

## **Interruption of a Presidential Press Conference by Some Television Broadcast Stations: Censorship or a Valid Innovative Measure to Combat Fake News?<sup>1</sup>**

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“No government ought to be without censors; and where the press is not free no one ever will.” (Thomas Jefferson)

### **Abstract**

Censorship normally refers to the Government’s actions to ban different forms of freedom of speech (i.e. suppression of words or images). However, cries of censorship were heard as a result of the decision taken by television broadcast networks to interrupt the transmission of a Presidential press conference in November 2020. Some interpreted this act as censorship against public authorities. Others thought it was a legal (and necessary) measure to combat fake news. This article addresses whether the decision to limit a televised broadcast by President Trump was censorship or, alternatively, whether it was a valid, innovative measure to fight fake news. To tackle these issues, it is necessary that some of the related duties and rights television broadcast stations have before the Federal Communications Commission (FCC), governmental authority in charge of these matters, must be revised.

Turnout in the last US Presidential elections were astonishing. Indeed, President Biden broke records as the candidate receiving the most votes cast in U.S. history.<sup>3</sup> On election day, everyone was interested in knowing the election results: who would prevail? The Republican Party or the Democrat Party? On November 5th, 2020, President Trump held a press conference about the outcome. During his speech, NBC suddenly cut its transmission,<sup>4</sup> as the network realized he was making false statements about the election. One of his most controversial phrases was, “If you count legal votes, I easily win, if you count illegal votes, they could try to steal the election”.<sup>5</sup> ABC and CBS followed NBC by taking the same action due to Mr. Trump’s false statements.

It was strange to witness American broadcast television networks deliberately interrupting their transmission, considering it was the President himself who was holding a press conference. This led to an examination of the intricacies of this intentional action by broadcast networks. This article provides answers to some common questions in this regard and presents two different visions of the actions by television stations to limit broadcasts of the President’s speech. Finally, the author provides an opinion based on his interpretation of current laws and the official

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<sup>1</sup> This article is not a comprehensive study; it simply encourages others to reflect on the matter.

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<sup>3</sup> Lewis, Sophie. “Joe Biden Breaks Obama’s record for Most Votes ever cast for a U.S. Presidential Candidate,” *CBS News*, December 7, 2020, <https://www.cbsnews.com/news/joe-biden-popular-vote-record-barack-obama-us-presidential-election-donald-trump/>.

<sup>4</sup> Hsu, Tiffany. & Grynbaum, Michael, “Major Networks cut away from Trump’s Baseless Fraud Claim,” *New York Times*, November 5, 2020, <https://www.nytimes.com/2020/11/05/business/media/trump-tv.html>.

<sup>5</sup> Keveny, Bill, “MSNBC, Major Networks interrupt Trump’s Falsehood-laden Speech to Fact-check; Fox, CNN carry in Full,” *USA Today*, November 5, 2020, <https://www.usatoday.com/story/entertainment/tv/2020/11/05/fox-cnn-covered-trumps-falsehood-laden-speech-msnbc-pulled-away/6182029002/>.

position of the Federal Communications Commission (FCC), the executive agency which regulates communications, including broadcast television stations.

### **PROGRAMMING DECISIONS, ROLE DURING POLITICAL CAMPAIGNS, AND OBLIGATIONS TO INFORM THE PUBLIC OF THE TRUTH**

Before providing a legal analysis, it is fair to represent different views the general public might have regarding some relevant issues vis-à-vis licensed broadcasting stations.

#### **DOES A BROADCAST TELEVISION STATION HAVE THE RIGHT TO DECIDE ITS PROGRAMMING AND/OR “CUT” BROADCASTING? IF SO, UNDER WHICH CIRCUMSTANCES?**

A broadcast television station is a private business, not a government entity, so it is up to the broadcast's parent company, for the most part, to decide its own programming. Each station takes into consideration its commercial goals and is guided by the will of its stakeholders. Yet some would answer that these television stations are not allowed to interrupt certain news broadcasts, such as presidential press conferences, because viewers deserve the right to see the entire statement and to decide for themselves the veracity of the speaker. They believe that to do otherwise is tantamount to censorship and that the program should be broadcast in its entirety.

Another position would argue that broadcasting decisions depend on who and what is being broadcast. If the program is a matter of public interest (i.e. something related to the management of the federal government which is relevant to viewers), then people should have the right to watch it in its entirety. Operating under this premise, a Presidential press conference should never be interrupted. Contrary to that view, in Trump's November 5, 2020 press conference, the broadcast was terminated in the midst of the president's remarks. “We have to interrupt here, because the President made a number of false statements, including the notion that there has been fraudulent voting. There has been no evidence of that”,<sup>6</sup> said Lester Holt, journalist of NBC, to justify the network's actions.

#### **WHAT IS THE ROLE OF BROADCAST TELEVISION STATIONS DURING A POLITICAL CAMPAIGN? CAN THEY OPENLY TAKE SIDES?**

One stance would argue that broadcast television stations should be neutral. They should give similar time and space to all candidates. This means that if candidate “X” is interviewed in a prime-time show, candidate “Y” as well as candidate “Z” should be interviewed by the same program and provided equal time to share their ideas. After all, broadcast television stations use the public spectrum – a public good or asset – to transmit their signals over the air.

Conversely, others assert that broadcast television stations, like any other person or enterprise, have the right to promote the candidacy of any person that best represents their ideology and/or political views. It is a matter of exercising their First Amendment rights. So, broadcast television stations could dedicate their programming to fully cover a certain candidate's campaign and openly incentivize their audience to vote in his/her favor.

#### **ARE BROADCAST TELEVISION STATIONS OBLIGED TO PROVIDE TRUTHFUL INFORMATION?**

Some would say broadcast television stations are obliged to report the truth. Curiously, the same general notion of public interest mentioned above can be used to support this point of view. A broadcast television station may not intentionally deceive its audience. Distorting reality is not a fair or reasonable option. It is in the best interest of the viewers to know the truth.

On the other hand, there are those who could allege that the way someone interprets reality depends entirely on the individual. For example, one month after several major television networks declared that Mr. Biden had reached above the 270 college electoral votes needed to win the Presidency, less than 20% of Fox News frequent

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<sup>6</sup> Henderson, Cydney, “‘Turtle on his back Flailing’: Anderson Cooper, others react to President Trump's Falsehood-laden Speech,” *USA Today*, November 5, 2020, <https://www.usatoday.com/story/entertainment/tv/2020/11/05/anderson-cooper-lester-holt-denounce-trumps-falsehood-laden-speech/6182108002/>.

viewers accepted the election results.<sup>7</sup> Ultimately, it is up to viewers to decide on their own if they trust a television station and whether the information it airs is truthful or not. According to this perspective, “tutoring” viewers is not only an insult to their intelligence, but it would also be an insult to their free will to choose what they want to watch. Regardless of the personal position readers might have regarding these controversial issues, this article will try to answer from a legal standpoint what the applicable law to television broadcasters is. Who can be granted a license? Furthermore, this article will examine the standards for granting a license to a television broadcast station and its renewal, along with the FCC stance regarding other important, related issues.

### THE COMMUNICATIONS ACT OF 1934 AS AMENDED<sup>8</sup>

The Communications Act of 1934,<sup>9</sup> amended by the 1996 Telecommunications Act,<sup>10</sup> provides guidance in this technical matter. First, the FCC was created to regulate every aspect related to interstate and international communications by wire, television, cable, and radio within the U.S. and its territories.

### LICENSE TO TELEVISION BROADCAST STATIONS

A television station can be granted a license as an individual broadcast station for an eight-year period that can be renewed (the FCC does not grant licenses to a network of broadcast stations, such as NBC as a whole). A broadcast television station can either be commercial or non-commercial. In this case, NBC affiliate stations or similar are typically commercial stations. They are entitled to advertise for profit to encourage contracting any product or service provided by any person.<sup>11</sup>

### PUBLIC INTEREST, CONVENIENCE, AND NECESSITY STANDARDS

The application for granting a license and its renewal shall be given if “the station has served the public interest, convenience, and necessity,”<sup>12</sup> states the Communications Act. However, none of those terms are defined in the glossary of the Act, leaving great discretion to the FCC and Courts on how to interpret them. The public interest is indeed a broad concept. Thus, it seems that every situation could be covered by the Act. Having said that, there is an incumbrance on the FCC’s ability to grant licenses. During the regular course, it should not be complicated for any television broadcast station to claim it is in its best interest and in the best interest of society to broadcast and/or continue broadcasting its signals over the air.

Additionally, under this system, viewers have more options from which to choose. Another important consideration that favors granting and/or renewal of licenses is that, unlike cable or dish networks, society welcomes these kinds of stations because no payment is needed to watch their programming. Likewise, note that the “convenience” and “necessity” standards do not have the requirement to be “public”. Even “corporate” interests and needs of the television broadcast stations could be alleged in order to be granted licenses. Therefore, it should be relatively easy for all license applicants to meet these last two standards.

Finally, the law explicitly restricts the power to censor broadcasters, and from “making any regulation that would interfere with freedom of speech,” as it is recognized in the document, “The FCC and Freedom of Speech.”<sup>13</sup> This should not be surprising because freedom of speech is one of the pillars of American democracy, together with freedom of individual enterprise, due process, and criminal trial rights, particularly the notion that no one is considered guilty until guilt is proven.

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<sup>7</sup> Ellefson, Lindsey, “Only 18% of Frequent Fox News Viewers accept Election Outcome, Poll says,” *The Wrap*, December 10, 2020, <https://www.thewrap.com/fox-news-msnbc-election-outcome/>.

<sup>8</sup> See, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288>.

<sup>9</sup> <https://transition.fcc.gov/Reports/1934new.pdf>.

<sup>10</sup> <https://transition.fcc.gov/Reports/1934new.pdf>.

<sup>11</sup> The Communications Act, 1934, 47 U.S.C. § 307 - 399B.

<sup>12</sup> Id. § 307.

<sup>13</sup> [https://www.fcc.gov/sites/default/files/the\\_fcc\\_and\\_freedom\\_of\\_speech.pdf](https://www.fcc.gov/sites/default/files/the_fcc_and_freedom_of_speech.pdf). n.d.

As stated above, the procedure to obtain a license and the subsequent renewal of a television broadcast station have standards that are relatively easy to meet. Even so, it is enlightening to consider whether the Act refers to truthfulness, neutrality, censorship, and the development of the programming by television broadcasters.

**Truthfulness:** There is no mandatory provision in the Act that asserts a broadcaster is required to check the accuracy of claims made by politicians, public officers, or private actors. Therefore, any of these actors could freely attempt to mislead the population, and the broadcast station should not refrain from broadcasting because of this situation. However, this is unquestionably an ethical matter.

**Neutrality:** According to existing law, television broadcast stations are not obliged to adopt an impartial stance while informing the public. Stations may take sides without violating any legal duty. However, until 1987, the FCC required “broadcast licensees to cover issues of public importance and to do so in a fair manner. Issues of public importance were not limited to political campaigns.”<sup>14</sup> This position, called “the Fairness Doctrine,” aligns better with the exercise of ethical journalism, which puts viewers first before personal and/or corporate interests. Unfortunately, the FCC abandoned the Fairness Doctrine in 1987 because it believes the doctrine “violates the First Amendment (...),”<sup>15</sup> among other considerations. It could be right, but other important constitutional values such as the right to live in peace are also relevant. Without knowing, respecting, and hopefully understanding the ideology of those who think differently, it is impossible to live peacefully as a society. Absence of the Fairness Doctrine has contributed to polarization and misinformation in America.<sup>16</sup>

**Censorship:** The term censorship has a negative connotation conveying a sense that it is illegal in all cases to suppress speech. However, current law provides that obscene material cannot be broadcast by television stations at any time. Material would be considered obscene if “the average person, applying contemporary community standards, would find that the material appeals to the prurient interest; that the material describes or depicts sexual conduct in a patently offensive manner; or taken as whole, the material lacks literary, artistic, political or scientific value.”<sup>17</sup> On the other hand, indecent material, which contains graphic sexual or excretory images, and is used to cause an impression on the viewer<sup>18</sup> can be broadcast by these stations with certain restrictions.

If the television broadcast stations comply by respecting the material just described while broadcasting, their actions cannot be considered censorship. Any federal or state authorities shall refrain from censorship. But does this restriction apply to censorship by private actors such as television broadcast stations? No, because in *McIntire v. Wm. Penn Broadcasting Co. of Philadelphia*, the Court stated, “The First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government, but a privately owned corporation.”<sup>19</sup> Therefore, the censorship cannot be claimed against private actors; the First Amendment is about the *government* restricting speech. Thus, licensed broadcasters are able to “interrupt” any program they want because they are not subject to any regulation that would compel them to do so. Thus, it appears to be clear that broadcast stations actually do have First Amendment rights!

#### DOES A TELEVISION BROADCAST STATION NEED TO OBTAIN FCC APPROVAL OF ITS PROGRAMMING?

Except for the observation made above regarding obscene and indecent materials, television broadcast stations have the right to decide their programming. If they decide it is fair, they may decide when, what, and how to broadcast. Licensed broadcasting stations have the right to choose programs.<sup>20</sup> For instance, television broadcast

<sup>14</sup> Ruane, Kathleen, “Fairness Doctrine: History and Constitutional Issues,” July 13, 2011, Congressional Research Service, <https://fas.org/sgp/crs/misc/R40009.pdf>.

<sup>15</sup> Federal Communications Commission, 1987, 1.

<sup>16</sup> Caldera, Camille, “Fact check: Fairness Doctrine only applied to Broadcast Licenses, not Cable TV like Fox News,” *USA Today*, November 28, 2020, <https://www.usatoday.com/story/news/factcheck/2020/11/28/fact-check-fairness-doctrine-applied-broadcast-licenses-not-cable/6439197002/>.

<sup>17</sup> O’Malley, Michael, “Regulating Television,” <https://chnm.gmu.edu/exploring/20thcentury/regulatingtelevision/>, (last modified April 2004).

<sup>18</sup> McFadden, Joseph, Censorship and Freedom of Speech, accessed July 17, 2021, <https://courses.lumenlearning.com/suny-massmedia/chapter/15-4-censorship-and-freedom-of-speech/>

<sup>19</sup> *McIntire v. Wm. Penn Broadcasting Co. of Philadelphia*, C.C.A.3 (Pa.) 1945, 151 F.2d 597

<sup>20</sup> Federal Communications Commission, The FCC and Freedom of Speech, accessed July 14, 2021, [https://www.fcc.gov/sites/default/files/the\\_fcc\\_and\\_freedom\\_of\\_speech.pdf](https://www.fcc.gov/sites/default/files/the_fcc_and_freedom_of_speech.pdf).

stations may support a specific candidate in an election and adjust their programs for that purpose. Stations may freely decide to transmit a certain event in its entirety, or only a part of it, and/or to interrupt broadcasting, if it is considered appropriate. In all three cases, broadcast stations simply have the obligation to follow the main issues that affect the society and explain them to the general public. According to “The Public and Broadcasting,” issued by the FCC<sup>21</sup>:

“We expect station licensees to be aware of the important problems and issues facing their local communities and to foster public understanding by presenting programming that relates to those local issues.”<sup>22</sup>

#### LICENSE REVOCATION?

Some advocate for the position that the FCC is entitled to revoke licenses because of what is being transmitted by broadcasters. Indeed, in 2017 Mr. Trump suggested challenging NBC network licenses. According to his view, “network news has become so partisan, distorted, and fake that licenses must be challenged and, if appropriate, revoked. Not fair to public!”<sup>23</sup> But isn’t this position inconsistent with Mr. Trump’s open admiration for a conservative network because of its faithfulness to his policies and politics?

Moreover, it appears that the former President was not aware that there is an express prohibition in the text of the Act to misinterpret any of its sections and “to give the Commission the power of censorship [that] interfere[s] with the right of free speech....”<sup>24</sup> Broadcast stations also have free speech rights! Censorship, as it has been construed in the Act, is not enforceable against broadcasting television stations. So, what is the nature of the decision of some broadcast stations taken on November 5<sup>th</sup>, 2020? It appears to be a new way to combat fake news, something that goes beyond the scope of this article and deserves further analysis.

#### CONCLUSION

As has been illustrated, it is possible to clearly answer whether the limitation of a presidential press conference by broadcast television stations was prohibited “censorship” or an otherwise legally valid measure taken by broadcasters. There is currently no legal obligation requiring television broadcast stations to obtain approval over their programming. Furthermore, the FCC is not entitled to require stations to transmit a certain event (in part or in its entirety). Therefore, it appears that there is a new approach by broadcast television stations to combat misinformation. Though this may be viewed as an innovative though extreme measure, it is undoubtedly legal. Even so, care must be taken to administer it wisely in order for broadcasters to retain the public’s trust.

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<sup>21</sup> See, <https://www.fcc.gov/media/radio/public-and-broadcasting>.

<sup>22</sup> Id., n.d.

<sup>23</sup> Greenwood, Max, “Trump pushes to challenge Media Network Licenses,” *The Hill*, October 11, 2017, <https://thehill.com/homenews/administration/355051-trump-news-network-licenses-must-be-challenged-and-if-appropriate>

<sup>24</sup> The Communications Act, 1934, § 326.