



Insight

# The FCC's News Distortion Rules Highlight Need for Updates

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## Executive Summary

- Former President Trump recently called for the Federal Communications Commission (FCC) to revoke the licenses owned by the American Broadcasting Company after alleging unfair treatment from the network's moderators during the September debate.
- Federal regulators do indeed have the authority to impose a variety of content-based rules on radio and television broadcasters and may revoke their licenses if broadcasters do not comply; such restrictions do not, and constitutionally cannot, apply to newspapers, streaming services, websites, social media, and a wide variety of other sources, an asymmetry that is likely harmful to the overall media environment.
- Over the longer-term, Congress should consider legislative changes to allow broadcasters and alternative media sources to compete on a more level regulatory playing field.

## Introduction

After the first debate between former President Trump and Vice President Harris, the Republican candidate criticized the host of the debate, American Broadcasting Company (ABC), arguing that its moderators had treated him unfairly. He further recommended that the broadcaster [have its licenses revoked](#) (although it is unclear if he was referring only to the licenses directly owned by ABC or those of its local affiliates). While many were quick to [dismiss](#) Trump's call, it is indeed possible for the federal government to revoke a broadcast license, even in response to what is essentially a political offense. The Federal Communications Commission (FCC) currently prohibits broadcasters from [intentionally distorting the news](#), and imposes a wide variety of other content-based restrictions, such as limits on the broadcasting of profanity or specifically requiring children's television programming.

While this rule would seem to violate the First Amendment rights of broadcasters, the Supreme Court has justified such content regulations, arguing that spectrum, or really the licenses themselves, are scarce, and the FCC must be able to [regulate in the public interest because of this scarcity](#). While this logic may have once made sense in an earlier era with a limited number of broadcast licenses available in a given market, content providers today have myriad ways to reach consumers, most notably over the Internet. Still, some consumers choose to get content through broadcast – but content-based restrictions and rules can make it difficult for broadcasters to provide the content that viewers want, driving consumers to other forms of media without such restrictions. While broadcasters could simply forgo the broadcast license and choose to reach consumers over other media, doing so would deprive consumers who want to tune into their local broadcast of the ability to do so.

Congress cannot change the courts' interpretations of how the First Amendment applies to broadcasters, but it can limit or revoke the FCC's authority to impose content-based restrictions on broadcast television. Congress should begin to consider removing content-based regulations of broadcasters, allowing the market to dictate the

types of content consumers can get over the airwaves.

## **Content-based Regulation at the FCC**

### *Objectionable Programming*

The FCC's authority to regulate objectionable material on broadcast television is [perhaps](#) its most well-known. Under current rules, indecent and profane material is largely prohibited over broadcast, with an exception for broadcasts between 10 p.m. and 6 a.m., as children are less likely to be watching during those hours. The rules also prohibit obscene material, which is much like indecent material but lacks serious literary, artistic, political, or scientific value, and depicts sexual conduct in a patently offensive way. Notably, obscene material is not protected by the First Amendment regardless of the medium over which it is presented.

### *News Distortion*

The FCC's news distortion rule prohibits a broadcast station engaged in broadcast journalism from intentionally distorting the news, as [according to the FCC](#), "rigging or slanting the news is a most heinous act against the public interest." While the FCC has not clearly defined "distortion" under the policy, it generally relies on a four-part test. First, there must be an accusation of deliberate intent to distort the news. Second, there must be extrinsic evidence to the broadcast itself, such as that a reporter had received a bribe or that the report was instructed by management to distort the news. Third, the distortion was initiated by the management of the station. And fourth, the distortion involved a significant event. While these standards are fairly stringent, the FCC must investigate complaints when a station seeks to renew its license, adding risk and uncertainty even if the station never truly violated the policy.

### *Political Broadcasting*

Regarding political advertising, broadcasters must provide [reasonable access to candidates](#), meaning broadcasters must allow legally qualified candidates to purchase reasonable amounts of broadcast time throughout their campaign. Further, if a broadcaster gives access to one candidate, it must provide equal opportunities to other candidates for that office. This is distinct from the now eliminated [fairness doctrine](#), which dealt with discussion of controversial issues rather than political candidates. Broadcasters must also maintain online political files and include sponsorship identification for political ads.

### *Children's Television*

Congress specifically imposed two requirements on television broadcasters relating to children's video programming. First, commercial television licensees must limit the number of commercials that may be aired during children's programs. Second, when reviewing license renewal applications, the FCC must consider "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."

## **First Amendment Scrutiny**

While some of the restrictions, such as the obscenity rules, do not receive First Amendment protections, many of the rules as applied to broadcasters would violate the First Amendment rights of different communications platforms. The distinction, according to the Supreme Court, is that [there is a scarcity of the medium](#); only a

certain number of broadcasters can operate in a market at a given time due to the potential for harmful interference. For example, if two broadcast stations operated at 92.3 MHz, a consumer tuned into that frequency would not be able to listen to the individual station they want because both signals would cause interference in the consumer's receiver.

But while it is true that the number of broadcast licenses in a given market remains limited, the media landscape has changed significantly since the Supreme Court first adopted the logic in 1943. Cable and direct broadcast satellite television provide television stations with an avenue for reaching consumers without having to broadcast a signal, creating a vast opportunity to reach consumers. Even more important, if a content provider wants to reach consumers, it can do so much more easily, and with a much wider range, over the internet. While broadcast licenses may be scarce, the ability to deliver content to consumers is not.

### **Path Forward for Lawmakers**

While the medium-scarcity logic no longer holds true, Congress cannot dictate to the Supreme Court how the Court should interpret the First Amendment. So long as the cases remain good law, the FCC can use the authority granted by Congress to regulate broadcasters' content under the lower standard of review.

Nevertheless, Congress can and should carefully examine the FCC's specific rules as applied to broadcasters and require the agency to eliminate those rules rendered unnecessary in a digital age. For example, the news-distortion rule, could disincentivize a broadcaster to take political stances with its broadcast out of fear of political retribution. If, hypothetically, a news broadcast decides to report on a story that could make the current president look bad, they may fear that the administration's FCC could attempt to use the news distortion rule to block a license renewal. And rules prohibiting profanity can impact the shows that broadcasters air, limiting the types of content that consumers can consume over broadcast media. As consumers continue to choose alternatives without such restrictions, Congress should continue to examine the content-based rules that apply to broadcasters.

While this would help consumers by giving broadcasters more freedom to meet market demands, it would also allow broadcasters to better compete with other media sources. Absent unnecessary content regulation, consumers may readily prefer to consume media over the airwaves. As it stands, Americans are [moving away from broadcasting](#), in part because certain types of programming just cannot be aired over these networks. For example, some listeners may prefer explicit versions of songs, but can't find them over the air, so instead they turn to digital streaming services. By removing some of these unnecessary restrictions on broadcasters, they would be able to compete using the unique aspects of broadcast, namely its local nature and ease to tune in. As a corollary, the freedom to succeed would also entail the freedom to fail: If a station airs content that consumers do not want to see, it will simply go out of business.