Mr. Claiborne, what is the -- what business is it of the Executive Branch of the United States to take a position in a case like this, once the petition for

certiorari is granted to review an unfavorable decision to the government, of the Court of Appeals for the District of Columbia Circuit, and this Court is going to consider it on the merits, what interest does the government as an institutional litigator have in wanting a narrow construction of a statute enacted by Congress?

MR. CLAIBORNE: Mr. Justice Rehnquist, of course the United States is a statutory separate party and is therefore a respondent in this Court. In this particular case, the United States has, or the Department of Justice has a separate interest, because it has an independent responsibility to enforce this statute quite separate from the Commission's responsibility to enforce the same statute in its regulatory field.

It is therefore appropriate, it seemed to us, that the United States should speak the views of the Department of Justice in this case, since it must be bound by the decision of this Court in this case.

QUESTION: But if this Court upholds the FCC, the government will have no problem prosecuting cases under the statute, because it will be given a fairly broad construction, I would take it.

MR. CLAIBORNE: Mr. Justice Rehnquist, the government, that is, the Solicitor General and the Department of Justice takes the view that they should not press for broader prosecutorial discretion than in their view the constitutional

reach of the statute would authorize. And, accordingly, it seems to us that the Court ought to have the benefit of the views of the Department of Justice, as to the constitutional reach of the statute.

QUESTION: Would you think the government is ever entitled as an institutional litigator through the Solicitor General to assert that an Act of Congress is unconstitutional?

MR. CLAIBORNE: Mr. Justice Rehnquist, there may be rare occasions when that is so. This is not such an occasion. We do not suggest that the statute is unconstitutional, we suggest that it has a limited application and that the Commission has construed it beyond that constitutional reach.

QUESTION: You say the United States is a statutory party?

MR. CLAIBORNE: Indeed, Mr. Justice White. I have cited in the brief the provisions of both the Communications Act and the Judicial Code which make that clear. Perhaps the clearest provision is that in the Judicial Code, and one finds it in Section 2342 which first tells us, in paragraph one thereof, that all final orders of the Federal Communications Commission may be reviewable by Section 402(a) of Title 47, all covered by the following sections. This is such an order, issued by the Commission under Section 402 of its statute.

And when we then turn to Section 2344, we note that an action brought in the Court of Appeals to review such an

order is to be an action against the United States, and it further provides at the end of that provision that the Clerk shall serve a true copy of the petition on the agency and on the Attorney General.

Then when we turn to Section 2348 of Title 28, we note that the Attorney General is responsible for and has control of the interests of the government in all court proceedings under this chapter. The agency, and any party in interest, may appear -- I am skipping words -- as parties thereto of their own motion and as of right. Primary responsibility of the Attorney General, but independent right of the agency to be represented.

Hence, here the Commission, though not joined by the Solicitor General, was authorized to file petition for certiorari.

QUESTION: Mr. Claiborne, does it occur to you that there may be a difference between the relationshipof the Department of Justice to, let us say, the Secretary of Defense, a Cabinet officer, and the relationship with what is called an independent regulatory agency, which is not subject to the same way, surely, to the direction of the Executive Branch?

MR. CLAIBORNE: Mr. Chief Justice, that would certainly apply with greater force in those circumstances where the agency was not free to represent itself before this Court, and where, therefore, the Solicitor General would feel a

greater inclination to support the independent Commission's view, which could otherwise not be presented to the Court.

When the agency has an independent right to appear here, that consideration is perhaps lessened. This, however, is an unusual case in that the Department of Justice has a quite separate responsibility under the statute, and therefore cannot be bound or overly influenced by the views of the Commission as it applies to the statute in a different field.

And, indeed, when this Court decided the ABC case in 347 of the United States Reports, the Court relied on the construction of that anti-lottery statute for -- in the Communications Act, relied on the construction placed on that statute by the Attorney General, and said it cannot have one meaning for the Commission and another for the Department of Justice. We notice that the Department of Justice did not view these programs as violating that statute. And we were influenced by that in holding that the Commission has overstepped that line.

QUESTION: But there's a difference where the Commission has authority by statute to come in, like the ICC.

QUESTION: Yes.

MR. CLAIBORNE: And indeed the Federal Communications Commission, under the Hobbs Act, in this sort of case.

QUESTION: Has the same right as ICC?

MR. CLAIBORNE: Has the same independent right, and

indeed its petition, which this Court granted, was not joined by the Solicitor General, nor was the --

QUESTION: Well, there are instances where the ICC and the Solicitor General have been at direct odds.

MR. CLAIBORNE: Indeed.

QUESTION: In this Court.

MR. CLAIBORNE: Indeed, Mr. Justice Marshall. And there have been instances in which the Federal Maritime Commission and the United States have been at odds, and in the most recent such case the Court upheld the views of the United States rather than those of the Federal Maritime Commission.

QUESTION: I didn't mean by that to say that that was a nice way of doing business, or running a railroad.

MR. CLAIBORNE: Mr. Justice Marshall, of course it is to be avoided if possible. And we, as the Court knows, have joined the Commission in some of its submissions before this Court. We part company at a certain point.

QUESTION: Apart from these background procedural matters, Mr. Claiborne, do I understand this station that is involved here is a public, part of the public radio system?

MR. CLAIBORNE: Yes, Mr. Chief Justice, it is --

QUESTION: And supported by the Congress, by funds appropriated by Congress?

MR. CLAIBORNE: Mr. Chief Justice, I do not know whether federal funds are involved, but certainly it uses the

public airwaves, it is licensed by the Federal Communications Commission. It is in every respect like a commercial radio station except only that it is owned and operated by a non-profit corporation, and --

QUESTION: And it doesn't take -- have commercial advertising?

MR. CLAIBORNE: It doesn't take commercial advertising, and, of course, is not governed by the profit motive; and for that reason may not be censored, as it were, by public taste to the same extent the commercial station --

QUESTION: May not be?

MR. CLAIBORNE: May not be influenced by the reaction of a commercial public, who might view such material as is involved in this case as distasteful, and accordingly sponsors would not sponsor it, and the station would not air it. That consideration doesn't apply with respect to a broadcaster like Pacifica.

QUESTION: Mr. Claiborne, the Department supported the Commission below, did it not?

MR. CLAIBORNE: Mr. Justice Powell, that is true, and that is an embarrassment to us. It's right to say that the matter was handled there by the Antitrust Division rather than the Criminal Division. When the matter came on for consideration of a petition for certiorari, the matter was turned over to the Criminal Division, and its view, shared by

the Solicitor General, was that the judgment below was correct and that a review of it ought not be sought; and accordingly we did not petition.

We did not oppose the petition, but when the Court took the case, we deemed it our duty to give this Court the benefit of our views.

QUESTION: Mr. Claiborne, our collateral inquiries have taken some of your time, we'll enlarge your time five minutes.

MR. CLAIBORNE: Thank you.

QUESTION: That's so I won't feel embarrassed by asking you another question.

QUESTION: Another collateral question.

QUESTION: Another collateral question. Do you think Section 2348 is limited to the agency that's listed in 2342?

MR. CLAIBORNE: I think that is so.

QUESTION: Because it says "under this chapter"?

MR. CLAIBORNE: Yes.

QUESTION: What about the National Labor Relations Board?

MR. CLAIBORNE: My understanding, Mr. Justice White, is that the National Labor Relations Board does not have independent authority to --

QUESTION: How does it get into the Court of Appeals? How does the Court of Appeals get authority to review its --

if it isn't under this chapter?

MR. CLAIBORNE: It --

QUESTION: I take it it isn't, but --

MR. CLAIBORNE: There must be, and I don't have it at hand, a provision in the Labor Relations law --

QUESTION: It's an enforcement proceeding, in the Court of Appeals.

MR. CLAIBORNE: Yes. Which allows the --

QUESTION: However, it is different, technically, from the review of a judgment decision, it's an enforcement proceeding under the Labor Act.

MR. CLAIBORNE: I'm grateful -- I think so. And I think it is clear, Mr. Justice White, that when it comes to proceedings in this Court, a petition for certiorari or otherwise, the Labor Board does not have independent authority to represent itself.

QUESTION: And only the agencies in 2342 now, since 1966, have this authority.

MR. CLAIBORNE: In addition, the ICC.

QUESTION: Well, it is listed.

MR. CLAIBORNE: Well, yes, sir. The Federal Maritime Commission --

QUESTION: Federal Maritime, Atomic Energy Commission, Interstate Commerce Commission, the Secretary of Agriculture, Federal Communications Commission; those agencies. Do you think

those are the only ones?

MR. CLAIBORNE: I think those are the only ones which have independent authority to appear on their own in this Court, at least.

QUESTION: And that has only been true since 1966? Except for the ICC?

MR. CLAIBORNE: That may be so, Mr. Justice White, I don't go back any further.

QUESTION: Thank you. I'm sorry to take one minute of your time.

MR. CLAIBORNE: In what time remains, it's perhaps useful to say that our position is simply this: that we construe Section 1464, the only statute which really is involved in this case, as one that cannot consistently with the First Amendment be applied so as to ban absolutely, for any substantial period of time, the airing of particular words on radio or television, wholly without regard to circumstances or to the context. That is the limit of our position.

QUESTION: I'm sorry to keep interrupting, but I notice those words in the caveat at the end of your brief, and I wonder really whether you think that's a fair characterization of the Commission's order or its present position. The Commission denies it hotly in its reply brief. Judge Leventhal didn't think that was a fair characterization. Is it necessary to construe what the Commission actually held so sweepingly?

MR. CLAIBORNE: Mr. Justice Powell, I fear it is. Judge Leventhal sought to save the Commission's order by narrowing it, and the Commission rides his coattails.

But the order, which is what is before the Court and not counsel's representation of it, is very clear that the Carlin dialogue was not judged except only in so far as it contained certain words. Those words, regardless of how they were spoken or the manner in which they were spoken, regardless of the surrounding words, were adjudged by the Commission to be indecent language. The definition of indecent language, which the Commission gave, was clearly one which did not have any relation to the context. They ruled that indecent language could in no circumstances, except after perhaps ten o'clock in the evening, be redeemed by its context.

And, accordingly, we see no option but to say the Commission, and to this extent they are to be commended on their clarity in the order, has said straightforwardly: these words, in no circumstances, when children may be in the audience, -- and so far as we can determine that is all the time -- may be aired. And they did not look to the monologue to see whether in that context things might be different. They said these words recur in that monologue, they are indecent by our definition, and accordingly that may not be done again.

QUESTION: Mr. Claiborne, assume that if this station's license came up for renewal or that of a commercial station

with exactly this record of a broadcast, precisely this, and a coalition of churches, civic associations, parent-teacher organizations intervened under the United Church of Christ intervention procedure, would you think, on this record, if the Commission refused to renew the license that on that ground, and solely upon the ground that this broadcast has been antagonistic to the public interest, that that should be sustained by the court?

MR. CLAIBORNE: Mr. Chief Justice, I have some difficulty with the question. Of course the question refers beyond the boundaries of Section 1464. I take your question, Mr. Chief Justice, to suggest that perhaps under a public interest standard, --

QUESTION: That's right.

MR. CLAIBORNE: -- the Commission has some discretion in renewal proceedings and perhaps in judging repeating applicants --

QUESTION: They have very broad discretion, do they not?

MR. CLAIBORNE: Yes. I would have submitted, though it is perhaps beyond the responsibility of the Department of Justice to speak to this, but I would have submitted that the Commission may take into account whether the station has devoted a very substantial portion of its programming to a kind of material that did not appeal to substantial parts of its

audience. And that, accordingly, it was not in the public interest to renew that license when other applicants who served more what the general public wanted were there waiting to take the spot.

But I would not think it permissible for the Commission to focus on an isolated instance of the broadcast of this monologue and say that bad mark will justify our revoking your license when renewal time comes.

QUESTION: But if they did it once a week for ten weeks, would you say that was --

MR. CLAIBORNE: Mr. Chief Justice, I don't know where the line is drawn, but I do recognize that the Commission must judge between applicants, and must be concerned that the station to whom it's granted a license does effectively serve the public interest, and that must mean serving what most of the public within its reach prefer. It does not, however, in my submission, allow the Commission, through the back door, to censor particular programs by saying we can't forbid it, but we can take it into account in failing to renew your license.

That would overstep the bounds of Section 326.

QUESTION: Well, is it the position of the Department of Justice that under Section 1464 anything goes?

MR. CLAIBORNE: Mr. Chief Justice, no. We -- as we have tried to explain in the last portion of our brief -- indicated that in our view, first, if these very words are used

in a way which, though not really fighting words because the confrontation is not face-to-face, nevertheless, are used in a hostile manner so as to insult the audience generally, or any one in particular, they may be reached under the free speech analysis.

We go further and --

QUESTION: This case would not include any one or more of the words used in a hostile manner by a fictional character insulting another fictional character, would it?

MR. CLAIBORNE: Indeed, Mr. Justice Stewart; in that extent we say it must be judged in context. It depends on the circumstances. Even fighting words, properly so defined, cannot be judged as words. The words "fascist" and "racketeer" in Shapinsky itself are not banned, it is simply that when they are used face-to-face to an individual, even without a disarming smile, they are likely to provoke a breach of the peace, and accordingly may be banned as fighting words.

Here we go further and we say that if -- and we're concerned here primarily about Citizens Band radio -- if someone, ill-advised, attempted to jam the airwaves by the use of four-letter words strung out indefinitely, we say that sort of spewing forth of indecent language, with no conceivable redeeming purpose, could be reached by Section 1464. And the indecency provision of it. Because it would not qualify as obscenity, since it didn't appeal to prurient interest.

And it's for that reason that we think --

QUESTION: You really left out one part of the statute, haven't you? Indecent.

MR. CLAIBORNE: Mr. Chief Justice, I meant to say, if I didn't, that that would be reached under the indecency portion of the statute, and it is for that reason that we think it important to save something of the separate, as we view it, indecency prohibition in the statute, quite separate from the obscenity provision which of course survives under the Miller case.

QUESTION: Mr. Claiborne, in view of the standard that you propose on the next-to-last and last page of your brief, in light of that standard, what would your position be, the Department's position be with respect to this entire program if these 11 minutes were put on the air at, say, eight to nine o'clock on Saturday morning, which is prime time for small children?

MR. CLAIBORNE: Mr. Justice Powell, if it could be shown -- I don't know that it could -- that that was the time peculiarly devoted to children's programming, and that the particular program in which it was included was one aimed at specifically children, we would, as we say in our brief, view that as reachable.

QUESTION: Would it have to be aimed in a hostile manner, uttered, not innocently?

MR. CLAIBORNE: No, Mr. Justice Powell, I think we say that, in the very last paragraph of our brief, that quite independently of that --

QUESTION: Yes, you have a reference to children.

MR. CLAIBORNE: -- "any radio broadcast specifically directed at younger children, regardless of the hour" might, at least, we think, tentatively be reached under this statute. There are definitional problems about what a program aimed specifically at children would be, and there we would seek the help of the Commission in defining a children's program.

QUESTION: Mr. Claiborne, just to follow up on Justice Powell's question, your conclusion, of course, is quite tentative in the last paragraph as I read it. Do I correctly understand that if we were to adopt Judge Leventhal's view and say that all that is before us is the broadcast -- these words as broadcast, using his limitation, and we only passed that; is it the Department's view that it would not be constitutional power in the Commission to prohibit this specific broadcast in this specific time and context?

MR. CLAIBORNE: Mr. Justice Stevens, that would be our conclusion. We haven't addressed particularly what arguable redeeming value there is in the Carlin monologue, because it seemed to us that the Commission's order does not address it. But we would point out that that was plainly not a children's program.

QUESTION: Even under its general authority that it relied on as an alternative ground to the statutory ground, you would still say that there is not constitutional power in answer to Justice Stevens' question?

MR. CLAIBORNE: Well, first, Mr. Justice Rehnquist, I would say there wasn't statutory power because of the anti-censorship provision in Section 326.

QUESTION: Right. But as I understand the Commission's order, it also relied upon its general authority, such as it was, outside of the statute.

MR. CLAIBORNE: That is certainly so, Mr. Justice Rehnquist.

We would say that the only exception to the anti-censorship provision with respect to banning a particular program is what was originally the second section, the second sentence of that same section, that is Section 1424 as it now is; and therefore, anything that's reached under 1464 is -- can be viewed as an exception to the anti-censorship provision. But the public interest provisions do not, in our view, allow the Commission to violate the anti-censorship provision, except only in the sense that if programming is devoted to material that does not serve the public interest to such a degree, that may be taken into account at renewal time. But not a ban.

I've exhausted my time, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Marino?

REBUTTAL ARGUMENT OF JOSEPH A. MARINO, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MARINO: Just two small points, Your Honor.

May it please the Court:

Yesterday in his argument, Mr. Plotkin, and this morning in his argument, Mr. Claiborne keep referring to the Commission's order as banning, banning, suppressing. We thought the Commission's order makes it very clear that it wasn't banning, it wasn't adopting a flat ban, that it was trying to channel this material to periods when there wouldn't be a reasonable risk that children would be exposed to it.

QUESTION: Well, what was it, a suggestion? I mean, in dead seriousness, it wasn't an order banning it, it wasn't a fine.

MR. MARINO: No, it was a declaratory order. And what happened is that we --

QUESTION: It was no more than a declaratory order?

MR. MARINO: Absolutely, Your Honor. The suggestion that the Chief Justice made, his analogy, a citizen came in to the Commission and said: These words have been broadcast. Take the station's license entirely away from them, because they have abused the public airwaves.

The Commission thought that that would not be fair to

even put them in hearing, it was out of the question.

QUESTION: They also thought they'd be violating the censor statute, too, didn't they? If they did that.

MR. MARINO: 326, Your Honor, prevents -- 326 was written in the Communications Act, it has two limitations on it: No. 1, the Commission cannot censor. This section was written in 1927, and at a time when everybody had --

QUESTION: Couldn't you have considered that when you were drafting this order?

MR. MARINO: We did. And we were certainly aware --

QUESTION: That's all I said.

MR. MARINO: Yes. Yes, Your Honor. We are certainly aware of 326, we're also aware of the language that Mr. Justice White put in the Red Lion case about the Commission suppressing or preventing people from broadcasting what they want to broadcast.

We are aware of 326, we are aware that we are not in a position, for example, of a motion picture censoring board which can say to a film distributor: Bring in your product so we can look at it.

We can't censor, we cannot interfere with the right of free speech by means of radio communication, because that's also included in 326. But we would add that when Congress wrote 326, it quickly added at the end of it that it will be unlawful to use any obscene, indecent or profane language by

means of radio communications.

That was written in by the same people who wrote the section in 1927. And so when we approach these cases, we have Congress's indication in 326 itself that we should concern ourselves.

We not only have the indication in 326, we have it in at least three other sections that we are supposed to be concerned and enforce to the limited extent that we can, using our regulatory powers.

I want to respond again, if I can, to Justice Stevens' question of yesterday. This declaratory order, Your Honor, was aimed only at broadcasting, which is a medium -- and when we say broadcasting, and I think everybody recognizes this, we're talking about television, AM and FM radio. It did not address the question of CB, which is a different medium and raises different problems.

So that the declaratory order was aimed only to broadcasting, and I think there is no doubt about that in the order.

QUESTION: I understand that, Mr. Marino.

May I go back to your question of your statement about censorship, Section 326; is it the Commission's position that if the Commission regards something as indecent, profane or obscene, in its expert judgment it concludes that it fits within that category, that then it's entirely outside the prohibition

against censorship?

MR. MARINO: I don't think so. First of all, let me back up and say it's not if the Commission regards it that way, Your Honor, it's the --

QUESTION: Well, subject to judicial -- well, excuse me, go ahead, finish up.

MR. MARINO: Well, what I wanted to say is that it's very clear from the very beginning of radio communications law that it's really a question that turns on the community in which the station is located. So if those words are found to be patently offensive by contemporary community standards in that community, and this is --

QUESTION: Well, you give us the easy case, if it's unprotected speech, why, surely it can be prohibited; but --

MR. MARINO: Then you have the hard case --

QUESTION: But I'm talking about the tough case where something is indecent, but yet may be protected, the person may be protected from criminal prosecution for uttering some swear words or something like that. But if it's in the indecent category, you're saying it's outside of the non-censorship category. That's what I -- how do you mesh the censorship --

MR. MARINO: Well, by censorship, I think 326 takes the classical censorship, which was prior restraint, a motion picture censoring board which -- and I think this was -- let's

bear in mind that the section was written in 1927. There had been very few Supreme Court cases, and everybody's concepts of what the First Amendment meant were the Flagstonian concepts that, first of all, you cannot -- that the First Amendment means that you can't censor. Subsequently this Court has said that in a limited category you can, the motion picture censoring board may censor. But we know that we cannot censor.

The problem is that broadcasters have traditional responsibilities. Broadcasters have to broadcast in the public interest, and I think that's the other side of the --

QUESTION: What about this community you keep mentioning, all I have heard argued here today is one protest, by one man, with one son -- am I right?

MR. MARINO: We only received one complaint, Your Honor, that's correct.

QUESTION: Well, where do you get community action out of one man? He wasn't the Mayor, was he?

MR. MARINO: I'm sorry, Your Honor.

QUESTION: He didn't speak for the community, did he?

MR. MARINO: He certainly did, Your Honor. He came in in a representative capacity, we think. We've been --

QUESTION: Well, what made you think that? You've only got one.

MR. MARINO: Your Honor, the standing --

QUESTION: Do you need the community's standing to

win your case? That's what I'm wondering.

MR. MARINO: One citizen can raise a legitimate public interest question --

QUESTION: Well, if you've got one citizen, that doesn't give you the right to say he speaks for the community, does it?

MR. MARINO: We've --

QUESTION: Does it?

MR. MARINO: We've limited -- we've loosened the standard -- especially in these informal complaint cases, Your Honor, we have loosened the standards to such an extent that we will entertain complaints from one citizen on behalf of his community. We've learned our lesson on --

QUESTION: So it's not community.

MR. MARINO: He's proposed to speak for his community, to the extent that he raises a public interest question, or some other question.

QUESTION: And am I correct that if nobody had protested, you wouldn't have taken action?

MR. MARINO: We wouldn't have known about it, Your Honor, because we don't -- we just don't have funds or we don't have even instructions to monitor. So we would have never known about it, except that -- except a citizen bringing this to our attention.

QUESTION: Well, I suppose one citizen can call the

attention of the police department or a fire department to a nuisance, and that triggers the procedures; is that what you're suggesting?

MR. MARINO: That's the theory, and Mr. Justice White's opinion in the New York Telephone Company case.

QUESTION: Well, this wasn't a fire!

[Laughter.]

MR. MARINO: No, Your Honor.

QUESTION: Was it?

MR. MARINO: No, it wasn't, Your Honor. But it gave the Commission an opportunity to give broadcasters some guidance, and it did it in the context of a concrete factual situation.

I want to once again stress, and I don't understand why the United States feels that they have to expand the Commission's order to reach constitutional questions, when it could have been read very narrowly, as it was by Judge Leventhal, and as it was by the Commissioners, who instructed us to come and seek cert before this Court on the basis of Judge Leventhal's opinion,knowing that we were going to rely on that opinion.

QUESTION: Well, as I understand it, the Solicitor General has taken the position that this particular broadcast was protected by the Constitution. I thought that was the answer in response to a question by my brother Stevens.

MR. MARINO: I don't think that --

QUESTION: So even so limited, I think they --

MR. MARINO: Then they are saying that it couldn't even be channeled. They would channel -- I think what it comes down to --

QUESTION: Do you understand their position differently?

MR. MARINO: They still would say that if you channel -- I think they said if you channeled, in response to Mr. Justice Powell, if you channel it out, let's say Captain Kangaroo, where you know it's going to get to children, I can't believe that --

QUESTION: Well, that's right, that's quite different from this broadcast.

MR. MARINO: But what we're saying is that there's a reasonable risk of always reaching children, so it's a question of which is -- under the public interest standard, which is the more, the better channeling device.

And finally, in conclusion, Your Honor, if I may, I think we may have inadvertently slighted the alternative theory that the Commission used in its order, that's contained at page 18 of the Joint Appendix, and we would also rely on that and rest on that in submitting this case to you and asking you to reverse the judgment of the Court below.

QUESTION: Perhaps, if you know, could you clarify

what I put in the question to Mr. Claiborne: Is this station itself supported by appropriated funds, appropriated by the Congress?

MR. MARINO: Your Honor, --

QUESTION: Or is it public subscription?

MR. MARINO: -- it's a noncommercial educational station. I know that, going through their license file, there's at least one indication that perhaps they were asking HEW for funds to improve their facilities; but I don't think it's the traditional educational, or PBS, if that's the correct term, station, which is purely educational.

I think a noncommercial, and they therefore qualify for educational frequencies; but I don't think they are a government-supported station, other than perhaps this subsidy from HEW, if they've gotten it.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:42 o'clock, a.m., the case in the above-entitled matter was submitted.]

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