



UNLOCKED

What is the role of the Federal Communications Commission (FCC)?

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on Media, Politics and Public Policy



TRANSCRIPT:

Nancy Gibbs:

Hi, I am Nancy Gibbs, director of the Shorenstein Center on Media Politics and Public Policy at Harvard's Kennedy School. And this is Unlocked. Today we are talking about when and how the government can decide what we can see, watch, hear, listen to. My guest is Tom Wheeler, the expert in telecommunications, and importantly, a former chairman of the Federal Communications Commission, which is the independent agency that television, internet, cable, radio, Wi-Fi, satellite. And so let's start there. Tom, can you explain the historic mission of the FCC? What does it control, and importantly, what does it not control?

Tom Wheeler:

Well, can I also begin by saying that I'm a proud alumnus of the Shorenstein Center and a former Walter Shorenstein fellow, which is what makes it doubly delightful to be with you, Nancy. The FCC regulates, as you just detailed, all of America's communications networks from satellite, to the internet, to telephone to broadcast. And that amounts to about one sixth of the American economy, which is a non-trivial amount. But what's really interesting is that the other five sixths of the economy depend on those networks for everything they do. So the FCC's impact is immense because it gets down to the heart of what democracy and the economy is all about, and that's the ability to communicate.

Nancy Gibbs:

So when we include the internet, to what extent does the FCC regulate the internet? Because telephones, we understand, broadcast television, okay, I get what that means. But when it comes to the universe we live in now-

Tom Wheeler:

One of the big debates we had when I was chairman was this thing called net neutrality, which is a terrible name for the idea that we need to provide ongoing first come, first serve non-discriminatory access to the internet the same way we did with the telegraph, the same way we did with the telephone. And while we were in office, we put forth net neutrality rules. They were challenged in the court, they were upheld by the court, and then when the Trump administration came in, they were killed.

Nancy Gibbs:

So give me an example of what that ... If I am a consumer, why should I care about net neutrality? How would that affect me?

Tom Wheeler:

Well, it came about a dozen years ago. Golly, it was longer than that now. But when you saw cable companies slowing down Netflix on their broadband delivery side because it competed with their cable offerings. And the key concept is that the networks that deliver the internet ought to deliver it for everybody and shouldn't be sitting there and saying, "Well, you get on or you have these different terms, or you're going to get a faster lane than these guys," and providing various levels of preference. And so we passed what's called Title II, which made the internet providers, whether it be Comcast or AT&T. Whether it made the internet providers, common carriers. And common carriers are required by law to provide first come, first serve nondiscriminatory access to everyone.

Nancy Gibbs:

Help us understand the difference between the FCC's role in the content of what is on broadcast television versus the content of what is available on the internet.

Tom Wheeler:

The FCC should have no role in content period, end of discussion. The First Amendment says government has no role in dictating content. The Communications Act of 1934, which created the FCC, said you've got no right in content. What I was trying to talk about when we talk about common carriage for internet providers is exactly that. That it needs to be open and accessible on equal terms. And nobody ought to sit there and say, "Well, I like this point of view and not that point of view. I like this product and not that product. I get a cut from this outfit and I don't get a cut from this outfit.", to determine what the consumer get to see.

Nancy Gibbs:

But when we were growing up, there were things that you could not show on broadcast television. There were decency standards, you couldn't show naked people, you couldn't curse. Cable television seemed to be more lenient. What, if anything, is the FCC's role in enforcing standards across any of those channels?

Tom Wheeler:

There are two parts to that question. First of all, the FCC by statute does not regulate cable with minimal little exceptions, but does not regulate cable. The FCC does regulate broadcasting because broadcasters use the public airwaves to deliver the message. And the Supreme Court has held multiple times that indecency is not protected by the First Amendment. So one of the things that the FCC does is to judge whether or not there is indecency. The famous example of that was the wardrobe malfunction of Janet Jackson at the Super Bowl. And a lot of people got very upset about that and petitioned the FCC to take action.

There is a fine line between an accident and taste and indecency. And so for the most part, at least when I was chairman, I reviewed probably well over a thousand indecency complaints and took action on maybe a half a dozen of them. I'll give you an example. There was a station in Virginia that was doing a story on a new local firefighter. A woman firefighter that they felt was news in and of itself. But then they discovered that her previous job had been an actress in porn movies and they showed some of her previous activity on television for the kids and everybody else to see. We thought that was perhaps going a little too far and so we fined them.

Nancy Gibbs:

And would that apply also to certain levels of violence, certain levels of other kinds of content that cross some line other than sexually explicit content?

Tom Wheeler:

It becomes a question of what is the line and who's drawing it? And I could tell you that at least my interpretation when I was the guy making those decisions was that the First Amendment called for the benefit of the doubt that Potter Stewart was, right. I know it when I see it, but I can't define it. And so we would take that kind of approach on a case-by-case basis.

Nancy Gibbs:

So for an FCC chair to suggest that the of a late-night comedian's monologue crosses some line is out of the ordinary, out of the jurisdiction of the FCC or is there ... How much intrusion or comment on content puts a broadcast license at risk?

Tom Wheeler:

So Chairman Carr in his comments about the Jimmy Kimmel monologue kept referring to the public interest. We will define the public interest. And that concept is at the heart of the FCC statute. The job of the FCC, according to statute is to make decisions based on the public interest, convenience, and necessity. The problem is public interest is a wonderful term, incredibly vague and undefined. And what the Trump FCC has started doing is defining it in terms of where are you on issues that Donald Trump cares about and what are you saying about Donald Trump? And it's not in the public interest if you are ... Donald Trump himself was very explicit about that on the plane coming back from the UK when he said, "All of these networks say bad things about me. They don't support what I'm doing. Maybe we ought to take their licenses." And Brendan Carr used the bully pulpit of the FCC to not so subtly threaten, not ABC, but it's licensed affiliates, that they could possibly lose their licenses. Classic. His mob boss line where he said, "We could do this the hard way or the easy way." You have a really nice license there. It'd be a shame if something happened to it.

Nancy Gibbs:

And was part of that also a reflection of the FCC's role in mergers and acquisitions among communications?

Tom Wheeler:

That's a great question, Nancy. There are two parts of what we're seeing going on right now. There is the message that is being delivered to the broadcasters, which is, we'll help you with your economic goals if you'll help us with our political goals. And there are two ways of doing that. One is the overt way of how do I affect what is being said? The other is how do I affect who is saying it? And today as we speak on September 30th, there is a meeting of the FCC in which they're going to begin the process to change the ownership rules. There's always been ... Not always, but there's been for years a rule at the FCC that said that ... Let me back up. One of the underlying concepts of the FCC's oversight of broadcasting is a diversity of voices and of diversity of ownership.

Nancy Gibbs:

Meaning you don't want one media baron owning every local television station or Radio station.

Tom Wheeler:

It is core to democracy that you have competing ideas out there using the public's airwaves. The FCC today is starting a new rulemaking that will deviate from that by allowing one giant company to own multiple outlets in a market. For instance in India ... And there's a merger that's already been agreed to. \$6.2 billion merger between Nexstar, the nation's largest chain of broadcast outlets and Tegna, the old USA Today network. Today that deal was signed despite the fact that it is illegal today. It violates the ownership cap of how much reach any one company can have to assure that there's a diversity of voices out there nationally, and it violates the local ownership rules of how do we make sure that there are multiple voices in each market?

Nancy Gibbs:

So does it take Congress to change the laws governing that or can the FCC with the stroke of a pen change those rules?

Tom Wheeler:

So today they're starting the process of the local ownership rules being changed by the FCC, the National ownership rules against the cap, Brendan Carr, Chairman Carr has promised he'll also deal with. And both of those rules have to change in order for this already signed agreement to be legalized. So the FCC is engaged right now in an ex post legalization of something that today is illegal.

Nancy Gibbs:

So are the courts in the position for competitors for whom it is not in their interest for that merger to go through? Presumably they can take that to court and say this is illegal. The courts could block it.

Tom Wheeler:

We're undoubtedly headed down that road.

Nancy Gibbs:

The FCC-

Tom Wheeler:

Let me go back here. One of the things of the Trump administration, as you'll notice, okay, take us to court. We don't care. We still have this effect. What did the chairman's comments about Jimmy Kimmel have on ABC and Jimmy Kimmel negotiation about what he would say when he went back on the air? There's a story in the Wall Street Journal that went through the whole thing and talked about how on the first time that Kimmel and Bob Iger, the head of ABC and the head of the ABC television network got together, they couldn't reach agreement on what Kimmel would say, and it wasn't for two days later ... In other words, the threat of the government taking action against licensees who were broadcasting this, broadcasting Kimmel had a chilling effect of what ABC was agreeing to let Kimmel say.

Nancy Gibbs:

The FCC is an independent commission.

Tom Wheeler:

Supposedly. It was until Donald Trump.

Nancy Gibbs:

So who appoints its commissioners? And to what extent does the chairman have to act based on a vote of commissioners versus act independently?

Tom Wheeler:

That is a very deep question. The FCC was created by Congress as an independent agency. It is five commissioners, one of whom is chairman. It is a strong chairman commission, which means that the chairman is the CEO. Nothing gets on the agenda unless the chairman approves it. And the other four commissioners are there as countervailing forces. But every word that goes on an agenda item the chairman has approved.

On February 15th of this year, Donald Trump issued an executive order in which he said the FCC and similar independent agencies are no longer independent agencies. That they report to the White House and that the White House must approve everything they consider as well as what the final action must be. That is a reversal of 90 years. The agency was created in 1934, so over 90 years of how the agency acted, which was as an independent agency. The president appoints the commissioners, which are confirmed by the Senate. The Congress holds the oversight hearings to follow through on is the FCC following the laws that we have passed, and that in the middle creates a level of independence or is supposed to create a level of independence. And Donald Trump said, "No. It's not going to be independent anymore. They will report to me." And unfortunately, the Congress has done nothing to assert themselves.

Nancy Gibbs:

And what is the role then of the courts in that?

Tom Wheeler:

The courts are as so many things in the Trump administration, the ultimate arbiter of this. But here's the interesting thing, Nancy. The FCC is governed by what is called the Administrative Procedure Act, and there are two levels of operations at the FCC. There is an informal proceeding, which is what Chairman Carr was doing when he was saying, "We can do it the easy way or the hard way." The hard way, revoking a license, becomes a formal proceeding, and in the formal proceedings you have specific rights of everybody having the opportunity to express themselves. It is all on the record and it leads to a final decision by the agency, and that decision is appealable to the court. The kind of action that Chairman Carr took when he threatened ABC and Jimmy Kimmel is not an appealable decision because it is not a final decision. And Brendan Carr has become masterful in dealing at this level.

For instance, he said flat out to all the companies he regulate, if you expect to come here and get approval for mergers or anything else, and you still have DEI policies, you're not going to get what you want. Don't come see me until you've abolished your DEI policies. It's the same kind of coercive intimidation that he used against Jimmy Kimmel, but it is not an appealable decision because it's not a formal decision. Another example was that the CBS merger. So Donald Trump sued CBS for \$20 billion over the 60 minutes editing of the Kamala Harris interview before the election. And Brendan Carr, Chairman Carr let it be known that the FCC has the authority to approve or disapprove a merger. CBS was going through a merger and he let it-

Nancy Gibbs:

It's parent company.

Tom Wheeler:

I'm sorry, it's parent company Paramount was going through a merger and Chairman Carr let it be known he would not consider that merger until CBS had resolved the suit with President Trump. Most lawyers feel that suit was specious and groundless, yet this \$8 billion merger could not go through until CBS settled that suit. Because of, again, back to the authority of the chairman, I'm just not going to put it on the agenda until you make President Trump happy.

Nancy Gibbs:

What other enforcement mechanisms does the FCC have? We talked about pulling broadcast licenses. What other measures can they take?

Tom Wheeler:

It's a great question. Actually, the FCC does two things. The FCC is a rulemaking body, as we discussed, such as making the rules on local television ownership. It's also a policing agency where you have an enforcement bureau whose job it is to prosecute those who violate the law. For instance, one of the things that happens in major markets around the country is what's called pirate radio. It's not difficult to send out a radio signal. And so in New York, Miami and elsewhere on the rooftop of a tenement, somebody puts up an antenna and hooks it up to a laptop and it starts broadcasting across the airwaves. The problem is that interferes with the licensed broadcasters. So the FCC has the ability to go out and find out where they are, track them down and prosecute, but there is a police action as well as a rulemaking action at the FCC, and they should be governed separately. The chairman should treat them as two separate things, not as two intertwined things.

Nancy Gibbs:

These past months have had far more than the typical level of coverage and attention on the FCC. What do you think are the major misunderstandings, misconceptions about its role? Its powers that reporters, for instance, covering these news stories need to know about?

Tom Wheeler:

The interesting thing, I think the thing that has been most displayed in the Jimmy Kimmel activity was this, what you can do on an informal basis, rather than having to do anything publicly and making a formal decision. Again, whether it's on DEI or you say you're not going to get any deals unless you kill all your DEI stuff or it's on, you're not going to get this deal approved unless you do something my way. Or it is, it's a nice license here, I sure wouldn't want to lose it. All of these things are coercive intimidation rather than open public policy decision making.

Nancy Gibbs:

So in that sense, it's norms that have been abandoned rather than rules broken, laws broken.

Tom Wheeler:

And hopefully not new norms being created.

Nancy Gibbs:

Tom Wheeler, thank you for helping us understand a commission that I think many of us could not have explained or described, and that now has been front and center in some really critically important public interest, public communications stories.

Tom Wheeler:

Thank you, Nancy.

Nancy Gibbs:

Thank you for your time.