

no inhibition, and that in fact the debate is more robust than ever as a result of its doctrine. I don't think it has carried this burden.

Mrs. PILPEL. May I ask, Mr. Robinson, where is it written that the burden is on the Government? It seems to me that it is the right of the public to be informed, which is paramount.

Quoting from the FCC—

Rather than any right on the part of the government or the broadcast licensee, or any individual member of the public to broadcast his own particular views, it is the right of the people to be informed.

I don't know that there is any warrant for saying that the burden is on the Government to prove something. The fact of the matter is that reasonable men must make reasonable judgments based on what in their opinion is more productive of free, robust, uninhibited debates.

I would submit that the decisions of the Supreme Court in the *Times* and *Butts* cases have absolutely nothing to do with what we are discussing here. What we are discussing here is, it seems to me, the self-evident proposition that when there is an act which says that all sides of controversial or many sides of controversial issues shall be presented and it is the obligation to present a discussion of such issues, it is a necessary corollary that you have an agency which can step in and say "No, you did not present controversial issues or various sides of that controversial issue."

To say that that has any impact on broadcasting or to involve Government interference in the airwaves seems perfect nonsense.

Mr. ROBINSON. First of all, on the burden, I think you are approaching this on the erroneous premise that the first amendment applies to curb the activities of individuals.

The courts have squarely held to the contrary and I suspect they will never hold that the first amendment requires that the Government promote free speech to overcome private restraints. Among other cases, there is *McIntyre v. William Penn Broadcasting*, a third circuit case; and there is a later Supreme Court case.

But apart from that, I don't see anything in the first amendment that talks about fairness. I don't see anything in the first amendment that talks about diversity. If that is part of the first amendment, it seems to me the FCC is obliged to shoulder the burden of providing that that is what the first amendment really means. That is where I derive the burden.

Mr. JAFFE. I wouldn't put it that way. I think that sort of goes off the skids. I think what was meant by that formulation is this, that prima facie—I take it this is the teaching of a number of cases—regulations which tend to inhibit discussion or for which there is evidence that it might tend to inhibit discussion, such as excessive taxes on a newspaper or whatnot, are prima facie contrary to the first amendment because they inhibit free speech, and the burden is on the Government.

If it is admitted that there is some possibility of inhibition, then as I understand it, the burden is on the Government to show that the restraint is justified by some other objective.

In other words, prima facie one is entitled to speak out without any conditions or qualifications. Maybe qualifications can be put on it. But if those qualifications are put on it, then it is up to the person who is advocating the qualifications to show that they are consistent with the purposes of free speech and do not constitute an unusual burden.