

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: 95-992

PLACE: Washington, D.C.

DATE: Monday, October 7, 1996

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Supreme Court U.S.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 TURNER BROADCASTING SYSTEM, :

4 INC., ET AL., :

5 Appellants :

6 v. : No. 95-992

7 FEDERAL COMMUNICATIONS :

8 COMMISSION, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Monday, October 7, 1996

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:04 a.m.

15 APPEARANCES:

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

18 WALTER DELLINGER, ESQ., Acting Solicitor General,
19 Department of Justice, Washington, D.C.; on
20 behalf of the Federal Appellees.

21 BRUCE J. ENNIS, JR., Washington, D.C.; on behalf of the
22 private Appellees.

23

24

25

H. BARTOW FARR, III, ESQ. SEHNQUIST: We'll hear argument
now On behalf of the Appellants Broadcasting System v. 3
ORAL ARGUMENT OF Communications Commission. 22-1111-1
WALTER DELLINGER, ESQ.

ORAL ARGUMENT OF ~~ON~~ BEHALF OF THE APPELLANTS

On behalf of the private Appellees 37

H. BARTOW FARR, III, ESQ. neither of the interests now

On behalf of the Appellants

1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-992, the Turner Broadcasting System v.
5 The Federal Communications Commission.

6 Mr. Farr.

7 ORAL ARGUMENT OF H. BARTOW FARR, III

8 ON BEHALF OF THE APPELLANTS

9 MR. FARR: Thank you, Mr. Chief Justice, and may
10 it please the Court:

11 At the outset, if I may, I would like to explain
12 briefly why we think that neither of the interests now
13 asserted by the Government to support the must-carry law
14 justifies the burdens that it imposes on speech.

15 The first argument, that the law merely
16 regulates anticompetitive conduct, fails for two reasons.
17 First, just as the Government can't ban all fund-raising
18 on the ground that some of it might be fraudulent, here
19 the Government can't forbid the sort of protected activity
20 at issue, choosing what speech to offer, unless it shows
21 at a minimum that those decisions are generally
22 anticompetitive acts and thus fall outside the scope of
23 the First Amendment, otherwise, the law is reaching too
24 far into protected activity in an effort to get at
25 unprotected activity.

1 The record, however, shows that cable operators
2 voluntarily carry the vast majority of broadcast stations,
3 those accounting for some 98 percent of actual viewing,
4 and it is wholly implausible to presume that, were it not
5 for some sort of anticompetitive bias, the cable systems
6 would carry every broadcast station regardless of how
7 minimal the viewership, in preference to the 150 or so
8 other programmers that are also seeking access.

9 QUESTION: Well, at some point during the
10 argument -- maybe now if it's convenient -- would you just
11 explain this to me, Mr. Farr. I've always had this
12 difficulty with the case. The cable operators say, this
13 is so terribly burdensome. We have to cancel out
14 programmers whom we'd rather have. And then on the other
15 hand it says in its brief, well, we're not really
16 cancelling the broadcasters. All this is unnecessary. It
17 seems to me you can't have it both ways.

18 MR. FARR: Well, I think there are two different
19 questions that are involved. First of all, there can be a
20 burden on rights that is substantial, even though as a
21 mathematical matter the burden on speech itself is not
22 particularly substantial, but I don't even think that is
23 the case here.

24 I mean, there are across the country not only
25 stations that in the past have been dropped and were

1 restored by must-carry, but many stations that are locked
2 in, and as the record shows now in the case, two out of
3 every three subscribers is served by a system that is
4 channel-blocked, that is, it has no available channels at
5 all for programming, and the other third of subscribers
6 are served by systems that will be channel-blocked at some
7 point. The Government's expert concedes that no cable
8 system actually builds in excess capacity for permanent
9 use.

10 QUESTION: Well, can we conclude from your
11 argument that if you prevail on this case a large number
12 of broadcasters will be dropped?

13 MR. FARR: Well, I guess it depends on what the
14 term large number of broadcasters means.

15 What the record shows, and I think this is
16 consistent with essentially the Government's
17 interpretation of it as well, is that the cable operators
18 in the past, without must-carry, voluntarily carried
19 virtually all network affiliates, they carried virtually
20 all VHF independent stations, they carried a considerable
21 majority of UHF stations, about 80 percent of educational
22 stations, and even one out of three of every station that
23 did not command even a measurable viewership.

24 Now, if one looks at that pattern, what that
25 shows -- and then groups that with stations community by

1 community. What that effectively shows is that in
2 communities with relatively small numbers of stations,
3 four, five, six, which tends to be more the norm, the
4 cable system tends to carry -- not always, but tends to
5 carry all of the stations, or most of the stations.

6 Then as you get into markets where there are
7 more and more stations, 10, 12, 14, those tend to be the
8 stations that cable systems do not regularly carry.

9 The question then depends on whether those
10 stations, even though they have very lower viewership,
11 tend to add something to the overall package that a cable
12 operator is trying to provide to its subscribers, and many
13 of those stations do. That's why they're carried.

14 But the fact is, cable operators will not carry
15 all of the very lightly viewed stations if they believe
16 there is other programming that will provide a better fit
17 in the package that it's offering to subscribers. I don't
18 think there's any way to put an exact number on that, but
19 we know from the history that the number was not -- in
20 terms of must-carry ads was only 6,000 in the past, and I
21 assume some of those would still be carried, and then of
22 the 30,000, some number of those would not be carried even
23 though they were before.

24 QUESTION: How do you think we ought to assess
25 the significance of the fact -- I take it's a fact -- that

1 the brunt of the decisions not to carry tends to fall on
2 the new stations?

3 I think the figures were that in the absence of
4 must-carry about 50 percent of the new public broadcasting
5 channels did not get carried, and something I think in the
6 neighborhood of a third of the new nonpublic channels did
7 not get carried, so the brunt of the decisions not to
8 carry by the cable operators tends to fall on the new
9 stations. How do we assess the significance of that?

10 MR. FARR: Well, I think first of all it very
11 much would depend on what the programming of the new
12 stations would be. During the period without must-carry,
13 Justice Souter, as the Court I think is aware from the
14 record, there was a great increase in the overall number
15 of broadcast stations, both commercial and noncommercial.

16 During the period from '85 to '92, there were
17 270 new stations, and from the period of 1980 to 1992,
18 every market of the 209 ADI's in the country had either
19 the same number of stations or a greater number, and most
20 had a greater number.

21 So when there are proliferations of stations
22 like that, the question of whether their programming is
23 going to be of interest to the particular community, or
24 the particular subscribers to a cable system, I think will
25 depend very much on what kind of programming it is.

1 As your question indicates, obviously cable
2 programmers do carry a substantial number of even those
3 brand new stations, obviously because they find something
4 in the programming that they feel will appeal generally to
5 their subscribers, but I think there can't be any absolute
6 question as to whether each one will be carried or each
7 one will not be carried. I think it depends on the
8 circumstances.

9 QUESTION: Do we know how many of those -- in
10 the period before the present must-carry rules, do we know
11 how many of those 50 percent and 33-1/3 percent, or
12 whatever it was, failed to survive when they were not
13 picked up by the cable channels?

14 MR. FARR: Well, the numbers on stations that do
15 not survive suggest that the number is very low. I don't
16 know that the number is broken out by whether they were
17 brand new stations or whether they were stations that had
18 previously existed.

19 Of course, the bringing on, even if you had no
20 cable whatsoever, the fact that you are increasing the
21 number of stations within particular television markets
22 will put pressure on the other broadcasting stations.

23 QUESTION: Right. We'd have to know the
24 differential to make a -- yeah, to make a --

25 MR. FARR: That's right. So I mean, that's

1 simply a factor of numbers in competition, even without
2 respect to cable.

3 QUESTION: Following up Justice Kennedy's
4 question, from the cable operator's side, is this a
5 diminishing problem to the extent that there is a problem
6 with must-carry as cable, as the channel capacity expands,
7 this becomes less and less of a problem?

8 MR. FARR: Well, unfortunately, it has not
9 become less and less of a problem to date. I think anyone
10 who is familiar with the cable industry at the moment
11 knows that channel space is greatly at a premium within
12 the industry as a whole.

13 One of the reasons for that, of course, is that
14 there are many new cable programmers as well as additional
15 broadcast stations that are seeking access to these cable
16 systems.

17 Now, it is true that in general the capacity of
18 cable systems is expanding, but it is not expanding at a
19 pace that is outstripping the expansion of programmers who
20 are trying to reach the audiences that cable operators
21 serve.

22 QUESTION: Mr. Farr, when you use the term,
23 programmer -- I want to be sure I understand -- are you
24 referring to a company that presents a full line, 7 days a
25 week, 24 hours a day, or however much they're on the air,

1 or do you also include within that term companies that
2 might produce individual programs they try to sell, like
3 the Civil War documentary or something like that?

4 MR. FARR: I'm using it I think as it's been in
5 use throughout this case to mean the first of those two.

6 QUESTION: Just the first.

7 MR. FARR: Essentially a network of some sort.

8 QUESTION: We're not here concerned with the
9 impact on people who try to sell individual programs?

10 MR. FARR: Well, I don't think they're
11 specifically plaintiffs in this particular case.
12 Obviously, to the extent, for example, that those --
13 there's a market for those programs, particularly for
14 whatever reason within cable programmers, to the extent
15 those cable programmers can't get onto the stations
16 because the broadcasters are required to be carried, it
17 may -- it would have a derivative effect on them, but
18 that's not the specific claim that's at issue here.

19 The claim here is that the programming network
20 itself, which wants to be carried within an area --

21 QUESTION: And that's the -- that's what you're
22 referring to on that 150 figure you used, is that full-
23 line programmers?

24 MR. FARR: That's correct. Those are
25 essentially --

1 QUESTION: And how many of those are affiliated
2 and how many are unaffiliated?

3 MR. FARR: If you're talking about affiliated
4 with cable operators --

5 QUESTION: Right.

6 MR. FARR: -- I don't have a particular number.
7 I can perhaps work backwards a little bit from the other
8 side. If you look at the cable operators themselves, TCI,
9 which is the largest cable operator, has an interest in
10 something like 20 cable programmers. Time Warner, after
11 its merger with Turner, is somewhere around a dozen.

12 The others are all -- there may be four or five
13 that have interests in about four or five programmers, and
14 the rest the cable operators typically have no interest.

15 QUESTION: Mr. Farr, may I go back to the
16 subject of Justice Ginsburg's question? My recollection
17 is that the figure in the record was that when must-carry
18 came in, about, I think it was 6 percent of cable
19 operators had to drop at least one program in order to
20 comply with must-carry.

21 The suggestion was that that figure perhaps is
22 not wholly representative of the significance of must-
23 carry because there was evidence that the cable operators
24 were sort of on their good behavior before that, but in
25 any case we got a figure of about 6 percent.

1 Is that figure still, so far as the record
2 shows, the best measure that we have of the, at least the
3 quantified significance of must-carry on the operators?

4 MR. FARR: Well, to begin with I don't think it
5 is for two reasons. First of all, having to add a channel
6 as a result of must-carry doesn't reflect the limitation
7 on cable operators who may at the time have been carrying
8 a broadcast station but now in a different world of
9 programming might choose not to carry that particular
10 station. As I said --

11 QUESTION: It's true, but do we have anything
12 but a speculative basis to assess that latter
13 significance?

14 MR. FARR: In terms --

15 QUESTION: I mean, we'll assume it exists, but I
16 don't know how we -- I don't know that we have any
17 measurement of it.

18 MR. FARR: Well, I don't think there is any
19 particular way to measure it, because obviously must-
20 carry has been in place since 1992, or since it was
21 implemented, so there isn't a way to test particularly
22 what cable operators will do given the program selections
23 right now.

24 I would point out, though, that I -- the
25 Government, it seems to me, in its argument tries to

1 essentially -- excuse me -- make a balancing argument here
2 saying, well, this will help broadcast stations to have
3 carriage, and we think that the impact on cable operators
4 and cable programmers won't really be all that
5 significant, and therefore I think their argument is that
6 we really needn't be concerned about what impact there is.

7 I do think, I should say, I think that's a false
8 equation. I don't think that the First Amendment is
9 essentially a quantitative balancing test in which the
10 Government can say, we will try to benefit these speakers
11 at the expense of these other speakers as long as we
12 balance out the harms in a way that we think is in the
13 public interest. I think the First Amendment is a
14 qualitative standard that in fact puts a barrier to what
15 Government can do unless it is pursuing substantial
16 interests, and it has properly tailored what the law is to
17 those interests.

18 QUESTION: Well then, why do -- your implication
19 is that there is not a substantial interest here because
20 the beneficial impact under the three headings that Turner
21 I spoke of is insufficiently significant. Is that a fair
22 statement of what's implicit in your argument?

23 MR. FARR: It is implicit in this sense, I
24 think, Justice Souter, if I understand the question. At
25 the beginning of my argument I indicated that I -- the

1 reasons that I thought that the anticompetitive rationale
2 for this law would not stand up, that the law is simply
3 way to broad for any demonstrated anticompetitive
4 behavior, and in addition, although I didn't get a chance
5 to say it, there is the tailoring problem specifically
6 addressed by Judge Williams, that the law in fact imposes
7 discrimination. It just doesn't relieve the burdens of
8 any bias that the Government presumes to be there.

9 So I think if one takes that interest out, as I
10 think properly the Court should, then the question is, can
11 the Government use the means of forcing access onto the
12 private media in order to serve their goal of promoting
13 broadcasting for over-the-air viewers?

14 I think that's a straight, fundamental question
15 about the power of Government, and I don't think the
16 answer to that question depends primarily on some
17 balancing between --

18 QUESTION: Well, Mr. --

19 MR. FARR: -- the amount of benefit to the
20 broadcasters and harm to the programmers.

21 QUESTION: Mr. Farr, you say that the First
22 Amendment doesn't require -- it doesn't usually import any
23 balancing, but when you're talking about, is there a
24 substantial Government interest here under the O'Brien
25 test, that itself is a form of balancing, isn't it?

1 MR. FARR: Well, that's correct, Mr. Chief
2 Justice, there certainly has to be a weighing, if that is
3 a proper term, of the governmental interest, but I don't
4 think that can be divorced from the question of the means
5 by which the Government is pursuing it.

6 Certainly, the Government can pursue the
7 interest of benefiting individual broadcast stations, for
8 example, by granting them subsidies, or by providing other
9 forms of benefit to encourage their development.

10 QUESTION: Do you say it can't, then, simply
11 promote broadcast television in general because it's free
12 to the listener?

13 MR. FARR: I'm not saying that they can't
14 promote it in general. In fact, I agree that they can
15 promote it in general.

16 What I'm saying is, though, that when they come
17 to the question of means, how they are doing it, when they
18 say the means by which we are going to promote it are to
19 limit the speech rights of others, then they're running up
20 against a barrier that the First Amendment imposes.

21 QUESTION: Mr. Farr, suppose -- this is not a
22 hypothetical. It comes from Justice O'Connor's opinion
23 last time around -- the Government simply said, to the
24 extent that you have unused channels, just to that extent,
25 you must carry, so you can't leave any channels idle, but

1 if you fill them up with cable programmers, whatever,
2 that's okay.

3 MR. FARR: Obviously, that would be a less
4 restrictive alternative, there's no question about that.

5 I think in fairness I should make two points,
6 though. First of all, it doesn't mean that it wouldn't
7 have any impact, because the relationship between cable
8 operators and their subscribers is essentially the coin of
9 the realm for cable operators, and for them to put
10 programming on and take it off does introduce some
11 irritation.

12 The second point is that I'm not sure it really
13 serves the Government interest to have a broadcast station
14 on for a month or two and then take it off, but if the
15 Government felt that that -- and could demonstrate that
16 that did substantially advance its interest, that would be
17 a less restrictive alternative.

18 QUESTION: Less restrictive; why? Because -- I
19 mean, the First Amendment is certainly violated when you
20 are compelled to say something, whether or not you had
21 intended to say something else.

22 MR. FARR: It's less restrictive because it only
23 has one of the two constitutional flaws of the must-carry
24 statute, because in that particular case it is not
25 excluding a programmer at that moment that the operator

1 has decided it would otherwise carry.

2 QUESTION: Which is to say that the one both
3 compels you to say what you don't want to and prevents you
4 from saying what you were about to say.

5 MR. FARR: The must-carry law has both of those
6 effects, that's correct.

7 QUESTION: May I ask you if you think that
8 section 4 and section 5 are equally bad, or equally good,
9 whichever way we go?

10 MR. FARR: I do believe that they are equally
11 bad, Justice Stevens. The fact is that -- for the same
12 reason that I mentioned a moment ago, that I do think the
13 First Amendment puts a limitation on the means Government
14 can use to advance speech.

15 I don't think that particularly changes with the
16 content of the speech and, indeed, if the Court were to
17 rely on the content of the speech to make that
18 determination, I think it would call into some question
19 the use of the intermediate standard.

20 I should point out that with respect to the
21 interest in preventing anticompetitive behavior, the
22 argument with respect to the public TV stations really is
23 an even weaker argument than it is with respect to the
24 commercial TV stations. They are obviously not
25 competitors in the advertising market along with the cable

1 systems, and therefore at least one of the linchpins --

2 QUESTION: They get some donations, don't they?
3 I mean, you see, you know, this is sponsored by Mobil in
4 connection with public television.

5 MR. FARR: I don't think, though, typically,
6 that someone who is choosing to donate to a public
7 television station is choosing between that and running a
8 local ad on the cable system. There may be some instances
9 of that, but I think generally the advertising market that
10 one is talking about is the actual commercial advertising
11 market.

12 QUESTION: Well, but they -- but they do choose
13 to make the endorsement or not based on a projection of
14 the size of the audience, surely?

15 MR. FARR: Oh, I think that is true. I'm not
16 saying -- what I'm saying is that that would not, I don't
17 think, be a reason that a cable system would not run a
18 public broadcast station, in the hopes that it would draw
19 off what would otherwise be donated to the broadcast
20 station and to add it to its own advertising revenues.
21 Whether it had an effect on the public TV station is a
22 separate question.

23 I would like to return to a point that came up a
24 few minutes ago, though, about the ownership relationship
25 between owners and programmers. As I said, it is limited

1 to a certain number of operators, and even those, most of
2 them have a relatively small number of interests in
3 programmers, but I should say something which I think has
4 not really received enough attention in this case in the
5 lower courts as well, that I think vertical integration is
6 essentially a red herring here, and I think that for a
7 couple of reasons.

8 I think Judge Williams is perfectly correct that
9 if you look at vertical integration the statute is not at
10 all tailored to it. It applies to operators who aren't
11 vertically integrated. It applies to decisions between
12 nonintegrated programmers and broadcast stations.

13 But more importantly than that, there is a
14 specific provision in the Communications Act that deals
15 with vertical integration. In fact, there are several of
16 them, and the -- one of the provisions authorizes the
17 commission to set limits on the number of integrated
18 programmers that an operator can carry, which has been set
19 basically at 40 percent, but another one of them has a
20 specific nondiscrimination provision barring cable
21 operators from discriminating on the basis of affiliation,
22 so the idea that the must-carry law itself, that part of
23 the act was intended to remedy a problem of vertical
24 integration it seems to me is belied by the other
25 purposes -- excuse me, by the other provisions of the act

1 itself.

2 Now, I'd just like to make one point about the
3 anticompetitive argument, because I think it's critical in
4 thinking about what the Government calls structural
5 regulation, but keep in mind two things about structural
6 regulation.

7 First of all, just calling something structural
8 regulation doesn't seem to me to indicate much about
9 where -- how it should be analyzed under the First
10 Amendment. First of all, the question is what does it
11 regulate, and what the structural regulation here is
12 regulating is who can speak on a cable system.

13 The second thing is that structural regulation
14 is by its nature prophylactic, and prophylactic regulation
15 is, as this Court has often said, disfavored under the
16 First Amendment.

17 So I would submit that just because the
18 Government characterizes something as economic regulation
19 or structural regulation, even under O'Brien, the Court
20 has to look carefully at the assumptions that the
21 Government makes to justify a broad prophylactic law and,
22 furthermore, has to look at the remedy that's imposed to
23 see if the remedy is consistent with the types of remedies
24 that are imposed in other industries not involving speech,
25 because if it's not, if the remedy that is used, as it is

1 here, is broader than what would be used in another
2 comparable situation, then the Government it seems to me
3 has a strong burden of answering why the other remedy is
4 not a suitable, less restrictive --

5 QUESTION: Is the term structural borrowed from
6 some body of the law?

7 MR. FARR: Not that I know of. It -- I believe
8 it's just a -- something which is being used to describe
9 in a loose fashion regulation that does aim at a
10 particular industry but is not specifically aimed at the
11 content of speech.

12 Your Honor, if I may, I'd like to reserve the
13 rest of my time.

14 QUESTION: Very well, Mr. Farr.

15 General Dellinger, we'll hear from you.

16 ORAL ARGUMENT OF WALTER DELLINGER

17 ON BEHALF OF THE FEDERAL APPELLEES

18 GENERAL DELLINGER: Mr. Chief Justice, and may
19 it please the Court:

20 Many of the discussions that you've had so far
21 this morning with Mr. Farr related to his discussion of
22 what the Government interest may be, and efforts that
23 they've made in oral argument earlier and in their brief
24 to cabinet and denigrate that interest. I want to be
25 clear that the Government interest in this case is

1 important, substantial, content-neutral, unrelated to the
2 suppression of free expression, and solidly grounded in
3 reasonable inferences that are based upon substantial
4 evidence.

5 In spite of the talk about the anticompetitive
6 market foreclosure effects, there is, as Justice Kennedy's
7 opinion recognized in Turner I, a very clear principal
8 goal of the must-carry law, and that is to preserve a
9 healthy multiplicity of broadcast sources for the 40
10 percent of American homes that do not have cable, homes
11 that rely upon free, over-the-air broadcasting as the
12 entire source of their television programming.

13 When cable systems deny carriage to local
14 broadcast stations, and thereby foreclose those stations
15 from reaching the 60-percent of households, often more
16 affluent, that rely upon cable, those local broadcast
17 stations lose revenue and suffer financially.

18 QUESTION: Mr. Dellinger, I -- General
19 Dellinger, I'm sorry -- I suppose it can be said that
20 whenever you save a single station that would otherwise go
21 out of business you're preserving the diversity, in a
22 sense, but I thought that what our earlier opinion meant
23 was that, did you not save this broadcaster, or the ones
24 that are saved by this legislation, there would not be any
25 diversity, period.

1 In other words, it was a matter of the system as
2 a whole not having multiple voices, not merely whether you
3 would lose a few voices. Of course you would. I think
4 everybody concedes that.

5 GENERAL DELLINGER: Justice Scalia, I think to
6 the extent it is conceded that "a few voices would be
7 lost" it is conceded that the Government should prevail in
8 this case, that it's a perfectly consti --

9 QUESTION: Is that conceded? You think that the
10 other side thinks --

11 GENERAL DELLINGER: I believe --

12 QUESTION: -- is asserting that no voices would
13 be lost if this legislation were not --

14 GENERAL DELLINGER: They spend a considerable
15 amount of time in their brief suggesting that the
16 Government needed to prove that the entire national
17 broadcast industry, or the local broadcasting industry
18 would collapse in the absence of must-carry, but I want to
19 explain why I think the loss of some over-the-air
20 broadcast stations is a matter of critical importance to
21 the Government.

22 I think the record on remand amply shows that
23 exclusion from cable will harm local broadcasters so
24 excluded, and they will be unable to provide the kind of
25 sort of robust array of quality programming that they

1 could if they had the revenues from cable access.

2 QUESTION: But --

3 QUESTION: Can you quantify that, Mr. -- General
4 Dellinger? You say it shows that over-the-air
5 broadcasters will suffer. You know, how many and to what
6 extent?

7 GENERAL DELLINGER: I think Congress had an
8 ample basis for --

9 QUESTION: I mean, on the basis of the --
10 assuming that Congress made the appropriate finding, I
11 think the prevailing opinion last time said something more
12 was required to show the rationality of Congress' choice.
13 Now, what is shown in the subsequent proceedings after the
14 opinion 3 years ago?

15 GENERAL DELLINGER: I think what is shown by the
16 evidence on remand, Mr. Chief Justice, is that the problem
17 is even worse than Congress initially supposed. We --
18 there was much debate about whether, as a predictive
19 matter from economic theory, stations would be dropped in
20 the absence of must-carry, broadcast stations would be
21 dropped.

22 In fact, we now know that it happened. It
23 happened nearly 8,000 times.

24 QUESTION: Eight thousand?

25 GENERAL DELLINGER: Eight thousand times,

1 broadcast stations were dropped from one or more cable
2 systems.

3 QUESTION: Out of how large a universe?

4 GENERAL DELLINGER: How large a universe? There
5 are about 1,500 broadcast stations in this country. There
6 are 12,000 cable systems. There are -- those 12,000 cable
7 systems have about 500,000 total channels available. The
8 dropping of 7,945 stations for more than a year, between
9 '85 and '92 as the -- page 621 of the Joint Appendix will
10 show was -- showed that in the years before must-carry the
11 typical cable system denied carriage to somewhere between
12 one-quarter and one-third of the broadcast stations.

13 QUESTION: General Dellinger, was there any
14 offset? Were broadcast stations added? You recited the
15 number that were dropped. How many were added?

16 GENERAL DELLINGER: There would be during that
17 period broadcast stations added. I don't have the exact
18 figure, Justice Ginsburg. It would have been far fewer
19 than the number that were dropped.

20 QUESTION: Where they were dropped, how many
21 were left? That's what goes to my question. How many
22 communities were deprived of diversity in over-the-air
23 broadcasting because -- you know, to drop one over-the-
24 air station from New York City is no big deal, and I would
25 not be very sympathetic to the Government's claim that

1 this is necessary to "preserve diversity."

2 GENERAL DELLINGER: Well, the total number of
3 broadcast stations that were carried were 35,000
4 Nationwide, so there's a lot.

5 But let me address the question you've raised
6 twice now -- let me come back to it -- of whether the
7 dropping of a few stations is something about which
8 Congress can legitimately be concerned, that would support
9 must-carry. I think that's a critical part of Mr. Farr's
10 argument as well.

11 If you take a community that has six or seven
12 stations, and seven local over-the-air broadcast stations
13 is about the national average, if you take a community and
14 between one-quarter and one-third of those stations are
15 denied carriage on cable, you're weakening, substantially
16 weakening two out of six, two out of six local broadcast
17 stations. Perhaps it's three out of nine in other
18 communities.

19 QUESTION: Most communities have only one
20 newspaper. Now, could the Government, in order to foster
21 diversity, require the newspaper to carry competitors?

22 GENERAL DELLINGER: Well, it is clear that
23 Congress has, I think, since the Radio Act in 1927 and the
24 Communications Act, treated communications differently.
25 They could not do that with newspapers, but then

1 newspapers do not have the critical throat-hold that cable
2 operators have over access to those --

3 QUESTION: The radio spectrum, is that what the
4 cable operators have that newspapers don't?

5 GENERAL DELLINGER: No. What cable operators
6 have is a gate-keeping function over the wire that goes
7 into the homes of 60 percent of those in the community.

8 If you don't get a -- there is no one that has
9 the authority -- no newspaper has the authority to exclude
10 others from reaching the potential audience in the way
11 that the cable system does.

12 QUESTION: What you're saying is that cable is a
13 natural monopoly because nobody else is going to put in a
14 piece of copper. It's the same with newspapers. It has
15 been shown economically that in any market it will tend to
16 come down to one newspaper, because advertising only pays
17 for the newspaper that -- I really don't see the
18 difference, but the point I'm driving at here is, why is
19 it so horrible to have only four over-the-air television
20 stations when our country resigns itself to the fact that
21 most communities have only one local newspaper?

22 GENERAL DELLINGER: The answer to that question
23 I think is that -- is that local over-the-air broadcasting
24 is probably the -- now the cheapest and most accessible
25 form of sources of information in this country.

1 I -- you can buy -- some years back I bought a
2 black and white television set from a repair shop for \$15.
3 It lasted for more than a decade. Even if the price is
4 \$50 or \$100 for the bottom line television set at a
5 discount house, the longevity of those sets means that
6 you're talking a few dollars a year.

7 For a few dollars a year, those who don't have
8 cable -- it's 90 million Americans -- can rely upon that
9 simple fact. The whole community benefits from having a
10 source of information, and one wants to have on that
11 source of information as many stations as the economy of
12 the local community and its market area will support, what
13 this Court has called a broad array of diverse and
14 antagonistic sources of information, is quite good.

15 When you drop a station, one or two stations,
16 you may be dropping the station that is most critical to a
17 language minority, it may be the --

18 QUESTION: But the over-the-air -- the question
19 that I have -- I'm only thinking of the section 4. I
20 think maybe the section 5 is different, but you say there
21 were 35,000 stations, 8,000 were dropped, but am I right
22 in thinking that of the 8,000 that were dropped, all but
23 31 remained on the air broadcasting to the over-the-air
24 people, and -- so that's the problem that's bothering me.
25 If 7,700 of the 8,000 are still there broadcasting to the

1 people you said were trying to help, namely those who
2 don't have cable, then how were those people hurt?

3 GENERAL DELLINGER: Justice Breyer, I think that
4 there is ample evidence that even in the absence of loss
5 of survival -- I mean, Justice Souter asked the same
6 question. Survival is not the only issue. There is --
7 both -- our common sense tells us that when you lose
8 revenues, you lose the ability to put on quality
9 programming.

10 To have the same number of stations and have
11 them show the test pattern, or, to use a more realistic
12 example, to have the same number of stations but have them
13 sufficiently depleted of resources by not being on cable,
14 if you put some fellow up there with costume jewelry and a
15 telephone to take home shopping inquiries is not going to
16 be -- is not going to provide that source of -- if you
17 look at --

18 QUESTION: So it's the prosperity of programmers
19 that the Government is now concerned about, not just their
20 continued existence. It's --

21 GENERAL DELLINGER: No.

22 QUESTION: This is the overwhelming interest,
23 that they must prosper?

24 GENERAL DELLINGER: It is very important that
25 the prosperity of programmers is only an intermediate

1 step, not the final goal, as Mr. Farr has suggested or as
2 your question would posit. It is only an intermediate
3 step towards the actual goal of assuming that there is
4 some vibrancy and health to those small, local
5 broadcast --

6 QUESTION: But is there evidence in the record
7 on that, for the reason that, of course, I sought evidence
8 in the record of economists who said, if you have less
9 money, you will put on less expensive programming, while
10 at the same time the station, while having less money,
11 will then direct its attention to the minority, namely
12 those who don't have cable.

13 So the programs will be less expensive, but they
14 may be aimed more directly at the audience, and therefore
15 I didn't know -- I looked for evidence, and is there any
16 evidence in the record that tells us that that minority
17 that doesn't have cable actually has programming that it
18 finds less desirable? I saw a theory, but I didn't see
19 evidence.

20 GENERAL DELLINGER: Yes. I mean, you save me
21 the effort of going through the 25 volumes it cited. I
22 mean, we did have David Schutz, Roger Knowles, other
23 experts --

24 QUESTION: Roger Knowles said that --

25 GENERAL DELLINGER: He said

1 QUESTION: -- you have less money, you will
2 spend less on programming. I didn't see anything in his
3 statement.

4 GENERAL DELLINGER: Well, he said it's an
5 important factor in determining the quality of a station's
6 programs. Now, there certainly is, let me say admittedly,
7 anecdotal evidence, but anecdotal evidence that supports
8 our common sense viewpoint. For example --

9 QUESTION: Is the common sense viewpoint that
10 the quality will be better, is that what you mean?

11 GENERAL DELLINGER: Yes. Yes. That's --

12 QUESTION: Well, when you start talking about
13 quality, you're walking your way in, aren't you, into a
14 content-based justification? You're saying, we will
15 compare the programming, and it will be better
16 programming, I presume, by some governmental judgment.
17 You're turning this into a content-based justification,
18 aren't you?

19 GENERAL DELLINGER: One of the virtues of the
20 must-carry system as compared to what the cable industry
21 suggests as an alternative, that is, of Government
22 subsidies, is the Government doesn't have to make those
23 content-based decisions.

24 QUESTION: Well, it doesn't make them on a
25 specific case-by-case basis, but I think the tendency of

1 your answer to Justice Breyer is, when you talk about
2 vibrancy and quality, you are talking about some kind of a
3 content-based standard, and I think what you're -- I think
4 what you're saying is that overall, not on a program-by-
5 program basis, but overall, the content is going to be
6 better. Isn't that what you're saying?

7 GENERAL DELLINGER: It seems to me that one can
8 say that providing this kind -- that these over-the-air
9 broadcast channels are not starved financially in the
10 hopes that they're available to the community for the
11 quality programming that is chosen by --

12 QUESTION: The quality program, yes --

13 GENERAL DELLINGER: -- those local programmers
14 and not by the Government.

15 QUESTION: But you say, Mr. Dellinger, you want
16 quality programming, and yet you also say that the 60
17 percent of the people who don't have cable, or 40 percent,
18 whatever, are perhaps people in lower income brackets and
19 that sort of thing. Maybe the people in the lower income
20 brackets don't necessarily want the history channel or
21 something like that.

22 GENERAL DELLINGER: Well, it's -- these are
23 stations that often appeal to communities. Take an
24 example. KCEC was a Spanish language station, over-the-
25 air broadcast station. Once it got on the cable, it had

1 the resources to institute its first local news program in
2 the Spanish language that served the Hispanic population.
3 A lot of these -- there's a new fourth network made up of
4 channels that used to be located in the nether regions of
5 broadcasting.

6 Getting them on cable leads to more sources. I
7 do not think --

8 QUESTION: But to argue that it's better for
9 people to have more news programs certainly reinforces the
10 notion that it is a content-based interest here that's
11 being urged, and I wonder, General Dellinger, the
12 broadcast stations and the stations that aren't on cable
13 are still out there on the air for a viewer to receive if
14 they switch off of cable, aren't they? I mean, there are
15 switches. I can plug in a TV set and pull in these other
16 stations, can't I?

17 GENERAL DELLINGER: Let me respond to your first
18 question first, which is that I do think it's important
19 that having a legitimate congressional concern that local
20 broadcasters are not depleted of revenue so that those
21 local broadcasters can make their own decisions and have
22 the resources --

23 QUESTION: Well then, why not give them
24 subsidies? That's very narrowly tailored. You don't have
25 to commandeer all the channels. If the Government is

1 concerned about prosperity of the station, give them a
2 subsidy.

3 GENERAL DELLINGER: I think both the subsidy and
4 the A/B switch are unsatisfactory and not less restrictive
5 alternatives, but it is important to me that we understand
6 that one is not touching a third rail of content skewing
7 by the Government for the Government to think that local
8 broadcasters ought not be starved of resources so they can
9 choose, but on these two alternatives, the problem of
10 Government subsidies --

11 QUESTION: You at least -- the Government at
12 least thinks that expensive programming is better
13 programming.

14 GENERAL DELLINGER: The Government --

15 QUESTION: And there may be those that think
16 that, you know, talking heads are better than blowing up
17 buildings or things like that, but the Government has made
18 that decision --

19 GENERAL DELLINGER: Yes.

20 QUESTION: -- at any rate. Expensive
21 programming is better programming, right?

22 GENERAL DELLINGER: Congress believes that there
23 are -- that the harm suffered to local broadcasters when
24 they're not carried by local systems includes reduction in
25 a whole range of services, of content, that they could

1 offer. That's -- Government is not choosing content, but
2 wants there to be some robustness in local program, or the
3 ability of them to choose that. Now, the --

4 QUESTION: General Dellinger, may I ask you on
5 that point, at least with respect to the public stations,
6 am I -- and I'm talking about section 5. I thought that
7 the record showed that no station went dark in the must-
8 carry period, that the number of stations, the number of
9 stations in fact increased, and that even membership
10 revenue increased, so was there even -- the case that
11 you're making, even for what was available, was even that
12 made out with respect to the public television?

13 GENERAL DELLINGER: Justice Ginsburg, during the
14 period in the mid-eighties to 1992, it was of course a
15 period of great economic growth, so statistics generally
16 are good, but in the joint record before Congress there
17 are many instances of public stations where the --
18 particularly the secondary -- second or third public
19 broadcast stations, ones that might be serving a community
20 college, is being repositioned, losing its channel place
21 in the middle of a community college course, and there's
22 also the additional interest that Congress has always had
23 in promoting educational television and making sure the
24 cable homes have access to educational programs.

25 I mean, it's important as we debate these

1 issues to remember that the question is not whether on
2 these factual disputes Mr. Farr is right or I'm right, or
3 even whether Congress was right. The question you put in
4 Turner I was whether the obligation to exercise
5 independent judgment when First Amendment rights were
6 implicated, you said, there is not a license to reweigh
7 the evidence de novo.

8 QUESTION: No, but we indicated, General
9 Dellinger, that we wanted evidence that there was a
10 significant -- a significant effect, beneficial effect
11 that must-carry had, and you at the very first said well,
12 even if just a few stations are dropped, that's
13 significant.

14 I'm not sure that that's the correct
15 interpretation of the opinion, and this goes back to the
16 very first question the Chief Justice asked, and the whole
17 colloquy we've been having since.

18 Is there evidence in this record that shows that
19 there is a significant effect --

20 GENERAL DELLINGER: Yes.

21 QUESTION: -- that must-carry produces insofar
22 as the number of stations dropped or not dropped are
23 concerned?

24 GENERAL DELLINGER: The evidence was more than
25 substantial, and the averments were more than reasonable

1 that the loss of 8,000 local broadcast stations being kept
2 off of cable systems during that period, coupled with,
3 just in the printed appendix, 2,511 pages of substantial
4 evidence to support Congress' judgment that they were
5 going to suffer financially, have less resources to
6 provide programming, and those 90 million homes that
7 depend upon local broadcast television would have a less
8 diverse, broad, and healthy source of broadcast
9 information.

10 QUESTION: Thank you, General Dellinger.

11 Mr. Ennis, we'll hear from you.

12 ORAL ARGUMENT OF BRUCE J. ENNIS, JR.

13 ON BEHALF OF THE PRIVATE APPELLEES

14 MR. ENNIS: Mr. Chief Justice, and may it please
15 the Court:

16 I would like to make two interrelated points.
17 The first is, is that Congress reasonably predicted that
18 in the absence of must-carry there would be significant
19 injury to broadcast stations which would threaten the
20 Government interest in preserving a multiplicity of
21 broadcast sources, and the second point is that the
22 presence of must-carry has actually caused very modest and
23 decreasing injury to cable operators and cable programs.

24 First, on the injury to broadcast stations,
25 Congress did not predict that the entire broadcast system

1 would disappear without must-carry, but it did
2 specifically predict in its findings that without must-
3 carry, quote, additional local broadcast signals will be
4 deleted, repositioned, or not carried, and that would
5 threaten the multiplicity of broadcast sources which was
6 the Government interest.

7 That prediction turned out to be absolutely
8 correct.

9 QUESTION: Excuse me, the Government's interest
10 is in unending multiplicity, no matter how many? If you
11 have 97, the Government has an interest, a significant
12 interest in 100?

13 MR. ENNIS: Justice Scalia --

14 QUESTION: I think that's what you just said.

15 MR. ENNIS: No, that's not what I just said,
16 Justice Scalia. The Government's interest, described in
17 the House report, the conference report, and the text of
18 the act, is, serving the goals of section 307(b), which is
19 a fair, efficient, and equitable distribution of broadcast
20 resources.

21 That has always meant the system of allocation,
22 which means that each local community should have at least
23 one broadcast outlet, and that each local community should
24 be able to receive as many diverse broadcast sources as
25 the economic conditions and size of that community

1 dictate. That's not unlimited.

2 QUESTION: I read that as saying, at least one,
3 is what the Government --

4 MR. ENNIS: Well, Justice Scalia --

5 QUESTION: -- considers an irreducible minimum.

6 MR. ENNIS: If I could --

7 QUESTION: And the rest is whatever the market
8 will give it.

9 MR. ENNIS: Let me just respectfully refer you,
10 Justice Scalia, to the House report and the conference
11 report, which make clear what the Government interest is.

12 QUESTION: Look, Mr. Ennis, there's no
13 question -- I guess there's no question in anybody's mind
14 about there being a significant repositioning as a result
15 of must-carry, but isn't the ultimate measure of the value
16 of that repositioning, or its absence, the 31-station
17 measure?

18 In other words, as I understand the evidence,
19 out of over 40,00 broadcast stations and, indeed, out of
20 8,000 that were directly affected by must-carry, only 31
21 went under as a result of the repositioning in the absence
22 of must-carry. Isn't that the relevant figure that we
23 ought to look at to determine the substantiality of the
24 interest and of the threat?

25 MR. ENNIS: Justice Souter, let me respond first

1 by saying that Congress was not making a snapshot about a
2 frozen historical past. It quite explicitly said, we are
3 attempting to make a predictive judgment about ongoing
4 trends and what will happen in the future to broadcast if
5 we do not enact must-carry.

6 Here's what Congress knew in the non-must-carry
7 period, the trends. They knew that the growth rate in
8 broadcast stations had greatly declined from 5 percent to
9 less than 2 percent. They knew that the number of vacant
10 channels had greatly increased.

11 In fact, the number of vacant channels had
12 increased as much as the number of new stations, because
13 many broadcast stations had given up, and were simply
14 turning in their construction permits.

15 They knew that broadcast advertising revenues,
16 the lifeblood of broadcasting, had declined in real
17 dollars 11 percent during the non-must-carry period, and
18 that by 1991, broadcast revenues were lower than they were
19 in 1984.

20 QUESTION: How does that refute what seems to be
21 the message of the -- there were only 31 stations, that
22 none of that had much effect on the great, great majority
23 of broadcast stations?

24 MR. ENNIS: Well, Your Honor, it did have effect
25 on the great majority of broadcast stations.

1 QUESTION: How do you answer the fact that only
2 31 broadcasting stations actually departed this world, so
3 to speak?

4 MR. ENNIS: Because, Your Honor, Congress made
5 the predictive judgment that there was incremental
6 weakening of the broadcast system.

7 QUESTION: But in the first opinion in this case
8 we said that because there's intermediate scrutiny we
9 didn't accept as final Congress' judgment on that score.

10 MR. ENNIS: That's correct, Your Honor, and I'm
11 not suggesting you should accept it as final without
12 evidence, but there is evidence. The evidence in this
13 record overwhelmingly showed, and in fact --

14 QUESTION: How do you respond to the apparently
15 conceded fact that only 31 stations out of the great,
16 great number actually went under? What's your response to
17 that?

18 MR. ENNIS: The response is, there was hundreds
19 of pages of testimony before Congress and in the
20 additional evidence showing the actual impact on broadcast
21 stations of being denied carriage.

22 QUESTION: Well, what was the --

23 MR. ENNIS: It meant they had to cut back on
24 their programming. Many of them had to convert to home
25 shopping formats, which they did not want to use, because

1 they didn't have enough money to continue their other news
2 operations. There was serious injury to broadcast
3 stations. Appellants --

4 QUESTION: Are we now, then, back into content?

5 MR. ENNIS: No. No, we're not.

6 QUESTION: Why not?

7 MR. ENNIS: Because Congress expressly found in
8 the act, another one of the policy objectives, that they
9 wanted to rely on market forces to the maximum extent
10 possible to decide which broadcast stations would survive
11 and which would not. Congress was not saying --

12 QUESTION: But the justification, as I
13 understand your argument, or your argument on behalf of
14 Congress, the justification for that is that in fact there
15 will be a higher quality of programming if there is this
16 greater choice as a result of greater advertising revenue,
17 and so on, and doesn't that, then, bring us to a content-
18 based congressional choice?

19 MR. ENNIS: Your Honor, I don't think it's a
20 judgment about a higher quality of programming. I think
21 it is a judgment that the programming, if the market could
22 operate, would be more responsive programming to the local
23 needs of a local community.

24 Congress found that there was a structural
25 impediment to fair competition, the cable bottleneck

1 monopoly. It wanted to remove that structural impediment
2 and then let the market determine, based on market needs,
3 which stations would survive and which would not.

4 Congress didn't dictate we want this station to
5 survive and that not, which is why a subsidy would be
6 inconsistent with that specific policy objective, and
7 would also risk entangling the Government in very specific
8 content-based judgments.

9 The Government would have to decide, if this
10 station is not doing well in the market because it has
11 poor programming, we have to tell the station to start
12 putting on news, or getting involved in really content-
13 based judgments.

14 QUESTION: Well, you're just assuming that all
15 the money the station gets will be spent on better
16 programming. That seems to me a very unreasonable
17 assumption, unless you're talking about exclusively
18 nonprofit stations.

19 But I would think the normal assumption is, you
20 know, any additional money will go right into the owner's
21 pockets, except to the extent that spending it on better
22 programming will produce yet more money, and I don't know
23 that that's ever been --

24 MR. ENNIS: Your Honor, Justice Scalia, in terms
25 of the owner's pockets, Congress knew that in 1990 and

1 1991, 50 percent of all independent stations, and that's
2 approximately 500, 800 stations, lost money, and 25
3 percent of them lost over \$1.26 million in those 2 years.

4 QUESTION: Even less likely that it will be
5 spent on programming. It will be spent to cover the loss.

6 (Laughter.)

7 MR. ENNIS: We're not talking about money to put
8 in the owner's pockets, Your Honor. We're talking about a
9 broadcast system that was in precarious financial
10 condition. They needed must-carry simply to survive.

11 QUESTION: It might be that if I no longer
12 broadcast to the 8,000 people who have cable, and I can
13 only broadcast to the 2,000 people who don't, my
14 programming will be aimed more at what those 2,000 want,
15 not less. These are empirical questions.

16 MR. ENNIS: Justice Breyer --

17 QUESTION: And so I just don't -- I look for
18 evidence, and I can't find empirical evidence.

19 MR. ENNIS: Let me give you some evidence,
20 Justice Breyer.

21 First of all, the cable industry itself did not
22 dispute before Congress that lack of carriage would
23 cripple the broadcast industry and, in fact, in this case
24 we produced in discovery their own documents in which they
25 studied this very problem that you're asking, and they

1 concluded that carriage is critical to broadcast stations.

2 If you look at the Joint Appendix at pages 2147
3 and 2158, those are cable documents which are sealed,
4 because the cable industry insisted that they remain
5 sealed, but those documents themselves conclude that
6 carriage is critical to the survival of a broadcast
7 station.

8 It may be that the broadcast station would be
9 forced to pay more attention to the local market, but its
10 advertising revenues would shrink by at least 60 percent,
11 and without the advertising revenues lost to the cable
12 audience it wouldn't have the revenue to produce the
13 programming that would be responsive to the over-the-air
14 audience. That's what Congress reasonably concluded.

15 Let me simply say that, with respect to the
16 injury to cable, that's modest indeed. Only 1 percent of
17 the channel capacity in this Nation is occupied by new,
18 must-carry stations cable operators were forced to add.

19 This Court also asked how much channel capacity,
20 previously unused channel capacity could be devoted to the
21 carriage of must-carry stations, and the answer, as the
22 evidence shows, is that 87 percent of the time when a
23 cable operator was forced to add a must-carry station, it
24 did so with previously unused channel capacity.

25 QUESTION: Thank you, Mr. Ennis.

1 MR. ENNIS: Thank you, Your Honor.

2 QUESTION: Mr. Farr, you have 5 minutes
3 remaining.

4 REBUTTAL ARGUMENT OF H. BARTOW FARR, III

5 ON BEHALF OF THE APPELLANTS

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

7 One of the difficulties, I think, in addressing
8 the Government's interest here is that it is still
9 difficult to pin down. The specific finding by Congress
10 made in the act is that as a result of the economic
11 incentive that cable systems have to delete its set of
12 local broadcast systems, coupled with the absence of must-
13 carry, the economic viability of free local broadcast
14 television and its ability to originate quality local
15 programming will be seriously jeopardized. That is the
16 finding by Congress itself, not arguments made by the
17 executive branch.

18 Then, however, it seems that the argument had
19 turned at some point to survival of broadcasters, that in
20 fact the existence of cable itself would harm individual
21 broadcasters, which in our view at least is itself a less
22 significant interest than some broad -- broader interest
23 indicating that a multiplicity of voices in a significant
24 number of communities would be lost.

25 In fact, this Court has recognized, and Congress

1 has said before, that it is typically not concerned with
2 the fate of individual broadcast stations, but rather with
3 the system as a whole.

4 QUESTION: Mr. Farr, can I ask you kind of a
5 basic question that the colloquy has developed? Assume
6 that the Government's objective was to get better program
7 through diversity, quality, public, and so forth and so
8 on, but not to support any particular viewpoint, but it is
9 therefore fairly characterized as a content-based
10 justification -- that's -- would you say that was
11 impermissible?

12 MR. FARR: Yes. I would say so for several
13 reasons.

14 QUESTION: So therefore section 5 is
15 unconstitutional on its face.

16 MR. FARR: I'm -- well --

17 QUESTION: And I suppose a comparable provision
18 of the 1934 act is unconstitutional, too.

19 MR. FARR: Well, again, it depends what the
20 justifications are. What we have said --

21 QUESTION: The justification is, diversity and
22 better programming.

23 MR. FARR: If that is the sole justification
24 that is offered, and the means by which that is being
25 obtained is to say to cable operators that you have to

1 carry this program --

2 QUESTION: No, forget the means. I'm just
3 asking you, assume the means, and well-tailored and all
4 the rest, but that's the sole justification.

5 MR. FARR: Well, it's very hard to answer the
6 question, to be honest, Justice Stevens, without thinking
7 about means. If you're saying, can Government subsidize
8 that, of course it can. Of course it can.

9 QUESTION: Even though it's content-based, the
10 justification.

11 MR. FARR: Government provides funding for all
12 sorts of things where content is an issue. It funds the
13 Corporation for Public Broadcasting.

14 QUESTION: Well, then can we say that this
15 colloquy about whether the justification is content-based
16 or not really shouldn't affect our analysis?

17 MR. FARR: Well, in my view the law should go
18 down whether it's content-based or not, of course. That's
19 the position that we are fully prepared to argue, but --

20 QUESTION: I thought it was also your position
21 that it goes down a lot easier if it is content-based --

22 (Laughter.)

23 QUESTION: -- and affects First Amendment
24 rights.

25 MR. FARR: Of course.

1 QUESTION: If it's content-based but doesn't
2 affect First Amendment rights, no problem.

3 MR. FARR: Of course. Of course.

4 QUESTION: How can it be content-based and not
5 affect First Amendment rights?

6 MR. FARR: Because the Government can say, we
7 are going to subsidize something with a particular
8 content, and if it does -- if those are the means by which
9 it's choosing to do it, that is one thing.

10 When it says, we are going to subsidize
11 essentially by means of using you, by using your channels
12 and shutting out other programmers, that's our way of
13 subsidizing it, that falls on the other side of the First
14 Amendment line, and that seems to me, when you're talking
15 about the quality of programming, that is where the
16 interest has now shifted.

17 Survival is not particularly an issue. I mean,
18 a very small number of stations, as the Court has noted,
19 even went dark, and many of them returned to the air. I
20 mean, these figures, as was pointed out in the briefs,
21 include a station that was -- whose transmitter was hit by
22 a tornado, so what we're talking about, when we -- but
23 when you move from there on to talk about the question of
24 the programming being maintained or enhanced at a certain
25 level, that seems to me to open up a whole area of First

1 Amendment objections that this Court has really never
2 entered into before, I mean, that's in a sense the
3 Pruneyard case unleashed, that says, when we want to
4 encourage diversity, and we want to stimulate more of a
5 particular kind of voice, of particular speakers, whether
6 it's done by viewpoint or not, we can essentially take a
7 business of speech, a private business, and use that as
8 the means of doing it.

9 That is a line that I don't believe the Court
10 has ever crossed, and I don't think should cross now.

11 QUESTION: So the FCC's efforts to, in the
12 fifties, sixties, seventies, to get the broadcasters to
13 have news and public service, et cetera, also in your view
14 are unconstitutional?

15 MR. FARR: Well, if you're talking -- I'm sorry,
16 if -- I --

17 QUESTION: The NBC, ABC, you know, all the
18 networks in the forties, fifties, sixties, and seventies,
19 the FCC encouraged them in very strong ways to carry news
20 and public service broadcasting. In your view, was that
21 also unconstitutional?

22 MR. FARR: When I said it crossed a First
23 Amendment line that had not been crossed, it has been
24 crossed partially in the broadcasting context, and the
25 Court has looked at one or two specific examples of it,

1 for example in Red Lion, and said it was tolerable. In
2 League of Women Voters, it said that was beyond the
3 commission's power to interfere in content, so I'm not
4 sure where the precise answer would be.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farr.
6 The case is submitted.

7 (Whereupon, at 11:05 a.m., the case in the
8 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

TURNER BROADCASTING SYSTEM, INC., ET AL., Appellants v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.
CASE NO. 95-992

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

BY Don Mari Federico

(REPORTER)