ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TURNER BROADCASTING SYSTEM, INC., ET AL., Appellants v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CASE NO. No. 93-44

PLACE: Washington, D.C.

DATE: Wednesday, January 12, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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TURNER BROADCASTING SYSTEM, :

INC., ET AL., :

Appellants :

v. : No. 93-44

FEDERAL COMMUNICATIONS :

COMMISSION, ET AL. :

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Washington, D.C.

Wednesday, January 12, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

H. BARTOW FARR, III, ESQ., Washington, D.C.; on behalf of the Appellants.

DREW S. DAYS, III, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Appellees.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 93-44, the Turner Broadcasting System, Inc. v. Federal Communications Commission. Mr. Farr.

ORAL ARGUMENT OF H. BARTOW FARR, III

ON BEHALF OF THE APPELLANTS

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

The Government defends the must-carry law primarily by analogy to the antitrust laws, saying that it protects the broadcast system from anticompetitive actions by cable operators, but there is a critical flaw in this argument. The law does not just prohibit anticompetitive activity. It prohibits all decisions not to carry broadcast stations for whatever reason the cable operator may choose.

Thus, we submit, the Government must put forth an interest to justify what the law actually does, which is to override all editorial discretion with regard to carriage of broadcast stations, and we further submit that neither interest put forward by the Government can meet that burden.

First, an interest in promoting particular

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programming does not meet the burden, because Government can't generally promote speech that it favors by the means of ordering others to carry it, or by discriminating against disfavored speech, and the interest in protecting the economic viability of the broadcast system as a whole does not support the law, because even without must-carry, cable systems carry the vast majority of broadcast stations, and the broadcast system is concededly thriving.

QUESTION: Well, Mr. Farr, there is -- we have a situation where one medium has a limited number of channels, and does the Government have no interest at all in seeing that those channels are opened up --

MR. FARR: I think the Government --

QUESTION: -- to others on a neutral basis, for example?

MR. FARR: Justice O'Connor, I think the Government has an interest in seeing that cable operators like other businesses, including like other members of the press, do not make decisions about what to carry on an anticompetitive basis, and if the law was narrowly directed to that problem, then it seems to me the case would be different, but the law is not.

QUESTION: For instance, the dissenting judge on the panel below suggested an alternative way that the Government might proceed. Would you like to comment on

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that suggestion?

MR. FARR: Justice O'Connor, I don't completely agree with Judge Williams on the idea that least access channels are a less restrictive alternative for two reasons, even though, quite frankly, it is in one sense a helpful argument to us.

The first is that even least access doesn't require any showing of anticompetitive behavior by the cable operators. It is again a law that is directed to all cable operators and simply removes discretion from those operators to program particular channels, whether they've ever engaged in any economic misconduct or not.

QUESTION: What if a municipality chose or perhaps, if the Federal Government had the power, the Federal Government chose to say that all cable operators must be merely carriers? We're not going to allow anybody to put copper under our streets in order to carry their own programs.

MR. FARR: I think it is --

QUESTION: You have to be like the telephone company. Anybody who wants to use it may use it.

MR. FARR: Although I wouldn't concede it, I suppose it is possible that at one time that is something that could have been considered, but now we have a system with operating cable systems which --

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QUESTION: But why is that any different from Justice O'Connor's least access proposal? It's just doing it wholesale instead of for a limited number of --

MR. FARR: Well, that's correct, and as I'm saying, I have a difficulty --

QUESTION: So you think that would be unconstitutional, too.

MR. FARR: That's correct, I do. I think at least to the extent that one is saying we're going to take --

QUESTION: We do it for telephone companies. It is unconstitutional there?

MR. FARR: It is not unconstitutional for telephone companies, because they are not essentially engaged in the business of providing news, information, speech of that nature to the public.

QUESTION: But does that sort of define the problem in a way that makes it easier for you? Why is it illegitimate to look at the operating companies simply as carriers as opposed to originators, and say that in one respect, i.e. their respect as carriers, they are subject to obligations the way the phone company might be?

MR. FARR: What -- it seems to me that the particular activity that the must-carry law is aimed at is choice of material to be carried on a cable system. The

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cable operator has a choice of a number of different sources from which it can obtain programming, including, as you suggest, Justice Souter, creating its own programming, and what the must-carry law deliberately aims at doing is saying when you make that choice you must make it in a way that the Government directly controls, and not because the Government is saying you're engaging in some anticompetitive behavior, simply because the Government wants you to make a different choice.

QUESTION: Of course, the significance of that, in a way, is easy if we use the terms like editorial discretion, which have taken on a meaning from the newspaper context, but this doesn't quite fit the newspaper context.

I suppose the position that the carrier is in here, the operating company is in here, is somewhere in between that of the newspaper and the telephone company, and how should we decide whether the significance of a limitation on editorial discretion should be analyzed as if it were a newspaper, or on the other hand as if we were looking at it as an analogue to the phone company?

MR. FARR: Well, it seems to me that 1) the term editorial discretion means a particular thing. It means that a business which is engaged in providing speech to the public, and the Court has recognized that that's what

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cable systems do, is in fact making decisions about what material it would be, whether it is public television stations, alternative to public television stations --

QUESTION: But Mr. Farr, they're not making particular decisions. If they're carrying a program or they're carrying a broadcaster, they're not deciding what that broadcaster -- each individual program. They're making a gross decision.

MR. FARR: That's correct, Justice Ginsburg, they are not deciding each moment of the day what is put on a particular channel. That is something that the programmer itself does.

QUESTION: I think one of the briefs suggested a better term would be an entrepreneurial decision rather than an editorial --

MR. FARR: Well, Your Honor, to begin with, the term "editorial discretion" is a term that this Court has used in Preferred and other cases with respect to what the cable operators are doing, so I'm not simply creating it out of thin air, but I think it is an entrepreneurial decision in the sense that any member of the media who is choosing speech is choosing it in part, at least, for entrepreneurial reasons.

The question is, what, in fact, do the subscribers to a cable system, the readers to a newspaper,

the patrons of a bookstore or a movie theater -- what will interest them? What will they come to see, what will they pay money to see or hear?

QUESTION: But that's essentially an economic decision, not a literary or choice one.

MR. FARR: Well, it's a combination of the two. It seems to me that any member of the media can make decisions, and to say, for example, that we are simply going to say that you are making a decision for an economic reason, if a newspaper decides that it's going to carry a particular political cartoonist because that political cartoonist is popular and that will increase circulation, that may be entirely a business decision, but that's certainly something we don't think the Government can step in a preempt.

So the -- indeed, this goes very much to the point that I'm trying to make, which is it seems to me that Government does have a legitimate interest in saying, when you are acting in a way that we typically prohibit under the antitrust laws, the laws that regulate competition, then when we tell you that you can't exercise your discretion for that reason in order to injure somebody anticompetitively, then we have the power to impose some regulation.

But when Government goes further and says, we're

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going to control all of your decision-making with respect to a particular subject, whether you're acting anticompetitively or not, then it seems to me to have crossed a very important line.

QUESTION: Well, of course, I guess we can argue about Judge Williams' solution if and when it's ever adopted. I suppose you really don't have to fight whether that's feasible or not, do you. I mean, what's happened here is that the Government has not said you must make your channels available to everybody. They've said, you must make your channels available to this person.

MR. FARR: Well, that's correct.

QUESTION: So it isn't really the same thing as what's done with the telephone company.

MR. FARR: That is correct.

QUESTION: I think Justice O'Connor's question was whether, in your -- based on your argument, least access -- least access would be equally unconstitutional. You're arguing that must-carry is unconstitutional. Would least access, as a substitute for it, also be unconstitutional?

MR. FARR: I think that is a closer question, and let me explain why. The difficulty that I have with least access from the standpoint of cable systems is that, like the must-carry law, it does take away the discretion

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to program particular channels, and as I mentioned before, it doesn't do that based on any determination that there is anticompetitive activity. It simply makes the decision that we are going to preempt the programming for those channels.

What it does not have is the element of pure discrimination against particular programmers and in favor of other programmers, so in that sense it does not have one of the evils that the must-carry law has.

QUESTION: Can you explain one thing to me, because I think it was the nub of the answer that you just gave, and that is, Judge Williams relied very heavily in his opinion on the fact that the FCC requires certain elements of content in local programming, and therefore a fortiori it is required by must-carry.

Would your argument then equate must-carry with least access if the Government stopped regulating -- through the FCC stopped regulating the content of local programming? Would they then be on par?

MR. FARR: I would not put them specifically on a par, because I think it still is a particular discrimination in favor of identified speakers, and I think it would be illusory, frankly, to assume that Government is not generally aware of what speech on broadcast station consists of. Indeed, even apart from

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particular regulation by the FCC, there are specific laws that Congress has enacted that deal with programming on broadcast stations, so I would still have concern --

QUESTION: But they deal with programming on all broadcast stations, so that your identification of the speaker would be purely geographic at that point, wouldn't it?

MR. FARR: In the sense that --

QUESTION: I mean, i.e., locally. The only way you would identify them would be their point of origin rather than anything to do with their content, let alone their prescribed content.

MR. FARR: Well, for example, if I understand the question, Justice Souter, a law that says that a broadcast station cannot have indecent material, let's say, that is a law that applies to broadcast stations throughout the country, so Congress could know that if it's expressing a preference for broadcast stations, that it is therefore at the same time really expressing a preference for stations that are subject to that law and that restriction on their speech in ways that other possible programmers would not be.

QUESTION: That would distinguish -- I guess this is my point of ignorance. That would distinguish between cable and broadcast, the cable operators could be

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indecent?

MR. FARR: They are not subject to some of the same restrictions on their speech that broadcast stations are, and I think that is because they do not share the physical -- the spectrum and the physical scarcity rationale has not been applied to them. The Congress has not done that.

QUESTION: Mr. Farr, if a municipality is reviewing bids for a cable company, and let's assume economically there can probably be only one cable company, I take it it's entitled to assess the cultural offerings of the different programs from the different bidders?

MR. FARR: Well, I am not sure that I would give them much leeway in that regard, quite honestly. I mean, I think if what Government is doing is essentially trying to use a franchising process where there is perfectly adequate room for other cable operators to function, because there's plenty of space on the rights of way for additional lines or additional cable, if Government is using that process as a way to start to press for distinctions in speech, then I find that troubling.

Now, I think it's probably unrealistic to assume that when local governments are considering applications, that they don't take into account something on the grounds of content, but my general feeling is that that should be

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at a very, very attenuated level if it's permitted at all.

QUESTION: Well, Mr. Farr, let's suppose that a municipality decides, we don't want our telephone poles cluttered with a lot of things, so we're only going to be able to have one cable television within the -- and there are three or four applicants. Now, aren't they entitled to make some judgment as to at least which the majority of the people in the municipality might prefer?

MR. FARR: Assuming the premise, I think it is possible that there is some very modest leeway for that.

QUESTION: Well, why should it be modest?

MR. FARR: Well, because -- first of all because I do quarrel with the premise, quite honestly. When --

QUESTION: Well, accept the premise, though.

MR. FARR: But I think the premise is important, too, and I mean -- I will accept it, but I think the premise is important to it, because the question that one is always asking when one is extending Government leeway to get into content is, why are we allowing Government to do this?

Typically, Government is not allowed to do it, so if the answer is, because we have no choice, essentially Government is in a position, as it is in the broadcasting situation, where there is a spectrum which can only accommodate so many speakers, and the Government

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therefore has to shut down other speakers, has to silence particular speech, then the Government has been accorded some greater leeway with respect to the speech that gets on.

That really doesn't exist with cable operators, and therefore it seems to me if the local government says, we're only going to have one cable system, something which I point out Congress has now prohibited in the 1992 act, but if they say that, really they're using one power, the power to grant rights of way, to essentially leverage themselves into a second power to control content, and I do find that troubling.

QUESTION: So you say if there are 10 cable companies that apply, and the municipality says, we only want one, the First Amendment says no, you have to take all 10, no matter how cluttered the streets get?

MR. FARR: No, no, I would not suggest that cities have that obligation to allow all-comers to come in. I mean, essentially that's the issue that the Court --

QUESTION: Yes, but okay, well --

MR. FARR: -- had before it in Preferred.

QUESTION: -- you have a number of observations around the fringe, but how about the actual situation where you have several applicants, the city says we're

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only going to take one?

MR. FARR: When the city says that, and there is no absolute requirement that the city has to take one in the sense that it could easily accommodate others, then it seems to me the city's power to discriminate on the basis of content is very limited, if it exists at all.

QUESTION: So 10 applicants, the city says we're only going to take one, the applicants could make out a case that physically with a lot of cluttering you might be able to take three or four, the city can do nothing, it has to take all 10?

MR. FARR: No, no, I'm not saying that it has to take all 10. I'm saying that its basis for choosing among them cannot be dictated by its views about the content of programming.

If, for example, they say, we will accept -- we will give preference in the application process to cable operators who agree that they will not show the following 25 cable networks, they will go into an upper tier if they agree not to show these, I think that would be impermissible.

QUESTION: Mr. Farr, to what extent is the scarcity rationale undercut by current technology? I guess we have now coming on line satellite services that will provide hundreds of channels with a tiny dish --

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MR. FARR: That's correct, Justice O'Connor.

QUESTION: -- available so there would be no scarcity. We have fiberoptics coming on line, and they have virtually unlimited capacity. Does this undercut the scarcity rationale, in your view?

MR. FARR: Well, I think it changes part of it. I think what clearly is happening in the communications world is there are a number of new technologies, which means that the opportunities for those who want to reach the public are greatly increasing, and I think they're going to accelerate in the next 10 or 15 years.

In the particular scarcity rationale, really the only scarcity rationale that this Court has recognized, deals with one specific thing, which is the electromagnetic spectrum, and the limitations on assigning licenses based on frequencies in the spectrum, that spectrum is not really changing, so in that sense there still is physical scarcity.

It would seem to me that the difficult question in the broadcast context, none of which, I hasten to point out, applies to cable, is, even if you still have scarcity of the spectrum, given all the other ways that people can reach the public through other technologies, is the regulation that has been premised on the scarcity still justified, and it seems to me that is the question that

the Court has suggested that it is at some point willing to reconsider in League of Women Voters.

QUESTION: But Mr. Farr, what does it do to your argument that many cable companies have, say, only 30-odd channels now, and one of the reasons you say you don't want to be forced to carry is that you then have to give up something. Now, I can understand your point about the favored position that you're required to give to broadcasters, but if there's not going to be any limit on the number of channels that you can have, doesn't that dilute your objection?

MR. FARR: It's possible in the future, Justice Ginsburg, there may be a situation where essentially the ability of all programmers to reach the public through a cable system is essentially not foreclosed by a law like the must-carry law, but I would have a couple of comments. First of all, obviously we're not at that position now. The must-carry law applies today, and nobody disputes the fact that most cable systems have a definitely defined capacity which is already filled up, and therefore any inclusion of broadcast stations necessarily means the exclusion of some other programmer.

Secondly, of course, the hard thing to speculate about is, if at a time when the average cable system has 200 channels, it may be that there are 400 programming

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services, because programming services have expanded to meet the expansion in channel capacity of cable systems as that has occurred, so I think it's hard to say, even in the abstract, that in the future when there are more channels, that a preference for a particular kind of programming imposed on operators will not be troublesome, because there still may be the same need to make choices --

QUESTION: How many --

MR. FARR: -- just in larger numbers.

QUESTION: What is the maximum number of local channels that realistically a cable company might be compelled to carry?

MR. FARR: I don't have a precise answer to that. I think we're talking somewhere in the 15 to 20 range, depending -- it depends, because --

QUESTION: If there are that many local stations that want to be -- that would request access.

MR. FARR: That's correct.

QUESTION: Because in most markets there wouldn't be that many.

MR. FARR: That many stations total? You have VHF stations, you have UHF stations, if that doesn't fill up your number, then you have low power which you're required to carry as well, so the number actually does

fill up fairly quickly, so I think it is basically correct, although I can't say this with absolute assurance, that most cable systems subject to must-carry are finding that, through the combination of stations that are being carried through retransmission consent, and those carried pursuant to must-carry, they are filling up their limit.

QUESTION: Based on what we've said so far, I assume that the must-carry provision for public broadcasting is the most vulnerable based on the content argument, is that correct?

MR. FARR: I think that -- certainly there are specific findings, Justice Kennedy, about the public television station's content, although there are still findings of a slightly less specific nature about the commercial stations, so frankly I don't make much distinction between the two.

QUESTION: Well, if we assume for the moment that it's the most vulnerable, and if we assume also for the moment -- there can be a debate about it, but if you assume that that's the most justifiable provision from the standpoint of improving our young people's intellectual life, does that mean there's something wrong with our doctrine?

MR. FARR: Well, I don't think so. It seems to

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me that the doctrine permits choices by cable operators, and there is no reason to expect, based on history, that in fact cable operators aren't interested in providing programming that people want to see anyway. Most cable operators voluntarily, without must-carry, since 1986, when the rules were struck down, have carried the vast majority of stations.

I mean, 95 to 98 percent -- as an affidavit that we submitted in the Joint Appendix at page 305 suggests, 98 percent of the stations have been voluntarily carried, including public television stations. Why? Because there is in fact a demand. There is a certain kind of programming on public television stations that the public wants and the one thing it seems to me that is clear is that cable systems have the primary incentive to provide programming that the subscribers want, rather than incentives to drop broadcast stations for other reasons.

QUESTION: To the extent that's true, aren't you saying the must-carry rules just -- largely just make the cable companies carry what they'd carry anyway?

MR. FARR: I think that's correct, in a sense, Justice Stevens.

QUESTION: So maybe the fight isn't quite as serious as it sounds on the surface.

MR. FARR: Well, it's serious in one sense. I

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mean, if we're saying that this is going to dramatically change the face of television, whether must-carry stands or doesn't stand, I don't think it will, for exactly the reason that I'm saying.

On the other hands, I do think there is a very real difference between a voluntary decision to utter speech, to use the term in First Amendment language, and being compelled to do so, and I assume that, for example, most people voluntarily say the Pledge of Allegiance, but I think then when Government says, even if you would voluntarily say it, or even if most people would voluntarily say it, we're going to make it a matter of compulsion, then they have crossed over into an area of unconstitutionality.

QUESTION: Mr. Farr, as I understand your argument this morning, you pretty much are saying that even if we accept all the congressional findings, you should prevail on the theory you've been advancing.

MR. FARR: That would be true, that this law is not tailored to anticompetitive activity, and it is based specifically on discrimination among different programmers, and that itself is enough to make the law invalid.

QUESTION: What if we agree with you, Congress goes back, drops all the findings about content and the

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value of local origination, and simply sticks to findings about the threat to competition?

MR. FARR: Well, the problem is, simply making findings about the threat to competition, even if they were better substantiated than these findings, which show that in fact the stations are being carried, they're not being dropped in order to get advertising revenues, more broadcast stations are in fact carried on cable systems now than when there was must-carry.

QUESTION: Congress just says, look, we want to lock the door before the horse has gone.

MR. FARR: But the difficulty that they would not cure by simply going back and simply reenacting the same law with anticompetitive findings is the point that I made precisely at the outset. This is not a law directed specifically at anticompetitive conduct. It's not tailored to that problem.

So as long as the law reaches all decision-making with respect to broadcast stations, not simply decision-making for anticompetitive reasons, it doesn't make any difference what findings Congress makes, it is not justifying the law on that basis.

I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Farr.

General Days, we'll hear from you.

ORAL ARGUMENT OF DREW S. DAYS, III

ON BEHALF OF THE APPELLEES

GENERAL DAYS: Mr. Chief Justice, and may it please the Court:

What Mr. Farr wants the Court to do is basically ignore significant elements of the congressional decision to enact the 1992 law. At least two things can be said with conviction about the regulation of electronic media in the United States. First, the Federal Government made a promise to the American public in 1934 that it would make available so far as possible to all the people of the United States a rapid, efficient, Nation-wide and worldwide wire and radio communications service, and it expected that the administrative agency charged with promoting that policy would do so consistent with public interest, convenience, or necessity, and do so in a way that was fair, efficient, and equitable.

Second, the electronic media field has been from its beginning, to quote Justice Frankfurter in the 1943 National Broadcasting Company case, "a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."

Over the intervening 50 years, Congress has striven to strike a balance in the best interests of the American people on the one hand by developing a regulatory

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framework that does not retard the growth of the electronic media and increased outlets for expression while on the other assuring the growth of the electronic media did not disserve the goals of diversity and broad, equitable, and free geographic distribution of access to electronic media. It is a dynamic, not a static process that has required Congress to be alert to the existence and impact of new technologies. It is a process that goes on as I speak. It is this morning's headline news.

We respectfully submit that the lower court correctly upheld the constitutionality of the must-carry provisions of the 1992 act, finding it essentially economic regulation designed to create competitive balance in the video industry as a whole.

QUESTION: Now, Mr. Days --

GENERAL DAYS: Yes.

QUESTION: -- do you acknowledge that to be valid the congressional regulation has to be content-neutral?

GENERAL DAYS: We do not. We think that in this case there is no focus on content.

QUESTION: Well --

GENERAL DAYS: We think it's --

QUESTION: Wait a minute. Maybe I didn't express myself clearly enough.

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GENERAL DAYS: Yes.

QUESTION: Do you acknowledge the legal principle that to be valid it must be content-neutral?

GENERAL DAYS: I think that if it is not content-neutral then it has to meet a very exacting test that this Court has set out, but our position is that this regulation is not content-based. It is content-neutral. It is not focused --

QUESTION: Yes, I understand that.

GENERAL DAYS: -- on the speaker.

QUESTION: I was just trying to ascertain whether you take the position or acknowledge that it must be content-neutral to survive.

GENERAL DAYS: No, not at all. It just requires that the regulation meet a higher standard of justification.

QUESTION: And do you say the same thing about the public broadcast must-carry provision, that that's not content-based?

GENERAL DAYS: I think the lower court was correct in referring to it as being content-based in a de minimis sense, and this may get to your point, Justice Kennedy, about the doctrine.

To characterize what Congress has done here in promoting the increase in voices to provide educational

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and constructive video programming to the public as being content-based is somehow to distort this Court's decisions and the doctrines that have developed. This is not a situation where Congress is focusing on what the speakers are saying.

Now, with respect to section 5, it is true that Congress made references to educational television, but I think in only the most generalized sense. It's not a situation where Congress is dictating what those stations must carry. In fact, this Court's decisions make very clear that educational stations enjoy editorial discretion and freedom. That's really the League of Women Voters, and that's also true with respect to local broadcasting.

QUESTION: In other words, our doctrine puts you in the position of trying to minimize the content-based aspect of the decision, which might really be its best justification from a cultural standpoint.

GENERAL DAYS: Well, I think, Your Honor, that's why it was our argument on this particular legislation that the existing tools for evaluating it were really not adequate to the task, and that it was more productive not to look at the so-called content related cases or doctrines, but rather to look at those regulations, or those doctrines that deal with attempting to address market dysfunction and economic scarcity, the inability of

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speakers to have their messages heard because of control.

QUESTION: General Days, there's one point I wasn't clear on in your presentations in your brief.

GENERAL DAYS: Yes.

QUESTION: Are you saying, based on your argument that minimal scrutiny should apply here, that there really is no difference in the authority of the Government vis-a-vis cable and, on the other hand, radio broadcasting, radio and television broadcasters?

GENERAL DAYS: We are not --

QUESTION: In other words, could the Government, if it wished, have a fairness doctrine, have an equal time doctrine, have a decent speech regulation with respect to cable operators and programmers as it does for radio and television broadcasting?

GENERAL DAYS: That is not our position, Justice Ginsburg. The fact that we relied upon Red Lion was not to suggest that Congress necessarily has the power to regulate cable television in the same way that it does broadcast stations, but simply to indicate that the monopoly power of cable may justify some regulations that implicate but do not transgress First Amendment prohibitions.

QUESTION: But the same argument was made, or one much -- in the Tornillo case, that Tornillo's only

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opportunity to have his views heard was if the Miami Herald would publish his letter to the editor.

GENERAL DAYS: Well, certainly that argument was made. I don't think the Court actually resolved the question of economic scarcity, but the fact was that there were other ways in which Tornillo could express his views and be heard.

QUESTION: Well, do you think the case would have come out differently if he could have shown as a matter of fact that there was nothing nearly as adequate as publishing his letter to the editor in the Miami Herald to express his views to the public?

GENERAL DAYS: Mr. Chief Justice, I think that saying that there was nothing quite so adequate is not analogous to this situation. What Congress was looking at was basically a bottleneck, a control, a gatekeeper function that cable was performing with respect to the development of broadcast television.

I think that in the Tornillo case what we would have to have is a situation where the only way in which Tornillo could express himself was through the Miami Herald, or through the newspaper that published the particular article.

QUESTION: Excuse me. It seems to me the programs that are aired over broadcast television have

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many other ways to get onto the screen, not to mention many other ways of getting into human minds through the print media. They can get on the screen through cassettes that you can take home. They can get on the screen through cable programs that are not over the air.

I don't see how -- it seems to me there's much more scarcity in the daily -- which most of our cities have, the single daily newspaper situation than there is in the cable system.

GENERAL DAYS: Well, Justice Scalia, certainly that argument can be made. There are problems there, but again, to divorce the history of Congress' consideration of cable television from what it did in 1992 is to miss the point. This is not Congress deciding one morning when it got up to regulate the cable TV industry.

QUESTION: But my point is, we shouldn't look at this as the voice we're trying to get in is the voice of the over-the-air broadcaster. What we're talking about is whatever the over-the-air broadcaster chooses to program, and that can get to the viewer through many other means. They can syndicate it in cable instead of over the air. They can get it to the viewer on cassettes, in a lot of other ways. I don't see how there's this great bottleneck that you're talking about for the individual speaker.

GENERAL DAYS: There is the bottleneck insofar

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as we're talking about Congress' commitment that I just mentioned to the American people to ensure that they were able to get free television service.

QUESTION: That's a different issue. Now you're not talking about the message, you're talking about whether you get it free or not, I suppose.

GENERAL DAYS: That's precisely right. We're not talking about the message, Justice Scalia.

QUESTION: It has nothing to do with the content, then?

GENERAL DAYS: That's correct.

QUESTION: Well, that's a difficult argument to make in light of the findings that place such stress on the desirability of public television and local broadcasting and discussing local issues and so forth. I think it's very difficult to sustain that argument.

GENERAL DAYS: Justice O'Connor, it in our view is not difficult. It may be different, but not difficult, in the sense that there is nothing, in our estimation, constitutionally improper or inappropriate for Congress to express its views on the importance of local broadcasting -- it's something that it's been doing since 1934 -- or to talk about educational television.

QUESTION: Well, but Congress went ahead on that basis, then, and set aside a third of a whole medium for

the benefit of a favored class of speakers, so it's a little difficult to justify that --

GENERAL DAYS: Well, Your Honor --

QUESTION: -- on existing doctrine.

GENERAL DAYS: I think the point is that it's not favoring the broadcast industry in the sense of promoting it plain and simple.

The idea is to make broadcast television available to 40 percent of those households that do not have cable, and also to make certain that people who have cable get the quality of programming that they deserve, and to the extent that the cable industry, with its tremendous horizontal concentration, vertical concentration, tremendous control over the market present, what Congress envisioned was, down the line before long, there would not be that availability, and that's why Congress responded.

QUESTION: Yes, but Congress responded -- I mean, it seems to me the point of Justice O'Connor's question is, Congress responded by explaining why the content of local programming and educational television programming was more desirable, or was in itself desirable.

They were putting a content justification on it, and I don't know how you get over that hurdle except

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perhaps by saying, look, the motives were mixed, or on the other hand we have a justification that will avail us even though there is a content basis, but it's still the case that they have made the decision and have explained the decision on a content basis, haven't they?

GENERAL DAYS: Justice Souter, certainly there were all kinds of statements and findings, but I think they go to the point of diversity. It was not Congress saying, now, we're going to allow local stations on cable, we're going to allow educational stations on cable --

QUESTION: Sure, but whenever --

GENERAL DAYS: -- and we're going to watch to make certain that you do precisely what you expected. That was not what Congress had in mind.

QUESTION: But whenever you get a particular content which is not otherwise being broadcast, your justification is always diversity. If we don't require it, or push someone else aside to allow it in, we will not have diversity to that extent.

I don't see the difference between a diversity argument and a content argument here, and in any event I don't see how you could make that distinction so long as the Government through the FCC does regulate the content to some degree of the broadcast medium.

GENERAL DAYS: Yes, it's been suggested that

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this was perhaps a way in which Congress could control the cable TV industry, but I think this Court's decisions have made very clear that the editorial discretion of even broadcasters is fairly broad, and the FCC and the Congress are restricted in the way they go about regulating that particular part of the media.

QUESTION: And you conceded that there are more restrictions on what the legislature could do vis-a-vis the cable -- the content of what cable operators could choose to put on?

GENERAL DAYS: Certainly, given the record that Congress has compiled up to this point, I don't want to preclude Congress' looking at the issue at a later stage, but I think at this point there's nothing in the record that would justify Congress' extending its regulation to cable in the same way that it regulates the broadcast industry.

QUESTION: General Days, is it the Government's position that there is no violation of the First Amendment to discriminate with respect to speakers so long as there is no discrimination with respect to content? That is, can the Government say to a particular individual, you can't talk, and to someone else, you can talk, so long as the Government's -- I don't care what you say. It's just that we don't want you to talk.

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GENERAL DAYS: No, I don't believe that the Government can silence people, but this is not a situation where cable operators are being silenced. As was suggested in the questions about --

QUESTION: Well, they're saying the broadcasters have to talk, and that means that these other people who want the same space can't talk.

GENERAL DAYS: But Justice Scalia, it's a matter of reasonableness, and whether it's tailored to the particular problem that Congress identified, and it's our position that in this legislation that's what Congress did.

QUESTION: Well, how closely tailored is it? You say that there's this great problem. They're carrying 98 percent of all of the signals anyway. Must we accept Congress' assessment that there is a major market failure here?

GENERAL DAYS: I think what Congress identified was an enormous development in the power of the cable TV industry, and was projecting down the road the extent to which that power would overcome the ability of broadcast TV to reach the 40 percent --

QUESTION: But it was all prediction, because it hadn't happened. When the D.C. Circuit dealt with the FCC regulations, and so must-carry was out, there wasn't a

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huge change, was there, so these findings -- what you refer to, findings, are more in the nature of predictions, well, they're not so bad now, but they're going to get worse?

GENERAL DAYS: Well, Justice Ginsburg, they're not soley predictions. They're based on evidence in the record that Congress considered over many years through many hearings that there were denials of carriage, that there were limitations on carriage, that stations were being dropped, that they were being repositioned -- that's in the record, and I think --

QUESTION: Maybe they were very bad stations that people didn't want to watch, which is why the cable systems didn't have them.

GENERAL DAYS: Well, that may be the case, but what Congress found was that there was an incentive on the part of cable operators to drop certain stations because of their desire to have greater access to advertising revenue.

QUESTION: Well, now -- I thought the ratio for a cable station between the money it gets from advertising and the money it gets from the subscribers is 25 to 1, so if by failing to carry this single station they lose 1 subscriber, they have to make up from advertising 25 times --

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GENERAL DAYS: Justice Scalia, I think that the record reflects that cable operators are carrying network affiliates, but they are dropping some of the independent stations not because they don't have attractiveness to cable viewers, but because of the fact that if they're dropped, then other stations can be brought on, and those basically benefit the cable operators.

QUESTION: So that --

GENERAL DAYS: They're also able to use the --

QUESTION: Excuse me.

GENERAL DAYS: They also are able to use that for their own programming. There's a tremendous integration here, cable operators owning cable programmers, cable programmers owning cable operators. To that extent, cable operators do benefit by dropping some broadcast stations that are not affiliated with them.

QUESTION: Maybe Congress should pass a law against that.

GENERAL DAYS: Well, it's certainly trying --

QUESTION: Instead of saying who can speak and who can't speak.

GENERAL DAYS: Well, it's not a matter of telling people who can't speak and who can speak. Congress has dealt with this, for example, with respect to the cross-ownership rules, on the grounds that that

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created a problem within the marketplace for the availability of quality programming.

QUESTION: But in the present day context, if the networks are being carried, the network affiliates, then what we're talking about is replacing marginally successful broadcast stations against marginally successful cable offerings. Is that all this is about?

GENERAL DAYS: I don't believe it is, Your Honor. I don't think marginal is the right way to describe it. I think the record reflects that even those independent stations that have been dropped or refused carriage actually have more of an attractiveness to viewers than some of the cable programs that are put on, and the cable programs are put on because there is this interlinking relationship that stimulates that type of anticompetitive practice. That's what Congress felt was going on.

QUESTION: Are there findings to that effect, to the effect that you just described --

GENERAL DAYS: Yes. Yes, there are --

QUESTION: -- by Congress?

GENERAL DAYS: -- Mr. Chief Justice. There are references in the record. I can cite the Court, for example, to this interrelationship in the Senate report, which was an appendix to the Senate brief that was filed

in the lower court at pages 00268.

There's a chart that was before the Congress, indicating top cable networks owned by cable operators, top cable networks not owned by cable operators, and this is part of a discussion that was reflected in this report in Congress over this tremendous concentration.

QUESTION: And there is a finding by Congress that the result of this is to put owned subsidiaries, owned cables on at the expense of a broadcast station even though the broadcast station might be preferred by more people?

GENERAL DAYS: Yes, Mr. Chief Justice, there's a finding in the act at 2(a)(15) discussing the incentives on the part of cable operators to drop commercial and noncommercial stations. There are also other --

QUESTION: Incentive, but the experience -- Mr. Farr gave some figures about how little had in fact been dropped, and you're not disputing the accuracy of his figures? You point out that yes, there are some stations that have been dropped.

GENERAL DAYS: Yes.

QUESTION: But it's not an impressive record of what's been dropped so far.

GENERAL DAYS: Justice Ginsburg, I don't know about the word impressive, but I think that what it was

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for Congress was an indication of a problem that ought to be dealt with now, rather than waiting until devastation was wrought upon the broadcast industry and companies were either going dark or had so reduced the quality of their programming that they were not legitimate competitors.

QUESTION: So even though there was no clear and present danger of anything like that from the signals that had happened.

GENERAL DAYS: Well, I don't think that's the standard, with respect, Justice Ginsburg, in this situation, insofar as Congress is concerned.

Congress -- there was a discussion about new technology. Congress was aware of the new technology, and the record reflects the fact that fiber optics and what's called video compression will before long present a situation where most cable companies, most cable operators can have 500 channels.

QUESTION: Well, even more currently, does the record reflect any findings to the anticipated effect of this new satellite service that will go on line within a year that will make virtually unlimited access to people?

GENERAL DAYS: Your Honor, Justice O'Connor, I don't have any information to that effect. I do know in talking about this issue being as current as today's headlines that the vice president gave a speech yesterday

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about this administration's views on the so-called super highway, information super highway, and the position of this administration has been that there be open access and program diversity.

What that essentially means is that, even with this new technology, there will be an effort on the part of the administration, with the assistance of Congress, to ensure precisely the types of things that Congress has tried to achieve in the 1992 act.

QUESTION: But that's more like the telephone industry. The capacity will be virtually unlimited, and Congress on a content-neutral basis can say, okay, serve everybody. I mean, that's a very different proposition than what you have here, isn't it?

GENERAL DAYS: It is a different proposition, but I think it goes to the issues here in the sense that 1) we have -- in talking about the burden on cable operators, 1) if they're indeed carrying most of the stations that would be subject to must-carry, there's not a burden. If, indeed, there's this increased technology, then the must-carry responsibilities are also going to have less of an impact.

I think what it shows is that Congress was trying to deal with the problem but not in a blunderbuss fashion. It was not trying to make cable operators common

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carriers. It was trying to use a very limited mechanism, viewpoint neutral, to deal with a problem that had been identified, and it's not simply a matter of antitrust violations by the cable industry. It's something much more than that.

QUESTION: Well, this is, it seems to me, very blunderbuss if you're worried about broad -- I gather what underlies all of this supposedly is that Congress is worried about some broadcasters not being able to make it, and therefore going out of business, right?

GENERAL DAYS: Justice Scalia, I --

QUESTION: And in order to protect against that, cable systems are required to carry even the richest broadcasters, many of whom make millions of dollars a year. Why isn't that blunderbuss? I mean, why couldn't there been some system, if you talk about narrow tailoring, whereby local broadcasters who can't make it have a right to apply to be admitted to cable systems instead of just generally saying everybody has to be carried?

GENERAL DAYS: Well, Justice Scalia, Congress has tried to respond to that. Section 6 of the act, which is disparaged by the other side, by the cable operators and programmers, is in fact a way to allow the more powerful stations to negotiate with the cable operators

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for carriage, leaving those who are not in the position with market power to negotiate to take advantage of the must-carry provisions.

QUESTION: I don't see how that narrows the focus. That just gives the powerful stations double advantage. Not only must they be carried if they want to, but they can demand money to be carried if the cable wants to carry them anyway.

GENERAL DAYS: Well, just as an aside, I'm not sure that that's working very well, but again, let's put this in context. Cable operators have been able to carry broadcast stations free for a number of years with the assistance of Congress.

Now, for Congress in 1992 to decide that some stations may be in a position to negotiate with the cable operators does not seem to us to raise any major issues of government regulation of the cable industry. This is a response to, as I was suggesting at the outset, a very long relationship between Congress and the Federal Government and the cable industry.

In 1958, at least as early as 1958, Congress recognized the relationship between what was called at the time CATV and the broadcast stations and the possibility that there would be some problems.

QUESTION: General Days --

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GENERAL DAYS: Yes.

QUESTION: -- before you conclude, can you focus attention on the programmer, not the operator. The programmer's argument, I take it, is why am I being disfavored?

GENERAL DAYS: There are several answers: 1) the cable operators, or the cable programmers do have other outlets. They can sell their programs to broadcast stations. It's not a matter of their having to go to cable operations.

Secondly, the act in section 11, I believe, actually tries -- 11 or 12 -- tries to get at the problem that independent programmers have been encountering, faced with competition by affiliated programmers, so that what Congress has done is try to give them a better position in the competition for access to these channels, but there are public educational and governmental channels that have been given over that can't be used by programmers, there's leased access that can't be used by programmers -- this is an effort by Congress to deal with another problem in the same way that it dealt with the problems that PEG and the leased access arrangements did, so this is not in any sense an effort to get the programmers.

It's consistent with what Congress has tried to do over the years to create a marketplace in which people

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who have televisions without cable, and people who have cable availability, can get quality program stations both broadcast and cable and have the type of diversity of information and education that, as I indicated at the outset, Congress had in mind in 1934.

Before I close, I'd like to just respond to some of the questions that were put to Mr. Farr. He was asked about the capacity of stations, how many local stations would have to be carried, and he said 15. I think that's very high. For one thing, the act recognizes that there does not have to be duplication, so that in the case where there are 15 stations, there's bound to be some duplication.

Congress also found that 9,000 of the 11,000 cable operators had unused capacity, and just to pick up in closing on the questions about a municipality and whether it could make decisions about which cable operator to carry, based in part on programming, Mr. Farr gave a very modest response by suggesting modest regulations, but I think the fact is that what this case presents, as do those hypotheticals, is a situation where economic regulation, where the need to ensure that the best service is provided to a community, comes into the decision-making process.

Thank you.

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QUESTION: Thank you, General Days. Mr. Farr, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF H. BARTOW FARR, III

ON BEHALF OF THE APPELLANTS

MR. FARR: Thank you, Mr. Chief Justice.

I would just like to briefly address, if I may, a few of the points of the economic theory on which the Government is relying.

First of all, I could not emphasize more strongly that this is not a law that is tailored to the economic problem that the Government is talking about. It's the problem set out at findings 15 and 16 at 6 and 7 of the Joint Appendix, which is that cable operators will drop popular programming in order to divert advertising revenues. That's the theory on which it is based.

But the law does not prohibit cable operators from dropping broadcast stations for that reason. It prohibits them from dropping them for any reason, however protected that might be in First Amendment Terms.

But second, if one looks at this practice which the Government has identified and the supposed threat to the local broadcast system, which is what is predicted in finding 16, there are two immediate problems *with it.

First of all, as I have said, 7 years of experience without must carry show that in fact cable

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operators drop very few broadcast stations, and of course, even the numbers that are shown by the Government don't reflect the fact that cable operators also drop cable stations. They're changing their programming as time goes on, so many cable programmers have been dropped during this period, too, from particular stations.

But in addition to that they carry virtually all stations. They carry the most popular stations, which are their greatest competitors for advertising revenues. The FTC staff study that we lodged with the Court last week shows that, of the stations that are dropped, they either don't compete for advertising because they're public TV stations, or in fact they are very little watched, so they are very weak competitors for advertising.

And overall the number of stations carried on broadcast systems has gone up, and Congress clearly expects this to continue, because in section 6, the retransmission consent provision, it gave broadcast stations the right to demand payment for carriage, so obviously the incentive to carry popular programming for subscribers, where most of the money comes from, is much greater than any incentive to drop stations in order to get advertising revenues.

I'd like to make two other brief points. First of all, there has been discussion about the term, content-

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related, and I would simply like to say, I think it's important to recognize that this has two different meanings, both of which are implicated in this case.

This law is content-related in one sense because it specifically dictates the kind of programming, or at least who provides the programming that is seen on somebody's television screen, so it is putting this programming on instead of this programming, the programmer who is knocked off.

Second, the reason it's doing that is also content-based, because Congress, as the findings suggest, has a preference for local programming, for the kind of programming seen on public TV stations specifically.

QUESTION: You agree it's not viewpoint discriminatory.

MR. FARR: It's not viewpoint discriminatory.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farr.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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TURNER BROADCASTING SYSTEM, INC. V. FEDERAL COMMUNICATIONS COMMISSION

NO. 93-44

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)