

MEMORANDUM

To: Allan A. Pizzato, Executive Director, Alabama Public Television
From: Todd D. Gray
Date: May 23, 2012
Re: Programming Decisions

Following up on our conversations regarding the matter of the WallBuilders programs and the possible broadcast of one or more of such programs by Alabama Public Television at the direction of the Alabama Educational Television Commission (AETC), I thought it might be useful for me to expand a bit on the points expressed in my April 11, 2012 letter, to address a process issue rather than the content issues previously considered. The issue is how and by whom programming decisions should be made by AETC as an agency of the State of Alabama. I believe there is systemic risk to AETC and its public broadcasting mission if specific programming decisions come to be made by the Commissioners.

The basic issue is how an agency of the State of Alabama, which has no rights under the First Amendment, and which itself is prohibited from interfering with free speech rights by the First Amendment (as applied to the states by the Fourteenth Amendment), can own and successfully operate a broadcast station network. In the absence of being able to claim First Amendment protection, the network operates with risks that private broadcasters do not face, including being subject to content regulation by the Federal government in a manner that would not be allowed for private broadcasters, being liable for claims of defamation that would ordinarily be barred by the First Amendment, being subject to claims of censorship or discrimination arising from programming decisions, and perhaps even being regarded as some sort of an open forum that is obligated to carry programming demanded by station employees or the public.

There is a serious tension in the law as it applies to governmental broadcasters that has frankly never really been fully resolved. Under the Communications Act AETC, as the governing board of an FCC licensee, is obligated to exercise control over the stations' programming. At the same time, the State of Alabama and its officials are prohibited from interfering with the free speech rights of any person or institution of the press. The question is how these two competing principles can be accommodated.

We (and others in public broadcasting) have long believed the answer is that a governmental licensee must operate in such a way that the state's politics are not translated into, or allowed to affect, specific programming decisions. This is accomplished by having public

officials – including the AETC Commissioners – insulated from specific programming decisions. In the case of the AETC Commissioners, who collectively are charged under both state and federal law with the responsibility to govern the network's activities, this insulation can only be accomplished by delegating specific programming decisions to professional staff who have the ability to operate much as do editors of private media outlets. In the exercise of its required oversight and control over programming, the Commission should adopt general programming guidelines to govern content decisions, but it also should not involve itself in specific programming decisions (either to air or to decline to air any program). Instead, it exercises its overall control by requiring the Executive Director, and through him the professional programming staff, to apply its general guidelines as they make specific programming decisions.

There have been a couple of important legal cases that have addressed the basic issues here – one of which actually involved AETC. In 1982, the US Court of Appeals for the (old) Fifth Circuit, sitting *en banc* (23 judges) decided the case of *Muir v. Alabama Educational Television Commission*. The case was a consolidated appeal of two earlier decisions considering whether AETC and the University of Houston (an agency of the State of Texas) could refuse to broadcast a program, "Death of a Princess," over their respective public television stations. The plaintiffs in these cases charged that AETC and the University had engaged in censorship, prohibited by the First Amendment, when they decided to cancel the scheduled PBS broadcast of the program based on what were alleged to be political considerations (the program was thought to be harmful to relations with Saudi Arabia and potentially dangerous to oil industry workers there, as well harmful to the oil industry itself).

The case was so controversial and the issues so difficult that the Court did not ultimately generate a single majority opinion. A plurality of the Fifth Circuit judges decided that, based on the Federal Communications Act, government-owned and operated broadcasting stations were not public forums and therefore not required to air any and all speech that outsiders might want to broadcast, and that members of the audience had no enforceable Constitutional right to see particular programs. Thus, the Court upheld the denial of relief to the parties that had sued AETC and the University. However, in its analysis the plurality had to concede that the First Amendment does not protect governmental expression. As a result, in the Court's view, it would be possible for Congress to impose content regulation on governmentally owned stations that it could not impose on private licensees.

The second case is *Arkansas Educational Television Commission v. Forbes*, decided by the US Supreme Court in 1998. That case involved access to candidate debates produced and broadcast by the state-owned public broadcasting network in Arkansas. The network had organized and broadcast a debate between the two major party candidates for one of Arkansas's US Congressional districts, and determined to exclude a third candidate – Ralph Forbes – on the grounds that he was not a serious candidate. The Arkansas network relied on the facts that Forbes had no campaign organization, was not generating appreciable voter support, and was not regarded as a serious candidate by other press covering the election. Forbes sued, arguing that his exclusion from the debate organized and broadcast by a state agency violated his First Amendment rights.

At issue in the case was the network's status as an agency of the State of Arkansas, and whether the network, or at least the debate program itself, was a public forum for which the network could not exclude any qualified candidate for the particular Congressional district race. Ultimately, the Supreme Court determined that that the debate was a "nonpublic forum" and that the network could exclude Forbes so long as the decision to do so was reasonable and did not result from an effort to suppress Forbes' expression merely because public officials opposed his views. Important to the decision was the Court's finding that the Arkansas network took steps to insulate its programming decisions from political pressure. The Court cited specifically the facts that the network employed an executive director and professional staff who exercise broad editorial discretion in planning the network's programming, and that the network had adopted the "Statement of Principles of Editorial Integrity" which are intended to ensure that these programming decisions are free from political or financial pressure.

(It is my understanding that AETC has also adopted the Statement of Principles of Editorial Integrity.)

The *Muir* case thus stands for the proposition that stations owned and operated by states are not protected by the First Amendment and thus vulnerable to content regulation by the Federal government to a degree not applicable to privately owned stations. This is troubling because powerful political pressures motivate Federal officials to try to influence programming. Often, only the First Amendment holds these currents in check.

The lack of First Amendment protection has another serious risk. One of the most important First Amendment doctrines is in the area of defamation – holding that public officials and other public figures cannot succeed in a defamation law suit without showing "actual malice" – that is, actual knowledge of the falsity of published (or broadcast) content or a reckless disregard for its truth. This creates a heavy burden of proof that is a barrier to most defamation claims by public figures against broadcasters. It permits them to report the news without being harassed by lawsuits and held to an impossibly high standard of accuracy. Without First Amendment protection to justify an actual malice standard, public broadcasting licensees would be vulnerable in actions for defamation.

The *Forbes* case stands for the proposition that programming decisions by state owned broadcast stations that are insulated from political pressure by the delegation of broad editorial discretion to professional staff, and by adhering to established principles of editorial integrity that ensures that programming is free from political or financial pressure, will obtain some measure of protection against First Amendment claims from those who would disagree with specific programming decisions.

Given the risks that result from a state-owned and operated broadcast station or network operating without First Amendment protection, it has been the considered view of public broadcast stations owned and operated by governmental entities – state networks such as AETC and public colleges and universities – that appropriate measures should be taken to secure their First Amendment status by removing specific programming decisions from political or administrative direction so that program decision makers act for all practical purposes as private editors. Based on analogous court precedents in First Amendment jurisprudence (such as cases

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protecting the teaching and writings of professors at state universities, or the writings of law review editors at public university law schools, or the content of a public college student newspapers, in such cases because the professor or editor is protected from official direction and thus not viewed as an agent of the state in the development and expression of their views), public broadcasters believe that insulation of programming decisions in this manner provides the best possible protection.

The bottom line is that a state can establish and provide funding to support a speech activity such as public broadcasting, but if the activity is to pass First Amendment muster, editorial control must be delegated to persons who function outside of the political process. In the case of AETC, this should be the Executive Director and his or her professional programmers.

