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Brendan Carr Should Back Off

by

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Along with then-FCC Commissioner Brendan Carr, I often criticized what he called the Biden administration's "censorship cartel." Indeed, I published a whole series of essays under the title of "Thinking Clearly About Speaking Freely," with much ink spilled criticizing overreaching censorship of speech during the Biden era by both private entities and the government.

I was with Brendan Carr when he posted this on X on November 17, 2024, not long after President Trump's election: "We must dismantle the censorship cartel and restore free speech rights for everyday Americans."

Because defending free speech is an important part of the Free State Foundation's mission, it would be odd for me to be silent now.

Simply put, I don't like the not-so-subtle threats to broadcast station owners and the ABC television network that now-FCC Chairman Brendan Carr uttered regarding his view that Jimmy Kimmel's show should be terminated.

I don't like what Brendan Carr said – even though what Jimmy Kimmel said in his ill-fated monologue regarding Charlie Kirk's assassin clearly was not factually true and, in my view, was indisputably insensitive and uncaring.

And I don't like Brendan Carr's threats whether or not they have risen to actual violations of the First Amendment, which under the Supreme Court's current jurisprudence they may not have.

I understand that it is now Chairman Carr's view that the FCC has the authority to police what he considers to be egregious broadcast content like Jimmy Kimmel's monologue under the FCC's capacious "public interest" doctrine. If the holder of a broadcast license wishes to renew its license, or transfer or sell it in a business transaction then, under the Communications Act, the FCC must assess whether the proposed transaction is in the "public interest." As Chairman Carr often points out, a broadcaster's obligation to operate its station in the "public interest" has been justified by its use of a supposedly scarce public resource, the radio spectrum.

As Chairman Carr rightly points out, invoking the public interest standard to regulate program content has a long history at the FCC. And make no mistake, over the decades it has been Democrat-controlled FCCs that have tended to wield the agency's public interest authority most aggressively in ways that I think were unjustified. Recall, for instance, the FCC's Fairness Doctrine – for now confined to the dustbin of history. The doctrine allowed the agency, with approval of the Supreme Court in the famous *Red Lion* case, to sanction broadcasters and threaten revocation of their licenses for what the agency determined to be an insufficient balance of perspectives in the discussion of controversial issues.

Despite the fact that the FCC's power under the rubric of the public interest doctrine may have been invoked by Democrats more often in the past to silence conservative viewpoints, I don't like to see Brendan Carr now pick up the turn-about-is-fair-play mantle. That is the path, to paraphrase Daniel Moynihan, towards defining down poor policy – and perhaps poor law. When the wheel next turns, a Democrat-controlled FCC may well do to Carr, and to conservatives, one better when it comes to censoring content that it doesn't like.

As for the Communications Act's public interest standard which is invoked by Chairman Carr as the basis for regulating programming content, including Jimmy Kimmel's offensive and misleading remarks, I argued in a law review article in May 2001 that the public interest standard is too indeterminate – in effect a standardless standard – to be constitutional. The Supreme Court has yet to agree, although one day it might.

In a law review article published in 2008, "A Modest Plea for FCC Modesty Regarding the Public Interest Standard," I argued that the Commission, on its own, should use its admitted discretion to narrow the scope of the exercise of its public interest authority. I especially urged the agency, consistent with needed regulatory modesty, to narrow the scope of its public interest determination with regard to its consideration of transactions like the one presently pending before the Commission involving Nextstar, the owner of a large group of stations that took Jimmy Kimmel's show off the air, and the recent Paramount-Skydance transaction. The Commission has yet to do so, but perhaps one day it might.

In yet another law review article published in 2009, "Charting a New Constitutional Jurisprudence for the Digital Age," I argued that it was past time for the Supreme Court to jettison its analog-age precedents, based largely on the Communications Act's public interest authority, that allowed the FCC to regulate broadcasters' programming content and accord them less protection under the First Amendment than all other media. Justice Clarence Thomas has cited my article approvingly in a concurring opinion calling on the Court to revisit its precedents

allowing government regulation of programming content. But the Supreme Court has yet to do so, although it might ultimately adopt my view – and Justice Thomas's – if presented with an opportunity to do so.

It's possible, but by no means certain, that the Supreme Court, if presented with the case, could decide that Chairman Carr's threats abridge broadcasters' free speech rights under the so-called "chilling effects" doctrine holding that the government may violate the First Amendment if it unduly deters free speech through laws, regulations, or actions that appear to target activities protected by the First Amendment.

So, I don't agree with those who claim that Chairman Carr's statements necessarily have already violated the First Amendment rights of Jimmy Kimmel or the broadcast stations that carried his now suspended show – even as I've made clear that I think the existing jurisprudence regarding the exercise of the FCC's public interest authority is highly problematic.

In 2019, Brendan Carr declared that: "The FCC does not have a roving mandate to police speech in the name of the 'public interest.'"

He already has done much good in his short tenure as FCC Chairman, especially by way of eliminating outdated and costly legacy regulations that for far too long have imposed undue burdens on telecommunications companies. And I have commended him often for his leadership regarding these deregulatory efforts, which are important and need to continue.

In an early essay in my "Thinking Clearly About Speaking Freely" series, I said that the free speech values at the heart of the Founder's First Amendment are central to our nation's Constitutional Culture, and this is so regardless of whether the First Amendment dictates a particular result in a specific instance. I concluded there that "a robust Constitutional Culture, properly understood, should play an important role in combatting the growing Cancel Culture."

But, for me, regardless of the legalities, as a matter of conservative principle, I wish Brendan Carr would cease issuing further threats of regulatory consequences related only to concerns about the content of programming. I hope he does.

Based on what so many of us now know about Charlie Kirk and his work – and especially his advocacy for free speech and respect for those who can disagree agreeably – I believe Charlie would agree with me. His devotion to free speech is a major reason we mourn him and honor his legacy.

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