CONTENTS

A

SUMMARY CHRONOLOGY: FAIRNESS DOCTRINE

1. 1943: U.S. Supreme Court decided that the licensing system established by the FCC was constitutional and that the FCC is responsible not only for regulating the traffic on the airwaves but the content of that traffic as well. (NBC v. U.S., 319 U.S. 190)

2. 1949: "Report on Editorializing by Broadcast Licenses" -- This, the Commission's first general statement on the fairness doctrine, imposed the "dual obligation" on licensees: They must seek out issues of public importance, and they must present contrasting views. The report also rescinded the 1941 ban on editorializing by broadcasters.

3. 1963: The FCC held that if a licensee presents one side of a controversial issue of public importance and cannot find sponsorship for opposing viewpoints in order to fulfill the fairness doctrine obligation, it must provide that time free of charge. (Cullman Broadcasting Company, Inc., 40 F.C.C. 576)

4. 1968: The U.S. Court of Appeals upheld the FCC's determination that the fairness doctrine must be applied to ordinary cigarette commercials, which present smoking in an aura of vitality, good health, and social acceptability. [Congress later prohibited cigarette ads on radio and television.] (Banzhaf v. FCC, 405 F.2d 1082 D.C. Cir.)

5. 1969: The U.S. Supreme Court upheld the constitutionality of the fairness doctrine and of the FCC's personal attack rules, declaring, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." (Red Lion Broadcasting Company v FCC, 395 U.S. 367)

6. 1969: The FCC affirmed that the burden of proof is on the complainant and not the broadcaster in fairness cases and that the complainant must provide a prima-facie case before the complaint will even be considered by the Commission. (Allen C. Phelps, 21 F.C.C.2d 12)

7. August 11, 1969: Report of 20th Century Fund Commission on Campaign Costs in the Electronic Era (Newton Minnow, Dean Burch, Thomas Corcoran, Alexander Heard, Robert Price).

Major recommendations:

A. Voter's Time: Federal Government would provide to major party candidates for President and Vice President broadcast access to public via prime time, simultaneous airing over every broadcast and cable facility in country.

(1) Time Allotted:

(a) Six prime-time, 30 min. programs within 35 days of election

(b) Three prime time, 30-min. programs within 35 days of election

(2) Format: Designed to promote "rational political discussion for the purpose of clarifying major campaign issues..."

(3) Payment: Uncle Sam pays station at a rate not to exceed 50% of commercial rate card or the lowest charge made to any commercial advertiser for comparable time, whichever figure is lower. For Public broadcasters, they could charge the Government the cost incurred in presenting the program.

B. Time for other candidates: Minor party candidates would pay for their own time, but stations couldn't charge more than 50% of the lowest charge made to any commercial advertiser. However, stations could write off the difference on their Federal Income Tax.

8. 1970: The Court of Appeals, in an apparent move to put more force behind the fairness doctrine's applicability to product commercials, warned that the FCC's cursory treatment of ~~the~~ a Union's complaint was inadequate. The Commission had renewed without hearing the license of WREO-AM in Ashtabula, Ohio, which had stopped carrying paid advertisements from the Union about its side of a strike against a department store, while still carrying product ads for the store. The station maintained, and the FCC agreed, that no controversial issue was discussed in the product ads. The Court sent the desision back to the FCC for further study, but the Commission eventually reaffirmed its original decision. (Retail Stores Employees Union v. FCC, 436 F.2d 248 D.C. Cir.)

9. 1971: The Court of Appeals extended Banzhaf by applying the same line of public-health reasoning to the automobile pollution problem. The complaint argued that the use of high octane fuels and large car engines was a major source of air pollution, harming the public health, and therefore raising in their commercials the same issues that cigarette ads raised. The FCC held that cigarettes were unique, but the Court disagreed and reversed. (Friends of the Earth v. FCC,449 F.2d 1164 D.C. Cir.)

10. June 9, 1971: FCC issues notice of inquiry regarding fairness doctrine. First general inquiry in 22 years.

11. 1971: The FCC ruled that ESSO commercials, though they did not specifically mention the Alaska Pipeline, did subtly raise the need to develop oil resources on the Northern slopes. Although the fairness doctrine was thus applicable, the Commission ruled that NBC had covered opposing viewpoints adequately in later programing, and that no further action was necessary. (Wilderness Society and Friends of the Earth v. NBC, 30 F.C.C. 2d 643)

12. 1972: For the first time in history, the FCC revoked a license for fairness doctrine violations - and the U.S. Court of Appeals concurred, but not on fairness doctrine grounds. The FCC revoked the license on three grounds. First, it found that WXUR had

consistently failed to fufill fairness obligations. Second, it had not complied with personal attack requirements. Third, it has misrepresented itself to the Commission in its 1966 renewal application by failing to carry out many of its promises. The Court of Appeals agreed only with the third charge, Judges Bazelon and Wright issuing opinions still remarkable for their attacks on the fairness doctrine. (Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 D.C. Cir.)

13. June 16, 1972: FCC issues its First Report following the 1971 notice of inquiry covering how the fairness doctrine applies to political broadcasting. Comr. Johnson calls it a "cop out," a boone for the incumbent President; Wiley responds.

14. 1973: The Supreme Court upheld the FCC by ruling that neither the first amendment nor the Communications Act of 1934 requires broadcasters to accept paid editorial advertisements. The U.S. Court of Appeals had reversed the FCC,holding that a flat ban on all paid editorials violated the first amendment if the station was accepting other paid ads. (CBS v. Democratic National Committee, 412 U.S. 94) OTP took a public position on the earlier Appeals Court ruling and this is stated in the attached memo to CAW from Scalia. In that memo, Scalia called the Appeals Court ruling "a leap towards more pervasive bureaucratic content control, in a fashion more pernicious than the Fairness Doctrine."

15. 1973: Responding to complaint from the Democratic National Committee, FCC says the public has no automatic right of reply to Presidential address on Administration Policy. (DNC vs. the FCC, 481 F.2d 543).

16. 1974: A Florida statute requiring that a political candidate receive space to reply to a newspaper's attacks was declared unconstitutional by the U.S. Supreme Court. (Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241).

17. Sept. 27, 1974: U.S. Appeals Court in Washington (Judges Fahy, Tamm and Leventhal) says the FCC misappled doctrine when it found fault with NBC documentary "Pensions: The Broken Promise." Complaint filed by accuracy in media (AIM). The court said FCC erred when it ruled that even though NBC was reasonable in saying that the subject of the program was "some problems in some persion plans," the program had the effect "infact" of presenting only one side of a subject, i.e., the overall performance of the private pension plan system. But the court said the editorial judgments of the licensee must not be disturbed if reasonable and made in good faith. The licensee's wide discretion and latitude must be respected even though, under the same facts, the agency would reach a contrary conclusion. The Commission's proper function is to correct the licensee for abuse of discretion. The court thinks it plain that the lecensee in this case was not guilty of an unreasonable exercise of discretion. National B/casting Co. V FCC, 31 RR 2d 551

Subsequently, AIM appealed to the full court which agreed to review the case.

18. June 27, 1974: FCC issues its second report on doctrine which discussed the doctrine generally and product advertising in particular. Here the Commission generally defends its reliance on and interpretations of the fairness doctrine. For example, the Commission says that when a station represents one side of a controversial issue, he isn't required to bring in the other side on the same program, but to make opposing views available in overall programming. There also is no requirement that there be an equal balance of views.

However, the report also comes down hard on the recent moves to establish free and paid "access time" as a substitute for the doctrine, nevertheless encouraging broadcasters to establish such systems on their own. The Report affirms that the fairness doctrine applies to editiorial advertising, but unless the facts are "so clear that the only reasonable conclusion" would be that an ad was arguing one side of an issue, the licensee's judgement will be respected. However, as for ordinary product ads, the Commission reversed itself. The trend to apply the doctrine more stringently to product ads (c.g. Banzhaf, Retail Stores, Friends of the Earth, Wilderness Society) marks a serious departure from the central purpose of the doc-

trine, said the Report, and in the future, the doctrine will apply only to those ads which discuss public issues in an "obvious and meaningful way."

19. July 2, 1974: OTP letter to Senate Commerce Committee on proposed legislation to exempt Presidential and Vice Presidential candidates from Sec. 315. OTP sees no reason why the bill should be limited to Presidential candidates, says it should apply to all Federal candidates.

20. July 1974: CTW article in Yale Law Journal reviews Newton Minnow's book "Presidential Television." CTW argues that since Minnow's book deals mostly with the effects of the growing use by Presidents of TV, their recommendations, and especially their proposed changes in communications law "smack of tinkering and manipulation rather than the redress of Constitutional imbalances." CTW proposes legislation that would require broadcasters to accept all paid announcements during commercial time without discrimination as to the speaker or subject matter. The advertiser, not the broadcaster, would be liable for the content. CTW went on to say that such a policy would be compatible with the concerns expressed by the Supreme Court in the Democratic National Committee Case.

21. Novermber 2, 1974: Justice Stewart's address to Yale Law school on press freedom.

22. November 26, 1974: Richard Jencks of CBS and Robert Lewis Shaynon of Annenberg School of Communications debate the fairness doctrine during NAEB convention. Henry Geller commented afterward on the debate and his remarks are included.

B

Access

Major Fairness Doctrine Cases

NBC v. U. S., 319 U.S. 190 (1943)——The U. S. Supreme Court decided that the licensing system established by the FCC was constitutional and that the FCC is responsible not only for regulating the traffic on the airwaves but the content of that traffic as well.

Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949)——This, the Commission's first general statement on the fairness doctrine, imposed the "dual obligation" on licensees: They must seek out issues of public importance, and they must present contrasting views. The report also rescinded the 1941 ban on editorializing by broadcasters.

Cullman Broadcasting Company, Inc., 40 F.C.C. 576 (1963) ——The FCC held that if a licensee presents one side of a controversial issue of public importance and cannot find sponsorship for opposing viewpoints in order to fulfill the fairness doctrine obligation, it must provide that time free of charge.

Banzhaf v. FCC, 405 F.2d 1082 (D.C.Cir. 1968)——The U.S. Court of Appeals upheld the FCC's determination that the fairness doctrine must be applied to ordinary cigarette commercials, which present smoking in an aura of vitality, good health, and social acceptability. [Congress later prohibited cigarette ads on radio and television.]

Red Lion Broadcasting Company v. FCC, 395 U.S. 367 (1969)——The U. S. Supreme Court upheld the constitutionality of the fairness doctrine and of the FCC's personal attack rules, declaring, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

Allen C. Phelps, 21 F.C.C.2d 12 (1969)——The FCC affirmed that the burden of proof is on the complainant and not the broadcaster in fairness cases and that the complainant must provide a prima-facie case before the complaint will even be considered by the Commission.

Retail Stores Employees Union v. FCC, 436 F.2d 248 (D.C. Cir. 1970)——The Court of Appeals, in an apparent move to put more force behind the fairness doctrine's applicability to product commercials, warned that the FCC's cursory treatment of the Union's complaint was inadequate. The Commission had renewed without hearing the license of WREO-AM in Ashtabula, Ohio, which had stopped carrying paid advertisements from the Union about its side of a strike against a department store, while still carrying product ads for the store. The station maintained, and the FCC agreed, that no controversial issue was discussed in the product ads. The Court sent the decision back to the FCC for further study, but the Commission eventually reaffirmed its original decision.

Friends of the Earth v. FCC, 449 F.2d 1164 (D.C.Cir. 1971) ——The Court of Appeals extended *Banzhaf* by applying the same line of public-health reasoning to the automobile pollution problem. The complaint argued that the use of high octane fuels and large car engines was a major source of air pollution, harming the public health, and therefore raising in their commercials the same issues that cigarette ads raised. The FCC held that cigarettes were unique, but the Court disagreed and reversed.

Wilderness Society and Friends of the Earth v. NBC, 30 F.C.C. 2d 643 (1971)——The FCC ruled that ESSO commercials, though they did not specifically mention the Alaska Pipeline, did subtly raise the controversial issue by referring to the need to develop oil resources on the Northern slopes. Although the fairness doctrine was thus applicable, the Commission ruled that NBC had covered opposing viewpoints adequately in later programing, and that no further action was necessary.

Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C.Cir. 1972)——For the first time in history, the FCC revoked a license for fairness doctrine violations—and the U. S. Court of Appeals concurred, but not on fairness doctrine grounds. The FCC revoked the license on three grounds. First, it found that WXUR had consistently failed to fulfill fairness obligations. Second, it had not complied with personal attack requirements. Third, it has misrepresented itself to the Commission in its 1966 renewal application by failing to carry out many of its promises. The Court of Appeals agreed only with the third charge, Judges Bazelon and Wright issuing opinions still remarkable for their attacks on the fairness doctrine.

CBS v. Democratic National Committee, 412 U.S. 94 (1973) ——The Supreme Dourt upheld the FCC by ruling that neither the first amendment nor the Communications Act of 1934 requires broadcasters to accept paid editorial advertisements. The U.S. Court of Appeals had reversed the FCC, holding that a flat ban on all paid editorials violated the first amendment if the station was accepting other paid ads.

Democratic National Committee v. FCC, 481 F.2d 543 (D.C. Cir. 1973)——The public has no automatic right of reply to a Presidential address on Administration policy.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) ——A Florida statute requiring that a political candidate receive space to reply to a newspaper's attacks was declared unconstitutional by the U.S. Supreme Court.

NBC v. FCC, 31 Pike and Fisher Radio Regulations 551 (D.C. Cir. 1974)——[Pensions case–see article, page 7]

Fairness Report, FCC 74-702 (July 12,1974)——The FCC defends its reliance on, and interpretation of, the fairness doctrine. However, it also comes down hard on the recent moves to establish free and paid "access time" as a substitute for the doctrine, nevertheless encouraging broadcasters to establish such systems on their own. The Report affirms that the fairness doctrine applies to editorial advertising, but unless the facts are "so clear that the only reasonable conclusion" would be that an ad was arguing one side of an issue, the licensee's judgement will be respected. However, as for ordinary product ads, the Commission reversed itself. The trend to apply the doctrine more stringently to product ads (e.g., *Banzhaf, Retail Stores, Friends of the Earth, Wilderness Society*) marks a serious departure from the central purpose of the doctrine, said the Report, and in the future, the doctrine will apply only to those ads which discuss public issues in an "obvious and meaningful way."

C

CTW's "comments" in reply to an inquiry — not a statement of policy or formal press release position

August 6, 1971

CTW POSITION ON BEM-DNC DECISION

OTP is in sympathy with the court's objective of stimulating the free and open exchange of ideas through the broadcast media. It does not seem, however, that the means chosen to achieve this objective are desirable.

Leaving the acceptance of editorial advertisements to the discretion of individual broadcasters does indeed run the risk of unreasonable rejection. But a similar risk is run when we leave program and news content to private determination. As imperfect as this arrangement may be, it would be much worse to establish a system in which the Government decides who will be heard and which issues he will be permitted to address. The BEM-DNC decision invites precisely this type of dangerous government involvement in program content and public debate.

The decision gives new importance to the need for a thorough review by all branches of Government of the question of access to the media.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

August 5, 1971

MEMORANDUM FOR MR. WHITEHEAD

FROM: Antonin Scalia

SUBJECT: BEM & DNC Court of Appeals Decision

We have completed a review of the D.C. Court of Appeals decision in the BEM/DNC case and have the following comments concerning the advisability of your issuing a statement on the court's action. Since you are generally familiar with the factual context of these cases, we will limit our summary to the holdings. We preface that summary with the observation that you should take the time to read the entire opinion (attached) as soon as possible. It is an extremely important decision, and is unlikely to be reviewed by the Supreme Court.

By a 2 - 1 vote (Wright and Robinson in the majority, McGowan dissenting), the court has held that a broadcast licensee's total prohibition against accepting paid advertisements concerning "controversial" issues -- referred to as "editorial advertisements" in the opinion -- violates the First Amendment. The court stressed that it was ruling only on the "narrow" issue of "a total, flat ban on editorial advertising." The court did not hold, in other words, that broadcasters are common carriers and must air all editorial ads submitted to them. Rather, it merely ruled that the First Amendment requires broadcasters to accept some editorial ads, and left it up to licensees and the FCC to develop and administer "reasonable" procedures and regulations for determining which and how many.

> "We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that some such advertising be accepted, we leave the Commission and licensees broad latitude to develop 'reasonable regulations' which will avoid any possibility of chaos and confusion." (Opinion, pp. 40-41)

> "[I]nvalidation of a flat ban on editorial advertising does not close the door to 'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting some editorial advertisements, there is room for the Commission and licensees to develop such guidelines. For example, there could be some outside limits on the amounts of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same 'authoritative selection' in editorial advertising which he exercises in normal programming. . . . However, we are confident of the Commission's ability to set down guidelines which avoid that danger." (Opinion, pp. 41-42)
>
> "The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission." (Opinion, p. 43)

In effect, by remanding the BEM/DNC case to the Commission, the court has called for a rulemaking in which "the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements." (Opinion, p. 44) The court suggested that BEM and DNC resubmit their ads to the broadcast stations and, unless the ads are found to be excludable under the FCC's guidelines, they should be accepted by the stations.

In short, the BEM /DNC case does not represent the first step toward common carrier access to the broadcast media and a resultant loosening of government content control. To the contrary, it is a leap towards more pervasive bureaucratic content control, in a fashion more pernicious than the Fairness Doctrine. Not only would the FCC have greater latitude for meddling in access questions, but it would be deciding those questions not on the issue-oriented grounds of the Fairness Doctrine, but on grounds much more closely tied to message content and individual or group identity (i.e., "'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints" -- Opinion, pp. 41-42).

What is even worse from OTP's standpoint, the court's opinion very clearly eschews the spectrum scarcity rationale for imposing content control, and asserts that licensees are subject to First Amendment constraints because of (1) the governmental involvement in, and public character of, the enterprise ("almost no other private business -- almost no other regulated private business -- is so intimately bound to government and to service to the commonweal," Opinion, pp. 16-17) and (2) the importance or suitability of the enterprise for the communication of ideas ("in a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression so central to the First Amendment", Opinion, p. 19). See Opinion, pp. 11-19. This is a rationale for content control that could just as well be applied to cable television operators and, perhaps, to CATV channel lessees.

In short, the opinion not only fails to establish a right of individual access to the broadcast media on a "first-come, first served" basis, but it may even suggest that the Constitution prevents such access, since "the real problem . . . is . . . that [editorial advertising] may be dominated by only one group from one part of the political spectrum," and "a onesided flood of editorial advertisements could hardly be called 'the robust, wide-open' debate which the people have the right to expect on radio and TV." (Opinion, p.41) The court has merely substituted for the "paternalism" of the broadcaster the much more dangerous paternalism of the FCC. It achieves this by recognizing a First Amendment right to be heard -- but then leaving to the Government the extent to which that right may be abridged. Although it sounds better, it is in fact worse than recognizing no constitutional right to be heard, but leaving the decision of whether to grant a hearing or not to the private stations. Until full right of access is assured, no right of access is preferable. We point out again that all this has been done pursuant to a theory of "state action" which would subject other communications technologies to the same fate.

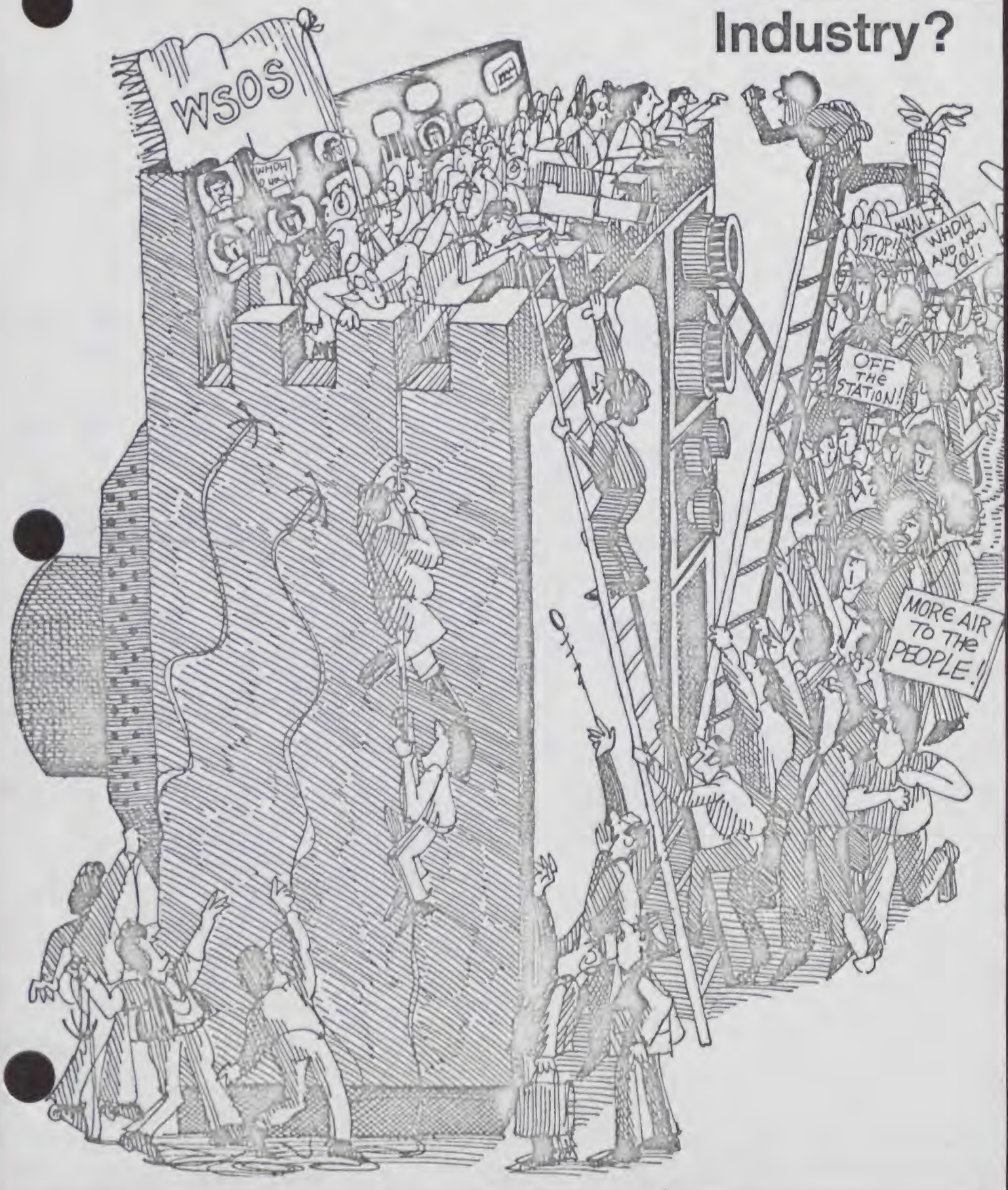
Finally, it may not be amiss to raise one political consideration: If we establish the FCC's power (perhaps a constitutionally required power?) to prevent editorial advertising from being "dominated by only one group from one part of the political spectrum," we may have achieved in effect a judicially enacted campaign spending bill. A Republican candidate seeking to spend 6¢ per voter on broadcast advertising might be restricted to a lesser sum by the FCC if his impecunious Democratic opponent is able to scrape up only 1¢ per voter. This result is not inevitable under Judge Wright's decision -- but it is at least possible.

Recommended Action:

Since Judge Wright's opinion is diametrically opposed to OTP's goal of loosening governmental control of program content, and since it is an opinion which will receive wide prominence, a public statement criticizing it would be in order. It can be brief -- a mere sigh of regret over the increase of government involvement in content regulation, joined with the assertion that OTP reexamination of this whole area is more necessary than ever. I am sure it will not escape your attention that such a statement would win the support of the broadcasters at a time when their confidence in your good will is critical.

D

Death of an Industry?



Commercial broadcasting is the victim of foul blows struck under the guise of fairness, and it faces an even greater threat—"counteradvertising"

ILLUSTRATION: BILL COLE

How would you like to own a business where you are required every three years to justify your performance to seven political appointees and perhaps lose that business if they don't think you measure up?

Or perhaps be forced to give away one of your wares for each one you sell?

Those are only two of the life-or-death problems facing the American radio and television industry.

Why should you be concerned about the broadcasters? Everybody knows they make millions and millions of dollars.

Their plight is of concern to you, however, for two reasons. If you ever advertise anything at all, new rules proposed for the broadcasting industry could eventually affect you, whatever form your ads take.

In a broader sense, you have a stake in the broadcasters' struggle because government policies that could cause the death of their industry could spread to others. The worst threat to the stations, of course, is that of being put out of business.

Owners of two TV stations—one in Boston, Mass., the other in Jackson, Miss.—have actually been stripped of their licenses, and over a hundred more stations are under attack.

Because of court decisions, any individual or group can challenge a station's right to continue operating. No matter how frivolous or unrealistic the complaint, the station is compelled to respond.

And a recent decision by the U.S. Court of Appeals in Washington has raised concern that a broadcaster—even after meeting the demands of a protester—might be required to pay for all expenses incurred by the challenger. And this, warn industry officials, could open the floodgates to all kinds of extortion by persons more interested in money than in changing a station's programs.

Pressures on broadcasters are coming from militant minority groups on the one hand and government edict on the other.

Target stations are having to spend untold man-hours and many thousands of dollars in legal fees to protect their investments.

The seven-member Federal Communications Commission can wipe out those investments by refusing to renew the licenses of station owners who come under attack. The owners' recourse: a further investment in money and time before the U.S. Court of Appeals in Washington, whose past rulings do not cast it in the role of the broadcaster's best friend. And now the Federal Trade Commission is asking the FCC to force radio and TV stations to offer time—even free time—to almost anyone who wants to challenge the contents of commercials.

This is known as "counteradvertising" and if it should come to pass, warns the Columbia Broadcasting

System, it would "undermine and destroy" the financial base of commercial broadcasting.

Here, too, the fate of the industry is in the hands of the FCC.

These twin threats are part of an overall review of who should have access to the airwaves under the so-called Fairness Doctrine for presenting all sides of controversial issues.

The implications are abundantly clear: Under this kind of oppressive federal regulation, the foundation of the competitive enterprise system is being severely rocked.

While advertisers on radio and television are most immediately under the threat of counteradvertising required by government decree, it's only a short step to the point at which any form of advertising would be affected.

Broadcasting officials, from the owners of tiny radio stations to executives of the national networks, have warned that any attempt to implement a counteradvertising policy in their industry could lead to an end to free TV and radio in this country.

After all, the only thing the broadcasters have to sell—in order to remain in business—is the time for commercials.

Sponsors, they say, are hardly likely to continue paying for commercials when part of the money is going to finance time to rebut those commercials.

One broadcasting executive asks specifically: Should free air time be made available to horse lovers to condemn autos, or to let "the carrot juice sippers" rail against soft drinks?

A colleague puts the issue in somewhat different terms: "When a commercial for a brassiere is aired on radio or television, should the no-bra bunch be offered equal time to extoll the virtues of the swinging life?"

Programs and personnel

While the counteradvertising debate rages, militants are aiming at the very heart of the broadcaster's business—his federal license to operate.

Petitions to deny license renewals are being filed with the FCC on behalf of Negroes, Mexican-Americans, Puerto Ricans, Indians, Orientals, Gay Liberation, Women's Lib and various other groups and causes. Common threads of their complaints concern programing and personnel.

They argue that they are entitled to more attention in broadcasting through "relevant" programs reflecting their interests and concerns. The racial and ethnic blocs in particular contend they should be represented on the broadcasting staffs of the stations.

Recent court and administrative decisions have opened the FCC's door to petitions by such groups for denials of license renewals, even though the complainants do not want to take over the licenses themselves and indeed often have no suggestions on who should operate the stations.

Some stations have compromised and agreed to such steps as putting on more black-oriented programs and hiring blacks for on-the-air jobs.

Hanging over the broadcasters, who have at stake millions of dollars in capital investments, not to mention goodwill built up over the years, is the fact that their licenses must come up for renewal every three years. The long-standing policy for the 7,000 radio and television licenses in this country once was to judge a broadcaster at renewal time on the basis of the record. Satisfactory performance in the previous three years virtually guaranteed renewal.

A competing application for the same license could be filed by a party with sufficient resources to establish and maintain a station on that same frequency. But a petition to deny the renewal application could be filed only by someone who could show a direct economic stake—another station that claimed interference with its signal, for example.

Shock waves

In recent years, however, two major developments have sent shock waves through the broadcasting industry.

Here's what happened:

• In 1966, the U.S. Court of Appeals in Washington—overruling the FCC—held that the general public, as individuals or groups, had legal standing to challenge a renewal and to argue that a given station had not

Now You See It, Now You Don't

In 1967, the Federal Communications Commission ruled that radio and television stations had to carry—without charge—antismoking messages to counter the paid commercials of the cigaret companies.

Smoking, the FCC said, had become sufficiently controversial to come under the Fairness Doctrine requiring broadcast licensees to air all sides of major public issues.

On Jan. 2, 1971, cigaret commercials were banned from the airwaves under a law Congress had passed the previous year.

But the antismoking messages continued. The FCC had announced just before the ban took effect that continuing the antismoking spots would be regarded as a public service. (Many broadcasters took the announcement as a strong signal that it would be good to be able to tell the FCC when their licenses were up for renewal that they had provided this service.)

So, under the Fairness Doctrine, it now appeared that the shoe was on the other foot, that stations carrying antismoking messages would have to carry the industry's arguments on the smoking-and-health issue.

No, it wouldn't be that way at all, the FCC said. Only the antismoking messages could continue.

The Fairness Doctrine? Well, the FCC explained, information about cigaret smoking had become so well-known that there no longer was a controversy over its effects. And the Fairness Doctrine, you know, applies only to controversial issues.

performed in the public interest. (In ame case, three years later, that stripped television station WLBT in Jackson, Miss., of its license as a result of objections to the way it handled matters concerning the local Negro community.)

• The FCC, in 1969, made a major departure from its own policy that an adequate record gave a licensee priority over a challenger. It refused to renew the license of WHDH-TV, of Boston, Mass., which had gone on the air in 1957 and was estimated to be worth more than $50 million. The station's record was not "superior," the FCC ruled, and the licensee would therefore be considered on the same basis as a competing applicant for the same license.

Then the FCC went on to take the license away from WHDH on the ground that its parent company also owned a newspaper, the *Boston Herald Traveler*. The FCC said it believed in diversification of ownership of communications media.

(There were two grim ironies for station here: Only three of the n members of the FCC voted gainst it. One member voted against transferring the license and the other three did not act on the decision.

(And, when the station finally ceased broadcasting this past March, company officials said the *Herald Traveler* could not long survive without television revenues that more than offset its losses.)

Later, the FCC sought to draw back from its sharp departure in the WHDH case and issued a policy statement reaffirming the importance of a good record in renewal applications. But the Court of Appeals in Washington struck down the policy statement last June on the ground it discriminated against new applicants.

Liberals attack a liberal

Sen. John O. Pastore (D.-R.I.), chairman of the Senate communications subcommittee, introduced a bill in 1969 to stabilize the situation. Under the legislation the FCC could ot consider a competing application r a license unless it had first taken the license away from the applicant for renewal.

Said the Senator: "A person who has a license has to live up to the law. And when he does, and does a good job, he hadn't ought to be harassed by any entrepreneur who comes in and makes a big promise."

Sen. Pastore, a veteran liberal and staunch supporter of civil rights legislation, suddenly found himself the target of liberal, civil rights and other activist groups.

Absalom Jordan, national chairman of Black Efforts for Soul in Television (BEST), told the Senator: "This bill is back-door racism . . . it says, in effect, no black ownership. First priority goes to whites."

The Rev. William F. Fore, executive director of the Broadcasting and Film Commission of the National Council of the Churches of Christ, opposed the bill "because we believe it would have the effect of permanently protecting the licenses of incumbent broadcasters. . . ."

The hearings on the Pastore bill became so emotionally charged over allegations that it would insulate broadcasters from challenges by minority groups that it got nowhere. While the Senator pointed out that challenges would still be possible, the provisions of the bill itself were obscured by injection of the racial issue.

Sen. Pastore, who was subjected during his 1970 re-election campaign to charges of racism because of his sponsorship of the bill, has declined to take up the fight again.

And the industry has been unable to obtain hearings on measures to restore some stability to the license renewal situation while at the same time keeping open avenues for legitimate grievances against a station.

As a result, more and more stations find themselves under fire.

In 1967, only one petition to deny a license renewal was filed with the FCC. In 1970, there were 32. In 1971, there were 68. The total this year is expected to go even higher.

Organizations that have filed, or are considering filing, petitions to take licenses away from present holders include such groups as the Black Knights and the Columbus Civil Rights Council, both of Ohio; the Black Identity Educational Association, of Omaha, Nebr.; the Bilingual-Bicultural Coalition on Mass Media, of San Antonio, Texas; the Chinese Media Committee of San Francisco, Calif.; the United Farm Workers [see "Chavez Blight Spreads East," page 32]; the National Organization of Women (NOW); and the National Union Alianza Federal de Pueblos Libres of Albuquerque, N. Mex. (The Alianza was organized originally to press a claim that Southwestern inhabitants of Mexican origin are entitled to vast tracts under Spanish land grants.)

One station's story

In Denver, Colo., for example, station KLZ-TV was the target of a complaint that carried such allegations as "lack of programing related to the black community and the Chicano community. . . . Programs fail to deal with human relations. . . . [The station] failed to display to the total community the frustrations, problems, aspirations and the cultural values of the black community and the Chicano community. . . . Many commercials urge children to purchase edibles of doubtful nutritional value and perhaps harmful. . . ."

KLZ-TV officials estimated that to prepare a response to those and other allegations, executives and employees put in 1,200 man-hours. In addition, University of Denver students were hired to review more than 1,000 days of news scripts. And thousands of dollars went for legal fees involved in drafting the response.

The station said:

"With one exception, none of the individuals or organizations signing the petition even contacted the station to make known any of their views, suggestions and observations . . . which are so vehemently expressed in the petition.

"Because of the nonspecific nature of charges, the preparation of this response . . . has consumed tremendous amounts of time. . . . Effort of this magnitude was required because the petitioners indulged in broad characterizations and loosely stated serious allegations without providing supporting facts. The licensee is left, therefore, to defend itself against many charges and innuendos that are neither articulated nor supported."

As an example of what it was facing, the station told of one incident: It had received a complaint that a

commercial featuring the "Frito Bandito" was considered offensive by Mexican-Americans.

The station told its advertising agency, the sponsor and CBS that when the commercial was scheduled, it would disconnect from the network and substitute a commercial acceptable locally. This involved special arrangements for a cue, breaking the network connection, presenting the local commercial and then rejoining the network.

"This arrangement required special handling by six different members of the station's personnel," KLZ told the FCC.

How much is enough?

Broadcasters confronted with challenges often find themselves up against such questions as who, if anyone, has the wisdom to lay down specific standards for determining "relevance" of programing to one or more minority groups, for identifying the genuine spokesmen for such groups, and for fixing the point at which minority-oriented programing is sufficient.

How much is enough? A Bakersfield, Calif., radio station directed 97 per cent of its programing to the Mexican-American community but was challenged on grounds it had not discussed programing with bona fide representatives of that community.

From the industry standpoint, the key legal case now pending involves WMAL-TV of Washington, D.C. That city's Black United Front has filed a petition for a denial of license renewal on grounds the station "has failed to serve the public interest . . . by completely overlooking and failing to serve the interests, needs and desires of the substantial black population within its primary signal area." The petition noted that blacks "constitute an overwhelming majority" of the city that WMAL "purports to serve."

The cost to WMAL-TV, in legal fees alone, of defending its position and retaining its license can only be described as staggering. NATION'S BUSINESS editors, examining FCC files, studied one set of documents submitted by the station—not its entire response—which amounted to a stack measuring some 36 inches high.

The FCC refused to order a hearing on the complaint. "Many types of programing cannot be broken down into that for black people and that for others," it said. "Were the Commission to require such a breakdown of programing according to the racial composition of the city of license, we would effectively be prohibiting the broadcast of network and other nationally presented programing. It is sufficient to say that such 'separate programing' is not feasible."

The Black United Front has asked the U.S. Court of Appeals to overrule the FCC and order a hearing.

A key issue in the case, one that could have a major impact on broadcasters in urban areas everywhere, is what constitutes WMAL-TV's area of responsibility.

The Black United Front says it is Washington, D.C., which is 70 per cent Negro. But the station points out its signal area, extending far beyond the city limits, contains a population that is predominantly white.

Running the gauntlet

Thomas H. Wall, president of the Federal Communications Bar Association, says broadcasting is "the only industry I know where you have to run the gauntlet every three years to stay in business."

No one is suggesting, he says, that broadcasters who do not live up to their responsibilities be shielded from competition. On the other hand, Mr. Wall says, those who make charges against licensees should be compelled to bear the burden of proving them. And, he adds, "if broadcasters give in to the wishes of the protesters too much, they will wind up being led around by the nose."

Mr. Wall says the bar group believes Congress should act to clarify the "confusion and uncertainty" surrounding license renewals.

The National Association of Broadcasters is backing legislation to extend the license period to five years from three. It also would provide that a license be renewed if the holder shows he has made a "good faith effort" to fulfill his responsibilities and has not shown callous disregard for the law or FCC regulations. Opponents could still come in to challenge licensees on whether they had met those standards. Meanwhile, what amount to pools of legal aid have been set up for challenges.

That pioneer case in Jackson, Miss., was brought on behalf of the local black community by the Office of Communication of the United Church of Christ, which has since made its legal expertise in license matters available to protesting groups in many other communities. And several other organizations have been formed to provide legal services in license challenges on request.

One recent case in which the United Church of Christ figured prominently could well cause even more headaches for the broadcasting industry.

Several black groups filed a petition to deny renewal of the license of KTAL-TV, in Texarkana, Ark.

Whereupon, KTAL entered into an agreement in which it pledged, among other things, to "discuss programing regularly with all segments of the public." It also hired two black newsmen to appear on camera.

On top of that, the station agreed to a demand that it pay more than $15,000 in legal and other fees incurred by the protesters.

The challenge to the license renewal was withdrawn, but the FCC refused to allow the payment to the challengers, holding that would not be in the public interest.

Then the same Court of Appeals that had ruled against the broadcasting industry so many times in the past overturned the FCC ruling and said the payment could be made.

Another case in which protesters have demanded that a station pay their legal fees—this time, the station refused to pay—is now before the FCC and is expected to wind up in court. Industry sources are concerned, because of the KTAL decision, that judges are heading toward requiring, not just permitting, payments by stations when challenges are withdrawn.

Taking a long look at all that is going on, the National Association of Broadcasters sums up this way: "It is no longer foolish or alarmist to say that present trends in government control . . . could wreck broadcasting."

END

It didn't take long for the FCC's "fairness doctrine" to be reduced to an absurdity. First, the broadcasters were ordered to offer "equal time," free of charge, to balance all "controversial" remarks. Time is money, especially TV time, so right away television became even more bland. Next, the courts ordered free commercials to balance the "controversial" ads for cigarettes, high-powered cars and leaded gasoline. By continuing to run the ordinary ads of a department store that was being boycotted by a union, a station was held to be implicitly endorsing only one viewpoint on a controversial issue and told to give the union its say. Now the Federal Trade Commission has gone all the way, advocating free "counteradvertising" against *any* commercials that say too much or not enough. While the advertisers are restricted in their claims by the FTC and by the ire of disappointed customers, their critics would not be, by anyone. By thus saturating the limited amount of commercial time available and encouraging advertisers to turn to other media, the counteradvertising principle might go a long way toward destroying free commercial television.

Nicholas Pressico

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FCC 72-534
79505
37 FR 12744

In the Matter of)
)
The Handling of Public Issues)
Under the Fairness Doctrine) Docket No. 19260
and the Public Interest Standards)
of the Communications Act.)

Adopted: June 16, 1972
Released: June 22, 1972

[¶10:315(A), ¶10:315(G)(1)] Fairness doctrine; Presidential reports.

The Commission will not apply the equal opportunities policy to Presidential broadcasts not covered under Section 315 of the Act. The public interest would be served by revision of the equal opportunities requirement so as to make it applicable only to major party candidates, with such candidates liberally defined to include any candidate with significant public support. Fairness Doctrine - Political Broadcasts, 24 RR 2d 1917 [1972].

[¶10:315(A), ¶10:315(G)(1)] Fairness doctrine; political broadcasts.

The Zapple doctrine [ ] RR 2d 421], that when a licensee sells time to supporters or spokesmen of a candidate during an election campaign who urge the candidate's election, discuss the campaign issues, or criticize an opponent, then the licensee must afford comparable time to the spokesmen for an opponent, did not establish that there is now a quasi-equal opportunities approach applicable to all candidates and parties, including those of a fringe nature. Fairness Doctrine - Political Broadcasts, 24 RR 2d 1917 [1972].

[¶10:315(G)(1), ¶53:119, ¶53:289, ¶53:654] Fairness doctrine.

Where broadcasters are supplied with tapes or films by candidates, the broadcasters must inform the public that such materials were supplied by the candidate as an inducement to the broadcasting of them. The disclosure requirement does not apply to mere news releases or typed advance copies of speeches. Fairness Doctrine - Political Broadcasts, 24 RR 2d 1917 [1972].

FIRST REPORT
(Handling of Political Broadcast)

By the Commission: (Commissioner Johnson dissenting and issuing a statement; Commissioner H. Rex Lee concurring in the result.)

I. Introduction

1. This first report deals with Part V of our Notice – the fairness doctrine as it relates to political broadcasts. We would ordinarily consider this aspect in the context of the revisions made in the general fairness area, including possible public interest decisions as to access. However, we are operating under time constraints here that we must take into account – namely, the appropriateness of disposing of this aspect well before the commencement of the general election period. See DNC v. FCC, ___ US App DC ___, ___ FCC 2d ___ [23 RR 2d 2165], Case No. 71-1738 (DC Cir Feb. 22, 1972), (slip op. at 7). We therefore have expedited our consideration of this aspect and, if necessary, will re-examine this report in light of our later decisions in Parts II-IV.

2. While this was the last topic in this inquiry, it is not, of course, the one of least importance. Promotion of robust, wide-open debate in this field vitally serves the public interest.

II. Background

3. In applying the fairness doctrine the Commission has traditionally required licensees to afford reasonable opportunity for the presentation of contrasting views following the presentation of one side of a controversial issue of public importance. The licensee has been given wide discretion in selecting the appropriate spokesman, format and time for the presentation of the opposing views on controversial issues, with two significant exceptions. Under §315 of the Communications Act of 1934, as amended, licensees are required to afford equal time to legally qualified candidates; and under the Commission's political editorializing rules (§§73.123(c), 73.300(c), 73.598(c), 73.679(c)) the licensee must afford a reasonable opportunity for a candidate or his spokesman to respond when the licensee has opposed him or supported his opponent in an editorial.

4. Under the ruling in Letter to Mr. Nicholas Zapple, 23 FCC 2d 707 [19 RR 2d 421] (1970) the Commission further limited the licensee's discretion. The Commission held in Zapple that when a licensee sells time to supporters or spokesmen of a candidate during an election campaign who urge the candidate's election, discuss the campaign issues, or criticize an opponent, then the licensee must afford comparable time to the spokesmen for an opponent. 1/ Known

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1/ In In Re Complaint of Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283 [19 RR 2d 1103] (1970), affirmed on reconsideration sub nom. Republican National Committee, 25 FCC 2d 739 [20 RR 2d 305] (1970), the Commission extended the Zapple ruling to a non-campaign period proffer of time to a political party chairman where the licensee did not specify the issue or issues to be discussed. This ruling was reversed in Columbia Broadcasting Co. v. FCC, 454 F2d 1018 [23 RR 2d 2019] (DC Cir 1971).

as the quasi-equal opportunities or political party corollary to the fairness doctrine, the Zapple doctrine is based on the equal opportunity requirement of Section 315 of the Communications Act; accordingly, free time need not be afforded to respond to a paid program.

5. Since some controversy has been generated as to the applicability or wisdom of this doctrine, the Commission asked for public comment on the following questions in its Notice of Public Inquiry in Docket No. 19260 (hereinafter, Fairness Inquiry).

> "Should the quasi-equal opportunities approach be restricted or expanded and what is the feasibility and effect of any proposed revision on the underlying policies of the statute (see Section 315(a))?
>
> "- Should the Commission adopt a position that Zapple applies only to political campaigns and not to other times?
>
> "- Should Zapple be disassociated from the fairness doctrine and incorporated into Section 315?
>
> "- Should Zapple be limited by applying a 7-day deadline for requesting 'quasi-equal opportunities'?
>
> "- Should Zapple continue to apply only to major parties (see Letter to Lawrence M.C. Smith, 25 RR 291 (1963)), or should it be extended to all parties or to some mathematically-defined category of 'parties with substantial public support' (e.g., percentage of popular vote)? How should it apply to 'new' parties?
>
> "- Should Zapple be extended to include spokesmen for ballot issues such as bond issues, amendments of state constitutions, etc.?"

6. One additional suggestion has been that the Zapple doctrine should be extended to include broadcast appearances of the President of the United States so that an automatic right to respond in comparable time, format, etc., would accrue to appropriate spokesman following a Presidential appearance. In Complaint of Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 294-298 [19 RR 2d 1103] (1970), the Commission declined to extend the Zapple quasi-equal opportunities concept generally to Presidential appearances, although it said that the fairness doctrine was applicable to Presidential appearances when dealing with controversial issues of public importance. Upon re-examination in Republican National Committee, 25 FCC 2d 739, 744 [20 RR 2d 305] (1970), the Commission again explained that Presidential broadcasts made in a non-election period do not come within the Zapple corollary but are included under the general fairness doctrine to the extent that controversial issues of importance are discussed. The question was raised once again and ruled on by the Commission in Democratic National Committee, 31 FCC 2d 708 [22 RR 2d 727] (1971, aff'd Democratic National Committee v. FCC, ___ US App DC ___ F2d ___ [23 RR 2d 2165], Case No. 71-1738 (DC Cir Feb. 22, 1972). However, we solicited the comments of the public on the questions raised in these cases in this inquiry.

III. Summary of Comments

7. Extensive comments and reply comments addressing these questions were received in response to the Fairness Inquiry from fourteen parties. In addition, the Commission conducted panel discussions and heard oral argument for a full week in March 1972, during which these issues were exhaustively discussed. (A list of all participants is included in Appendix A). A variety of ideas, proposals, and criticisms were presented, a brief summary of which follows.

8. Storer Broadcasting Company observes that since the fairness doctrine, unlike Section 315, gives no particular person a right to reply to previously broadcast material, the extension of the fairness doctrine to a quasi-equal opportunities doctrine in Zapple is a contradiction of the fairness doctrine. As presently constituted, Zapple and its progeny provide insufficient direction to licensees as to when comparable responses to non-campaign appearances of public officials are required, as to which party spokesman is entitled to reply when different factions within a party wish to respond, and as to the rights of minority parties to comparable time. Storer recommends, therefore, that Zapple should be codified in Commission rules or be incorporated into Section 315 to remove it from the ambit of the fairness doctrine. Storer further suggests that the Commission adopt a political broadcast primer to specify licensee obligations and responsibilities in this area.

9. The National Association of Broadcasters (NAB), General Electric Broadcasting Co., American Broadcasting Co. (ABC), National Broadcasting Co. (NBC), the Evening News Association, Lee Enterprises, Inc., Time Life Broadcasting, Inc. and others support the principles of the Zapple doctrine so long as the Cullman 2/ doctrine continues to be inapplicable, and licensees are not required to subsidize the campaigns of opposing candidates by affording free response time. Zapple is seen by those filing joint comments with the Evening News Association as an appropriate means to fulfill the purposes of Section 315, ensuring the equality of treatment of political candidates by broadcast licensees. Consequently, they would impose obligations on licensees only when a campaign is in progress in which the broadcaster has afforded time and relinquished content control to a spokesman for a candidate to support that candidate or to oppose rival candidates.

10. The NAB, ABC, NBC, and G.E. Broadcasting Co. argue that the Zapple doctrine should also apply to "political" broadcasts where a campaign issue (bond proposal, constitutional amendment, etc,) that is supported or opposed by a political spokesman has been placed on the ballot. It is argued that this situation is analogous to both Section 315 and Zapple, and, as is the case with

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2/ Cullman Broadcasting Co. Inc., 40 FCC 576, 577 [25 RR 895] (1963) held that ". . . where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the license – and thus leave the public uninformed – on the ground that he cannot obtain paid sponsorship for that presentation."

the political spokesman doctrine, Cullman should not apply. NBC emphasizes that the quasi-equal opportunity approach of Zapple or its extension to ballot issues should apply only to paid presentations in campaign periods, since the equal opportunities approach involving free time inhibits the presentation of political programming and interferes with a licensee's editorial judgment.

11. Two commentators, Democratic National Committee (DNC) and American Civil Liberties Union (ACLU) suggest that the Commission extend the fairness doctrine or adopt a specific rule that would require licensees to broadcast the opposing views of appropriate spokesmen following an appearance of a public official. It is claimed that there is an overriding national concern in informing the public on both sides of issues dealt with by public officials, and accordingly, that licensee discretion in presenting opposing views and selecting appropriate spokesman should be more limited than at present.

12. DNC specifically urges the adoption of a rule that: (1) would establish a presumption that a Presidential broadcast appearance involves a controversial issue of public importance; (2) would require licensees to seek out appropriate spokesmen to present an opposing view and to afford them equal opportunities; and (3) would require licensees or networks to keep publicly available for three years a tape or transcript of every Presidential appearance. DNC asserts that such a rule is necessitated by the public interest standard of the Communications Act and by the First Amendment, in view of the public's need to be fully informed on important public issues discussed by the President. The public is not presently receiving balanced information on such issues, DNC believes, because the President's control of the time, format, and content of his appearances maximizes their impact and effectiveness while, on the other hand, the difficulties encountered by DNC in buying time to discuss public issues or in securing free time to respond to Presidential appearances limits the effectiveness of the presentation of their viewpoint. DNC's views are currently presented, it maintains, through news and panel show presentations in which DNC representatives are merely responding to questions and have no opportunity, comparable to the President's, to develop a reasoned and uninterrupted presentation of the issues. DNC thus argues that the First Amendment goal of promoting robust, wide-open debate is being thwarted by its rejection as an entity responsible for defining options for the American people on major public issues and by denying it access, comparable to the President's, to respond to his appearances.

13. ACLU maintains that the responsibility of the licensee under the fairness doctrine should extend to making available comparable opportunities for opposing spokesman to comment on the issues raised in the broadcast appearance of any public official, including the President. Because of the President's unquestioned power to command broadcasting time and to attract an audience, ACLU feels that comparable time can be afforded only if the contrasting viewpoint is presented immediately after each Presidential appearance. The President and other public officials should furnish copies of their statements sufficiently in advance of their broadcast to permit station licensees to fulfill these fairness obligations.

14. The proposals of DNC and ACLU were opposed by a number of parties. ABC and G.E. Broadcasting Co. argue that no justification for the proposed

rule can be found in Section 315 of the Act, since under that Section, the requirement of an equal time opportunity to respond to a candidate's appearance must himself be a legally qualified opposing candidate and not just a representative of a political party or some other appropriate group. To extend a quasi-equal opportunities doctrine to non-election period Presidential appearances would require Congressional amendment of Section 315 because such extension would violate the intent of Section 315, and specifically, would negate the newscast, news documentary, and news interview exemptions to the equal time provisions contained in Section 315(a). Implementation of these proposals would also be a distortion of the fairness doctrine, it is argued, since the fairness doctrine focuses on issues, not individuals or candidates.

15. Those parties filing with the Evening News Association argue that the broadcast appearance of a public office holder should be treated as the appearance of a public official fulfilling the duties of his office, not as the appearance of a partisan spokesman presenting one side of a controversial issue absent some extrinsic evidence to the contrary. Otherwise, the public's right to be informed on important matters by its elected officials would be subordinated to the rights of a particular class (political candidates) to broadcast.

16. NBC believes that both DNC and ACLU have failed to show the necessity of their proposed policies or the present inadequacy of the fairness doctrine as a tool for informing the public on important public issues. Creation of an equal or quasi-equal time right to reply to all public official addresses would, as a practical matter, inhibit the appearance of public officials, NBC maintains. It would also ignore the difference in media use by different officials, as well as the fact that it is possible to distinguish the leadership appearances of an official from his political opinions. NBC also has argued that under present rules Presidential appearances during a campaign for his re-election are subject to the Section 315 equal time requirements, that Presidential appearances in a non-election period are subject to the fairness doctrine and the political party corollary, and that these doctrines are adequate to ensure that the electorate is informed.

17. WGN Broadcasting Co. (WGN) is also opposed to the DNC/ACLU proposals on the grounds that the standard proposed by DNC, that Presidential broadcasts that enhanced the political or personal image of the Presidential would be subject to the rule and require the presentation of opposition programming, is too vague to be realistically applied by licensees; and that the FCC would be inexorably involved in politically sensitive adjudications which should be avoided.

18. Three parties argue that the Zapple doctrine should be repealed altogether. WGN maintains that Zapple exceeds the intent of Section 315, which grants equal opportunities only to opposing candidates and not to their supporters. That question, WGN maintains, was settled in Felix v. Westinghouse, 186 F2d 1 [6 RR 2086] (3d Cir 1950), where it was held that the supporters of a candidate were specifically excluded from Section 315.

19. The law firm of Haley Bader & Potts argues that the Zapple doctrine overlooks the fact that the informational needs of the public are of primary importance, and mistakenly confers rights on individual parties. The standards of Zapple are too vague for day-to-day application by the licensee, it maintains,

and the resultant confusion will tend to inhibit licensee coverage of political matters. Moreover, it argues that Zapple unduly restricts licensee discretion in selecting spokesmen and regulating content.

20. The holding of Zapple would be acceptable to Public Broadcasting Service (PBS) as a fairness question if the Commission had limited itself to a discussion of the reasonableness of the balance of opposing views afforded by the licensee. PBS is opposed, however, to the extension of traditional fairness concepts of "reasonable balance" to a "comparable time" or "quasi-equal opportunity" doctrine because this restricts licensee discretion and creates artificial barriers to the discussion of controversial issues of public importance. Furthermore, PBS argues that Zapple cannot be limited to the two major parties nor to campaign periods only, but instead will engender a spiraling round robin of partisan responses. Several other parties also voiced this particular fear.

21. At the fairness panels, counsel for PBS further developed the foregoing argument by stating that the pricing mechanism and the economic realities of buying time on the commercial networks tend to discourage the broadcast appearances of minority candidates, but that no such economic barrier to access by minority parties exists in the Public Broadcasting Service. Counsel for PBS also argued that in extending quasi-equal opportunities to supporters of a candidate in Zapple, the Commission was doing what the Congress had decided not to do when it adopted Section 315 of the Communications Act.

22. Several parties submitted comments on the procedural methods or standards by which the Commission should enforce fairness concepts in the political broadcast area. As previously mentioned, Storer Broadcasting Co. urges the Commission to adopt political broadcasting rules or to develop a political broadcasting primer that would specifically define those situations in which licensees would be required to afford comparable time and which would specify guidelines for the selection of the appropriate opposing spokesmen in order to minimize the confusion that has resulted from the recent series of ad hoc adjudications (Zapple, RNC, etc.) modifying the traditional fairness doctrine.

23. Those filing with the Evening News Association argue that the FCC frequently oversteps its authority in judging the "reasonableness" of licensee action in the political broadcasting area. The Commission should therefore adopt a "grossly unreasonable" test of licensee conduct, and impose penalties only when licensee conduct meets an "actual malice" test.

24. Two other general points raised by commentators were as follows:

A. The G.E. Broadcasting Company believes that the Commission's recent ruling in In re Rosenbush Advertising Agency, 31 FCC 2d 782 [22 RR 2d 889] (1971), 3/ should be upheld since it

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3/ The Commission held in Rosenbush that a licensee's policy of accepting only paid political advertising of five minutes or longer during a primary campaign was consistent with Commission precedent where the licensee

[Footnote continued on following page]

ffords discretion in making determination as to how a given licensee's facilities should be made effectively available to candidates or supporters of candidates. Section 315 itself permits a licensee to have discretion in scheduling and the Commission, it is contended, should not restrict this discretion any further in "quasi-315" situations.

B. During the panel discussions, former FCC Chairman Newton Minow discussed the recent study and recommendations of the bipartisan Twentieth Century Fund 4/ on this subject. He recommended that the Commission support legislation that would enable the major party candidates in a Presidential campaign to obtain six one-half hour periods called "Voters' Time" in prime time for the simultaneous broadcast on all TV and radio stations of political presentations. Use of this time would be entirely within the candidates' discretion, and, since the beneficiary of these programs would be the American public who would thus receive information pertinent to the election of the President, public funds should be used to buy the time.

IV. Discussion

A. The fairness doctrine with respect to appearances of the President or other public officials

The Commission can appreciate why so much attention is focused on the question of the application of the fairness doctrine to Presidential appearances. As the court noted in Democratic National Committee v. FCC, [23 RR 2d 2135] CA DC, No. 71-1637, decided February 2, 1972, petition for writ of certiorari filed April 28, 1972, No. 71-1405, O.T. 1971, ". . . the President's status differs from that of other Americans and is of a superior nature," and calls for him to make use of broadcasting to report to the nation on important matters:

> "While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position, the President is a focal point of national life. The people of this country

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3/ [Footnote continued from preceding page]

recognized its public interest obligation to make its facilities effectively available to candidates. The licensee had stated its intention to make free time available to candidates for major offices in the primary; planned a one-hour special program presenting the candidates for mayor; and had announced the candidacies for the top three city offices in its regular news programs.

4/ Twentieth Century Fund, Voters' Time (1969).

look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and . . . this obligation exists for the good of the nation. . . ." (Sl. Op. pp. 26-27)

Because of this use of broadcasting by the nation's most powerful and most important public office, the argument has been made by DNC and by ACLU that there must be special provision for a response by the opposition party - some specific corollary to the general fairness doctrine that ensures equal or comparable use of the broadcast media by an opposition party spokesman.

26. We make two preliminary observations. First, the issue is not whether the American people shall be reasonably informed concerning the contrasting viewpoints on controversial issues of public importance covered by Presidential reports. The fairness doctrine is in any event applicable to such reports - as indeed it is to a report by any public official that deals with a controversial issue of public importance. See Section 315(a). Rather, the issue is whether something more - something akin to equal time - is to be required. The word "required" brings us to our second point. Because our goal is robust, wide-open debate, the Commission of course welcomes any and all programming efforts by licensees to present contrasting viewpoints on controversial issues covered by Presidential addresses. As we stated in our commendation of the CBS series, "The Loyal Opposition", Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 300 [19 RR 2d 1103] (1970); Republican National Committee, 25 FCC 2d 739, 745-46 [20 RR 2d 305] (1970), the more debate on such issues, the better informed the electorate. But the issue is not what programming judgment the licensee makes in this area but, rather, whether there should be an FCC requirement. With this as background, we turn to the proposal that equal time be afforded to an opposition spokesman to respond to a Presidential report. 5/

27. First, there is a substantial issue whether any such Commission prescription might not run counter to the Congressional scheme. In Section 315(a), Congress has specified that equal opportunities shall be applicable to appearances of legally qualified candidates and that in other instances "fairness" be applicable - that is, that there be afforded ". . . reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance." While fairness may entail different things in particular circumstances (see par. 30, infra), there is a substantial question whether it is not a matter for Congress to take the discussion of public issues by the President out of the fairness area and place it within the equal opportunities requirement - just as, for example, it was up to Congress in 1960 to take appearances by candidates for President out of equal opportunities and place them under fairness. There is a further

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5/ We are not dealing here with Presidential appearances during election campaigns where equal opportunities or Zapple (see B, infra) would ordinarily be applicable.

tr[illegible]esome issue here – whether we could create a special fairness rule for Pr[illegible]ential reports but then hold that a report by Governor Reagan in California or Mayor Lindsay in New York, for example, would come only under the "reasonable opportunities" standard of Section 315(a), in the face of arguments that such reports dealt with state or local issues of the greatest importance. Again we do not say that distinctions cannot be made here (compare Section 103(a)(2)(A) of the Federal Election Campaign Act of 1971, 86 Stat 3 applicable only to Federal offices) but rather raise the issue whether such distinctions are not more appropriately the province of the Congress.

28. But in any event, it would not be sound policy to adopt the DNC or ACLU proposals. From the time of the Editorializing Report, 13 FCC 1246 [25 RR 1901] (1949), to the present, we have been urged to adopt ever more precise rules – always in the cause of insuring robust debate (e.g., the argument, advanced in 1949 and now repeated by the ACLU, that fairness requires the contrasting viewpoint to follow immediately the presentation of the first viewpoint – see par. 8, Report on Editorializing by Broadcast Licensees, supra, at pp. 1250-51). However well intentioned these arguments are, we believe that increasingly detailed Commission regulation militates against robust, wide-open debate. The genius of the fairness doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate. Editorializing Report, par. 10, supra, at pp. 1251-52. Thus, the arguments for flexibility, rather than rigid mechanical rules, discussed in Committee for Fair Broadcasting of Controv[illegible]ial Issues, 25 FCC 2d 283, 292 [19 RR 2d 1103] (1970), remain persuasive. A[illegible]ing those principles, we do not believe it appropriate to adopt equal time po[illegible]cies that might well inhibit reports to the electorate by elected officials. Rather, the general fairness approach of facilitating such reports and at the same time insuring that the public is reasonably informed concerning the contrasting viewpoints best serves the public interest. 6/ See DNC v. FCC, supra, Sl. Op. p. 27, (". . . The President is obliged to keep the American people informed and as this obligation exists for the good of the nation, this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party. . . "); Committee for Fair Broadcasting, supra, at pp. 296-98. The latter case demonstrates that fairness can and does operate to protect the public interest in this important area.

29. In this connection, we note that the Commission believes that the public interest would be served by revision of the equal opportunities requirement so as to make it applicable only to major party candidates, with such candidates liberally defined to include any candidate with significant public support (see infra, par. 35); it has also supported, as a less desirable alternative, suspension or repeal of that requirement as to the offices of President and

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6/ For obvious reasons already developed, we strongly decline to make evaluations whether a report by an official is "partisan" or "political" and thus requires rebuttal by a spokesman for the other party, or the contending faction, or whatever. This would drag us into a wholly inadministratable quagmire. See, e.g., In re Complaint of Democratic National Committee, 31 FCC 2d 708, 712-713 [22 RR 2d 727] (1971).

Vice President. 7/ It would surely be anomalous for us to seek relaxation of the equal opportunities requirement as to candidates for the office of President, and at the same time to apply a new policy akin to the equal opportunities to Presidential broadcasts not coming within the present statutory equal opportunities requirement. We decline to do so.

B. The Zapple ruling.

30. Our 1970 ruling, Letter to Nicholas Zapple, 23 FCC 2d 707 [19 RR 2d 421] (1970), concerned campaign presentations that did not involve the appearance of the candidate. We pointed out that in some such presentations, the requirements of the fairness doctrine become in effect quasi-equal opportunities. There has been considerable comment on this ruling, but in large part the interest in it may stem from a misunderstanding of the ruling (e.g., that the ruling extends quasi-equal opportunities to all candidates or parties, even of a fringe nature). We can appreciate how such a misunderstanding could arise. The terms we used, fairness and quasi-equal opportunities, are terms of art and have accumulated their own baggage. Thus, quasi-equal opportunities conjures up a notion of all parties - even those of a fringe nature - being treated equally. And fairness carries with it concepts such as Cullman (free time if the public has not been informed of the contrasting viewpoint). See, also, In re Complaint of George F. Cooley, 15 FCC 2d 828, 829 (1967). But, Zapple was neither traditional fairness nor traditional equal opportunities. It was a particularization of what the public interest calls for in certain political broadcast situations in light of the Congressional policies set forth in Section 315(a). 8/ With this as background, we turn to the ruling.

31. What we were stating in Zapple was simply a common sense application of the statutory scheme. If the candidate himself appears to some significant extent (cf. Gray Communications, Inc., 14 FCC 2d 766, [14 RR 2d 353], 19 FCC 2d 532 [17 RR 2d 305] (1968)), then the Congressional policy is clear; equal opportunities, which means no applicability of Cullman but rather mathematical precision of opportunity. Suppose neither the picture or voice of the candidate is used - even briefly - but rather a political message devised by him and his supporters is broadcast. In those circumstances, a common sense view of the policy embodied in Section 315 would still call for the inapplicability of Cullman 9/ and for some measure of treatment that,

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7/ See Hearings Before the Senate Communications Subcommittee, 91st Cong., 1st Sess., on S. 2876, p. 50.

8/ Similarly, the personal attack and political editorializing rules are a particularization of what fairness requires in those situations. See, e.g., Report on Personal Attack and Political Editorializing Rules, 32 Fed Reg 10303 [10 RR 2d 1901] (1967); Editorializing Report, supra, at p. 1252.

9/ In this respect, Zapple did not break new ground. In our Report and Order on the personal attack rules (32 Fed Reg 10303, 10305), we noted the applicability of the Congressional standard in Section 315 to attacks involving candidates, their supporters, or authorized spokesmen, and accordingly made our rules - which result, as a practical matter, in free time - inapplicable to such attacks. See §§73.123(b), 73.300(b), 73.598(b), 73.679(b).

not mathematically rigid, at least took on the appearance of rough comparability. If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half-hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity? 10/ Clearly, these examples deal with exaggerated, hypothetical situations that would never arise. No licensee would try to act in such an arbitrary fashion. Thus, the Zapple ruling simply reflects the common sense of what the public interest, taking into account underlying Congressional policies in the political broadcast area, requires in campaign situations such as the above (and in view of its nature, the application of Zapple, for all practical purposes, is confined to campaign periods). Significantly, because it does take into account the policies of Section 315, the public interest here requires both more (comparable time) and less (no applicability of Cullman) than traditional fairness. 11/ Based on practical experience, we stress that in any event – taking into account the sum total of political broadcasts and news-type programs – the American people are reasonably informed on campaign issues, and thus that the basic public interest requirement is being met in this vital area. Green v. FCC, 447 F2d 323 [22 RR 2d 2022] (CA DC).

32. It follows that Zapple did not establish that in the political broadcast field there is now a quasi-equal opportunities approach applicable to all candidates and parties, including those of a fringe nature. This would clearly undermine any future suspension or repeal of the "equal opportunities" requirement, because it would mean that despite such suspension or repeal, the fairness doctrine would require that fringe party candidates be given comparable treatment with major party candidates. Further, it would negate the 1959 Amendments to the Communications Act. The purpose of these amendments was to permit presentation of candidates on, for example, a bona fide newscast, news interview, or news documentary, without the station having to present the fringe candidates. 12/ We need not belabor the point further.

10/ This example is stated as if the RNC program were the only matter to be considered. Of course in a particular factual situation this may well not be so. See CBS v. FCC, supra, n. 1, where the DNC program was presented by CBS to offset Presidential speech appearances, and the court held that this was perfectly appropriate and reversed a Commission holding that to avoid coming within Zapple, CBS should have specified the issues to which the DNC was to address itself. This case is of course the law governing similar future factual situations. Thus, each case must be judged in its factual setting, with the licensee having considerable discretion to discharge fairness obligations.

11/ And for the foregoing reasons, we do not believe that we have acted contrary to the legislative history. We have, on the contrary, acted to carry out the Congressional scheme in Section 315.

12/ In view of the 1959 Amendments, it follows that no quasi-equal opportunities doctrine is applicable when supporters or spokesmen for candidates are presented in bona fide newscasts; in this respect, the same general fairness principles that apply to the candidates are equally applicable to their supporters.

The Zapple ruling did not overrule the holding in Letter to Lawrence M.C. Smith, 25 Pike & Fischer, RR 291 (1963). 13/

33. The foregoing discussion - and the general approach that we have adopted in the fairness area - also dispose of the questions raised as to the desirability of extending Zapple, codifying it, or otherwise supplementing it with procedural and other trappings (e.g., a seven-day procedural requirement). Because Zapple reflects simply a common sense distillation of the public interest in certain political broadcast situations, there is no need to try to codify it or engraft new corollaries onto it. On the contrary, we have concluded that, generally, traditional fairness works better by setting out broad principles and permitting the licensee to exercise good faith reasonable discretion in applying those broad principles. We think that this is true here. Further, we doubt if we will be confronted with a host of ad hoc rulings in this field. Most problems should be disposed of at the licensee level by the application of rudimentary concepts of fairness and common sense. Significantly, Zapple itself was a ruling on hypothetical questions; there have been very few times when the issue has arisen on concrete cases. As to its extension beyond political broadcasts, the short answer is that it is based in substantial part on Congressional policies applicable to such broadcasts. 14/

C. Commission efforts to encourage the widest possible coverage of political campaigns.

34. We have considered most seriously what steps we can take in this respect. There would appear to be little we can do on an administrative agency basis. Let us take the most obvious suggestion: That the Commission by rule specify that a certain amount of time be set aside for presentation of political broadcasts on a sustaining basis. See Section 303(b). There are a number of difficult policy issues that would have to be resolved in any such undertaking. But there is, we believe, again an overriding consideration here - namely, that this is truly a matter for Congressional resolution. Congress is aware of the high expense of running for political office, particularly in view of mounting broadcast costs. It has considered a number of worthwhile suggestions here - for example the subsidy plan in the Presidential Campaign Fund Act of 1966 (the now inoperative Long Act) to supply federal funds to the national party candidates for the Presidency; the Voters Time proposal (see Hearings Before the Senate Communications Subcommittee, on S. 2876, 91st Cong., 1st Sess., pp. 24-34). Its response to this problem has been the Federal Election Campaign Act of 1971 (Public Law 92-225), with its limitations on spending, and requirement for reasonable access for those running for federal office and reduced rates for all political candidates. We do not see how we can sweep aside this scheme, and substitute our own. Indeed,

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13/ We there held that as to fund raising announcements for political parties, fairness does not require equal or comparable treatment for the fringe parties but rather that the licensee can make reasonable good faith judgments as to the significance of a particular party in the area.

14/ Thus, we do not extend Zapple to the situation involving ballot issues.

would not in any event be truly effective in any such agency action. Take the most important office – the Presidency. Were we to require free time for that office, we would run afoul of the equal time provision; we would find that we had required the broadcaster to devote hours of prime time not just to the significant candidates but also to as many as 15 fringe party candidates (e.g., Socialist Labor, Socialist Worker, Vegetarian). 15/ Our point is obvious: Reform here is needed, we believe, but it must come from the Congress because that is the only way it can be effectively accomplished.

35. Congress then can do much. We believe that consideration should again be given to the Voters Time concept or to some scheme akin to that used in Great Britain (i.e., blocs of free time to the major political parties). At the least, we propose again to urge Congress to adopt our proposed amendment to Section 315, limiting to major party candidates the applicability of the equal time provision in partisan general election campaigns. We described that legislation in the following terms (see Hearings Before the Communications Subcommittee on S. 2876, 91st Cong., 1st Sess., p. 48):

> "In any general election, other than non-partisan ones, the draft legislation would make the equal opportunities requirement, as to free time, applicable only to major party candidates, leaving fringe candidates coming under the general fairness requirement. It would define major candidates very liberally so as to include any significant candidates – such as Henry Wallace as the candidate of the Progressive Party 1948, Strom Thurmond of the Dixiecrats 1948, or George Wallace in the last election. The figures in the draft legislation are set forth only as possible guidelines – namely, that the candidate's party garnered 2% of the vote in the state in the last election or, if the candidate represents a new party, that petitions be submitted signed by a number of voters equalling 1% of the votes cast in the last election. To obtain time on the national networks as distinguished from individual stations in particular states, there would also be a requirement that the candidate be on the ballot in at least two-thirds of the states.

15/ To give but one example, in 1960 when Congress acted to suspend the equal opportunities requirement for the President and Vice President races, there were on the ballots in the several States 14 different candidates for the office of President: C. Benton Coiner, Conservative Party of Virginia; Merrit Curtis, Constitution Party; Lar Daly, Tax Cut Party; Dr. R. L. Decker, Prohibition Party; Farrell Dobbs, Socialist Workers Party, Farmer Labor Party of Iowa, Socialist Workers and Farmers Party, Utah; Orval E. Faubus, National States Rights Party; Symon Gould, American Vegetarian Party, Minnesota; Clennon King, Afro-American Unity Party; Henry Krajemski, American Third Party; J. Bracken Lee, Conservative Party of New Jersey; Whitley Slocomb, Greenback Party; William Lloyd Smith, American Beat Consensus; Charles Sullivan, Constitution Party of Texas. See H. Rept. No. 1928, 90th Cong., 2d Sess., p. 3. Query how effective any agency action in 1960 would have been.

"In short, Section 315 in its present operational form is claimed and would appear to inhibit broadcasters from affording free time - and does so, we urge, without any significant practical compensating benefits. The Socialist Labor or Vegetarian candidate does not get free time; rather, no one gets any free time for the political broadcast. Further, and most important, there would appear to be little, if any public benefits from insuring such equal treatment for candidates whose public support is wholly insignificant. We repeat that in defining the major party candidate, we would urge the selection of a numerical figure such as to insure equality to any candidate who did have some significant public support, regardless of what his chances of actually winning might be."

This, by itself, will make a marked contribution to facilitating broadcast presentation of important political candidates. 16/

36. As an alternative, we propose an additional exemption to Section 315(a) to cover any joint or back-to-back appearances of candidates. Additionally, consideration should be given, we think, to the further exemption that we urged upon Congress in connection with our 1970 Advocates ruling, 23 FCC 2d 462 [19 RR 2d 179]. We suggested the addition of the following provision to Section 315(a): 17/

"(5) any other program of a news or journalistic character -

(i) which is regularly scheduled; and

(ii) in which the content, format, and participants are determined by the licensee or network; and

(iii) which explores conflicting views on a current issue of public importance; and

(iv) which is not designed to serve the political advantage of any legally qualified candidate."

16/ Thus, in the above noted hearings, we stated (supra, at p. 50):

". . . when freed from the constraints of equal opportunities requirement, there has been no failure on the part of the broadcasters with respect to affording time for the Presidential candidates, and see that that time has been in substantial amounts, and free, not just reduced. Thus, in the one instance where the equal time requirement was suspended (1960), the TV networks afforded 39 hours and 22 minutes of free time, including the four hours for the Great Debates. Further, the audience for these debates totalled 280 million, or an average of 70 million viewers per broadcast. We believe that the networks thus effectively discharged their responsibility to inform the electorate in 1960. They have stated that they stand ready to do so in every Presidential election, if freed from the equal time requirement."

17/ See Hearings Before the Subcommittee on Communications and Power of the House Interstate and Foreign Commerce Committee, on H.R. 8721 and S.3637, 91st Cong., 2d Sess., p. 8.

3[illegible]t the least, we had thought that we could make a contribution here by giving the 1959 exemptions a reasonable construction in line with the broad remedial purpose of Congress. Accordingly, we did so in the recent Chisholm ruling, FCC 72-486 [24 RR 2d 447], decided June 2, 1972. The validity of this construction of Section 315(a) is, however, now in doubt in view of the action of the Court of Appeals in its interim relief Order of June 3, 1972. Until the matter is definitively settled, licensees cannot plan with any certainty, and the area remains confused. This is, we believe, unfortunate. We continue to believe that our construction of the exemption in Section 315(a)(2) is sound, meets the pertinent Congressional criteria, and markedly serves the public interest by allowing broadcasting to make a fuller and more effective contribution to an informed electorate. But unless and until that construction prevails upon appeal – or is in any event affirmed by Congressional revisions along the above stated lines – we cannot in good conscience urge licensees to act in this area as if there were no "equal opportunities" pitfalls. There clearly are.

D. Use in bona fide newscasts of film supplied by candidates.

38. One other political broadcast matter which has been brought to our attention merits comment here. Candidates, like many other news sources, have, normally issued press releases to the news media containing statements of the candidates, advance copies of their speeches, their future speaking schedules, etc. Media news editors in turn made judgments whether and to what extent to [illegible]such material. Increasingly, candidates have been supplying radio and [illegible]vision broadcasters with audio recordings and film excerpts produced by the candidates, e.g., depicting their campaign efforts that day or containing statements of their positions on current issues. Obviously, these excerpts are designed to show the candidate in the best light and, if presented on a newscast, have the added advantage of increased impact or credibility over a paid political presentation. We do not hold that the station cannot exercise its good faith news judgment as to whether and to what extent it wishes to present these tape or film excerpts. If it believes that they are newsworthy, it can appropriately use them in newscasts. But the public should be informed that the tape or film was supplied by the candidate as an inducement to the broadcasting of it.

39. In fact, our rules require such disclosure in these circumstances; that is, "in the case of any political program or any program involving the discussion of public controversial issues for which any films, records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcast of such program . . ." 18/ Disclosure of the furnishing of the tape or film is required to be made whether or not a candidate is involved in these types of programs. Accordingly, we take this opportunity to stress to all licensees their duty to comply with the rules and announce that the tape or film was

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18/ Sections 73.119(d), 73.289(d) and 73.654(d), relating, respectively, to AM, FM and TV. See also Section 317(a)(2) of the Communications Act which specifically authorizes the Commission to require announcements disclosing that such matter was furnished.

supplied by the candidate in question. 19/ If it was edited by the licensee, he may, of course, add a suitable phrase such as "and edited by the XXXX news department."

IV. Conclusion

40. Much remains to be done in the fairness area (Parts II-IV). 20/ We have acted here as best we could for the reasons stated in par. 1. The piecemeal approach is thus regrettable but necessary. As stated, we shall reconsider this most important aspect in light of the conclusions reached in overall proceedings. Our final message is one urging broadcasting to make the maximum possible contribution to the nation's political process. That process is the bedrock of the Republic, and broadcasting is clearly the acknowledged leading medium for communicating political ideas. No area is thus of greater importance ". . . to the public interest in the larger and more effective use of radio." (Section 303(g) of the Communications Act of 1934, as amended).

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

I. Preliminary Dissenting Opinion

We are in the midst of a highly televised Presidential election year. The FCC has just concluded what it calls a "broad ranging inquiry into the efficacy of the fairness doctrine." It has rushed into print with that portion of its findings having to do with the political use of radio and television by the President. And what does it offer? A punt on first down.

Broadcasters are urged voluntarily "to make the maximum possible contribution" to the nation's political process - without being told what that might be, or being required to do anything.

19/ In order to avoid possible confusion in interpreting this rule in relation to one interpretative example in House Rept. 1800 (86th Cong., 2d Sess.) dealing with Section 317 of the Act and rules thereunder, we should add that we are not attempting to apply the above disclosure requirement to mere mimeographed news releases or typed advance copies of speeches. Example 11 of the House Report (see FCC Public Notice of May 6, 1963, FCC 63-409) states that no announcement is required when "news releases are furnished to a station by government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program." We believe, however, that with respect to program material dealing with political or other controversial matters, the requirements of our rules must be followed strictly when audio tape or film is furnished.

20/ GE supports the Rosenbush ruling (see par. 24(A)). We have considered this issue generally in our recent Notice (Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 37 Fed Reg 5796, 5805 [23 RR 2d 1901]; Sec. 8, Q. 8), and will reexamine the matter as we gain experience. We thus may clarify our policies here either in a particular case or in our further reports in this Docket.

Congress is asked to lead the reform – but is given no new suggestions by the agency ostensibly set up by it to regulate the area.

The FCC is taking the rest of the year off.

The fairness doctrine requires that broadcasters (1) cover controversial issues of public importance, and (2) that they do so fairly, presenting during the course of their total programming a full discussion of the points of view involved.

The political equal opportunity ("equal time") doctrine requires that a broadcaster who affords some time to a candidate for public office must give an equal opportunity to all other candidates for that office.

The use of television by a President who will probably stand for reelection, but is not yet a declared candidate, falls somewhere in between – and is therefore covered by no doctrine.

All would agree that there will be occasions when the national interest requires that the President be permitted access to the American people by means of national television.

All would also agree, nopefully, that every President is a political animal, the leader of one of two major political parties, and a most persuasive propagandist for whatever point of view he wishes to espouse for whatever reason.

Nothing the President says is, by definition, newsworthy, a "controversial issue of public importance." The permanent White House press corps covers his every public word. The President has available to him the ultimate in research capabilities, writers, and production advisors in public relations and television performance. He has a large staff including the Director of Communications and White House Press Office to serve newsmen and media owners in ways designed to encourage them to help him make the most favorable possible impression upon the American people. Techniques of advertising, propaganda and public relations are known, effective, and used – by corporations and elected officials alike. The President is no exception.

In short, the President – as politician, party leader, and head of the executive branch – has an overpowering advantage going into the "marketplace of ideas." He has an advantage over his potential challengers to the Presidency. He has an advantage over the party out of power. And he has an advantage over the other branches of government: the Congress, the judiciary, and the administrative agencies.

The question before us is whether, in light of these disproportionate advantages, the fairness doctrine should take account of some opportunity for the American people to hear views other than those of a President seeking reelection. Since most of what the President says and does is, by definition, within the fairness doctrine (controversial issues of public importance), it also follows that there are generally opposing points of view.

Sometimes the Predident is engaged in an effort to reelect himself or other members of his own party. The oposing party would generally have a different approach to the issues he raises.

On other occasions the President is engaged in a struggle with Congress (or some other branch of government) in an effort to enact (or defeat) a piece of legislation, to take credit (or assign blame) for a national development, or to seize the public's attention away from Congressional criticism of the Administration.

It is fair to say that almost any President, almost all the time, is thinking of a great many things besides "informing the American people" when he takes to television. (This may include such things as relationships with foreign governments as well as domestic politics and Congressional relations.)

Given these realities, what should the fairness doctrine require when the President speaks? An automatic right of reply? By whom? When? If the President goes on all three networks, in prime time, for free, can something less than that constitute an adequate right of reply - by someone who is decidedly disadvantaged anyway going into a verbal contest with the President of the United States?

Those are the questions this Commission set out to address. They are the kind of questions the Congress set up the Commission to deal with. They are the very questions we dodge - and therefore resolve in favor of the incumbent President.

I dissent, and will have a fuller opinion to follow.

II. Introduction

The Federal Communications Commission, after long inquiry, study and deep contemplation, has brought forth its long awaited clarifying statement on political broadcasting. For those who expected the Commission to take a great step forward, its policy statement can only be seen as an embarrassing stumble.

In essence the Commission says that the rules governing political broadcasts are not at all what they should be, but that any reform must come through voluntary action or from Congress.

Nearly a year ago, on June 9, 1971, the Commission issued its Notice of Inquiry regarding the fairness doctrine. At that time the Commission stated its intention to institute "a broad-ranging inquiry into the efficacy of the fairness dotrine." 30 FCC 2d 26 (1971). The result is - most generously put - a very narrow response to that inquiry. In fact, the policy found in the Commission's statement does not involve fairness at all. It rather involves the characteristic failure of the Commission to resolve in one proceeding the broad policy questions before it. The majority's action is thus but one more example of the Commission's general tendency to react (in this case to the forthcoming elections) rather than plan.

The reasons given for this separate action with regard to political broadcasting are hardly compelling in light of the lack of action taken by the Commission. The Commission cites DNC v. FCC, ___ F2d ___, 23 P & F Radio Reg. 2d 2165 (DC Cir 1972) and the coming election as requiring this separate treatment of political broadcasting. My understanding of the opinion in

seems to be somewhat different from the Commission's. In DNC the t stated, "by the end of May or early June – we are assured that the Commission will have handed down new standards to apply to these difficult questions." ___ F2d ____, 23 P & F Radio Reg. 2d 2165, 2170 (DC Cir 1972). Search as one may, the Commission offers none of the promised new standards. Both the court and those who will be involved in the upcoming campaign have a right to a clarified Commission policy. Without such a clarification there is simply no reason for separate action on political broadcasting. The failure to take any action is a decision to let present policy stand. However, allowing present policy to stand is simply a "cop-out," a failure to make good on our assurances to the Court, and a blatently partisan gift to an incumbent President seeking reelection.

III. Jurisdiction and Abdication

The power to regulate political broadcasts may be found in at least two separate parts of the Communications Act. Section 303(g) gives the Commission the authority to "encourage the larger and more effective use of radio in the public interest." Section 315 of the Act (the "equal time" requirements), so heavily relied upon by the majority as a limitation upon changes and clarifications of the fairness doctrine, expressly provides that it does not relieve licensees "from the obligation imposed upon them under this Act to operate in the public interest and to affort reasonable opportunity for the discussion of conflicting views on issues of public importance." In upholding the validity of the Commission's personal attack rule the Supreme Court, quoting this portion of Section 315 stated, "This language makes it very plain that Congress, in 1959, announced that the phrase 'public interest' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial issues. In other words the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard." Red Lion Broadcasting v. FCC, 395 US 367, 380 [16 RR 2d 2029] (1969).

From the foregoing it should be plain that nothing in the Communications Act prohibits the FCC from additional regulation in the area of political broadcast fairness. Red Lion upheld the Commission's authority to make political broadcast rules complimentary to Section 315. Section 315 not only does not inhibit the Commission from making fairness rules, it affirmatively requires that public issues be discussed. It is the duty of this Commission to make rules that encourage effective discussion on broadcast facilities. See Section 303(g)

By today's action the Commission seeks to have Congress do the very job Congress established the Commission to execute.

But abdication of functions is the history of the FCC. Our broad authority over communications began with the power to regulate maritime radio communications. The Coast Guard has today assumed most responsibility in that area. The FCC licenses air-to-ground communications; but the FAA has taken the leadership there – including a budget for communications research that exceeds the FCC's entire operating budget. The FCC might have taken the lead in communications satellites policy and research. The Commission abdicated that responsibility to NASA and Comsat. Responsibility for leadership in educational broadcasting, once the frequencies were established, has

the communications media. For the words of the President, speaking as he does both in his constitutional roles of chief executive and commander-in-chief and in his extra-constitutional role as head of his party, carry an authority, a prestige and a visibility that have a counterpart in no other institution.

"Moreover, there is an inherent newsworthiness in anything the President says. In addition to his huge direct audiences, in most cases over all nationwide commercial television and radio networks simultaneously, all of what he says is later reported somewhere and something of what he says is reported almost everywhere. In the case of the incumbent administration, these built-in advantages of the presidency in forging public opinion have been used to an unprecedented degree. In his first 18 months in office, President Nixon appeared on network prime time (7:00 to 11:00 p.m.) television as often as Presidents Eisenhower, Kennedy and Johnson combined in a comparable period during their administrations.

"In their first 18 months in office, President Eisenhower appeared on prime time network television on 3 occasions, President Kennedy 4 times, President Johnson made 7 such appearances, and President Nixon 14. These figures exclude appearances on regularly scheduled news broadcasts, reports on foreign trips, charity appeals, convention and campaign appearances in the case of President Johnson, and, in that of President Nixon, his Apollo appearances. Remarks by Frank Stanton, President, Columbia Broadcasting System, Park City, Utah, July 10, 1970."

Columbia Broadcasting System v. FCC, 454 F 2d 1018, 1020 [23 RR 2d 2019] (DC Cir, 1971) (text and n. 1).

Opposition spokesmen get nowhere near comparable time. They must rest content to present their views in snatches in newscasts, or as answers on news interview programs.

This brings me to the heart of the unfairness. The President can command all three networks simultaneously for a prime time speech. By so doing he is able to reach audiences of over 55% of the over sixty million television homes. (Significantly, when the President appeared in prime time on only one of the major networks he drew only 14% of the same audience.) Thus, by his ability to use all three networks the President not only increases dramatically his own audience, for any message he wishes to disseminate, but he also captures a viewing audience far larger than any of his opponents could ever hope for. Unless this factor is taken into consideration, fairness with regard to the President's use of broadcasting is a joke.

V. Voluntary Broadcaster Action

The majority urges voluntary action by the broadcaster to solve this problem. If it could point to any evidence that this might be successful, I might concur. But the track record negates any hope on that account. Only one of the networks, CBS, became concerned enough about the numerous Presidential reports to do something. It at least once scheduled the series, "The Loyal

Opposition" - although it has now apparently dropped the program. 1/ I do not want to single out CBS for special criticism. It at least tried. But two points emerge. First, one cannot place reliance on the voluntary efforts of the industry; second, the problem lies in the President's command of all three networks simultaneously. Apparently only governmental action will be able to remedy the resulting unfairness.

VI. Congressional Action

Well, says the majority, that's a matter for the Congress. I would agree that it is most desirable (although not entirely necessary) for Congress to act in this area. We must recognize, however - as I am confident the majority knows full well - that it is difficult for it to do so. Congressional regulation of election ground rules necessarily gets bogged down in politics in an election year. Congress reflects the two party system. Every action affecting elections is gauged on both sides of the aisle against the vital standard, "Will it help or hurt the chances of our party?" And because Congress is made up of incumbents, the further question surfaces, "Am I voting for a principle that, if extended, will hurt me in my own campaign?" I do not think that I have to belabor the point. In 1964 the party urging that fairness required an answer to a Presidential broadcast was the Republican National Committee. See, e.g., Republican National Committee, 40 FCC 625 [3 RR 2d 767] (1964). The DNC - now so active - was silent. Today we get petition after petition from the DNC concerning the right to answer Presidential appearances. See, e.g., Democratic National Committee, 25 FCC 2d 216 [19 RR 2d 977] (1970).

But if Congress understandably has difficulties acting in this sensitive field, that makes it all the more important that the agency - set up in part because of Congress' awareness of its limitations - not abdicate its responsibilities at this hour. Yet that is what we have done.

I do not believe that Commission action would usurp Congressional prerogatives in any way. Any new policy we adopted as to fairness would not be effective as a practical matter for several months. The Congress, should it choose, would have ample opportunity to review that policy. Under the circumstances, I believe that action by the FCC, now is the most appropriate and practicable way to promote the public interest.

1/ CBS points to an erroneous Commission ruling on the basis of its cancellation. 25 FCC 2d 283 [19 RR 2d 1103] (1970). Frankly, I think that was just an excuse. In any event, whatever the merits of the Commission's ruling, it was easily circumvented - by merely specifying ten or so issues and saying that the DNC could talk about any of them. In any event, the court reversed, 454 F 2d 1018 (1971), and still there is silence from CBS about rescheduling the program. The real clue lies in the 1971 testimony of Dr. Frank Stanton when, under questioning, he seemed to acknowledge the need to re-think the value of the program. Hearings on S. J. Res. 209 Before the Communications Subcommittee of the Senate Committee on Commerce, Ses. 91-74, pp. 64-67 (1970).

ally, our action would not have been inconsistent with the court's ruling in C v. FCC, ___ F 2d ____, 23 P & F Radio Reg. 2135 (1972). The court there expressly ruled that the birth of "a new corollary" was a matter for the agency or the Congress ("Those who advocate the adoption of new standards have, of course, access to both the Commission and the Congress." ___ F 2d ___, 23 P & F Radio Reg. 2d 2135, 2165 (1972)). Further, that case did not address Fairness Doctrine requirements accompanying the simultaneous use of all three networks by the President in a series of reports.

VII. Proposals

The potential solutions are obvious. For example, we could require that whenever there have been two prime time appearances by the President on all three networks, the networks must schedule a prime time program, also to be presented simultaneously over the three networks, in which opposition spokesmen are given the opportunity to present contrasting viewpoints on the issues.

This would be eminently fair. It would give the President greater exposure than his opponents by a ratio of two to one, but it would still prevent the situation from getting totally out of hand, as it is today. It cures the basic defect – that, unlike anyone else, the President dominates the airwaves by getting on all three networks at the same time. Such an approach would also force opposition spokesmen to be truly on their mettle, because they are given the privilege of reaching such an enormous audience. Finally, it would titutionalize a solution, removing this Commission and the courts from ficult, and narrow ad hoc decisions, often made without the benefit of total perspective.

I do not understand the majority position that an opportunity for the other side to be heard will inhibit Presidential reports. Is the majority really arguing that if the American people are given a fair opportunity to hear contrasting viewpoints, the President will be deterred from using the airwaves, that his arguments are so lacking in strength that they cannot withstand healthy debate? That he will speak only if he can dominate the situation? For people who profess to believe that the goal of the First Amendment is to promote robust, wide open debate, this surely is an untenable position.

As for the broadcasting industry, I should think that it would welcome the policy. A large number of broadcasters' fairness headaches have arisen because of the ever increasing use of broadcasting for Presidential reports. See, e.g., Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283 [19 RR 2d 1103] (1970). This would give them a sound base with which to plan their operations, and to answer critics. For example, they could undoubtedly include Congressional leaders, when they find them to be appropriate spokesmen for the contrasting viewpoint – and thus largely meet the objections raised frequently by Senators and Congressmen that they receive quite unfair treatment in comparison to the President. 2/

In this connection, I believe the Congress could employ self-help – by facilitating the televising of "great floor debates." See S. 4189

[Footnote continued on following page]

Such a procedure would cut into the networks' entertainment Schedules somewhat. But last year, for example, it would have required half of what the networks gave the President. Surely an industry impressed with the public interest cannot be heard to complain that it is being called upon to make an undue contribution to an informed electorate on the most important issues confronting the nation.

I would in no way propose to limit the networks' wide discretion in selecting spokesmen. It may be that the opposition party would be a poor representative on some issue covered by the President - or that a number of spokesmen rather than one would better illuminate the subject or subjects. Those all could be matters for the networks' judgment; the only restriction is that they must reach a consensus on how to proceed, but that is a restriction they have incurred from acting in concert to present the President.

Nor can it be argued that the Commission lacks the authority to take these specific actions. The statutory command in Section 315(a) is that "reasonable opportunity" be afforded. In a case where the President gives prime time reports on all three networks, "reasonable opportunity" requires that at least a contrasting viewpoint be similarly presented, and at no more than a two-to-one imbalance. Significantly, even the Commission recognized that "reasonable opportunity" calls for some response on one occasion when the President gave five speeches in a row on television. See Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 297 [19 RR 2d 1103] (1970). And it did so even though the main subject of these talks - the Indochina War - was being given wide coverage by the networks on news-type programs. See Green v. FCC, 447 F 2d 323 [22 RR 2d 2022] (DC Cir 1971). The same principle is applicable here. The only difference is that I would not permit the imbalance to go beyond two-to-one, and that I would face up to the critical issue of simultaneous use of all three networks.

The Majority claims such a ruling would have to be extended to reports by all public officials. I fail to see why. First, I believe a distinction can be made on the basis of the importance to the nation of the issues covered in Presidential Reports. But even that is not the basis of my comments. The crux

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2/ [Footnote continued from preceding page]

Introduced by Senator Scott (116 Cong. Rec. 2388 (Aug. 5, 1970)) and described in Hearings on S. J. Res. 209 Before the Subcommittee on Communications of the Senate Commerce Committee, 91st Cong. 2d Sess., 91-74, pp. 99-107 (Aug. 5, 1970). The federal government has two political branches, the President, and the Congress. The consistent manner in which the broadcast industry has ignored the Congress raises serious questions. Congress has a right to appeal for popular support. The people have a right to hear the divergent views of the Congress. Thus far the broadcast industry has completely ignored this important area of the public interest. My proposal would provide at least a partial remedy for this situation.

at the President, with increasing frequency, commands all three networks reports to the nation and that any application of fairness must take that into account. No other public official, whether a governor or mayor, similarly dominates the airwaves in his state or city. Should that day arise, we will have time enough to consider extending the principle.

In the name of robust, wide open debate, the majority has simply turned its back on the problem - the debate. I also strongly disagree with failure of the majority to require broadcasters to set aside a specified amount of time for political broadcasts by candidates for office. We again have the statutory authority to do so. See Sections 303(b) and 315. The statutory scheme calls for the application of time for candidates' use. Indeed, that is the thrust of a recent amendment to the Communications Act. It is now grounds for the revocation of license if a broadcaster willfully or repeatedly fails to provide reasonable access for the use of his station's facilities to a candidate for federal office. See amended Section 312(a)(7). I commend broadcast journalists' efforts to cover the political process; but no one can denigrate the need also to let the candidate speak his piece, uncensored. See Section 315(a); 312(a)(7).

In this area as well, the Commission quickly tosses the hot potato back to Congress. Why? Congress has clearly set out the policy, and has given us all the broad rulemaking powers we need, both generally and specifically, to carry out Section 315. See Sections 4(1), 303(r), 315(d); NBC v. United ates, 319 US 190 (1943); FCC v. Southwestern Cable Company, 392 US 157 RR 2d 2045] (1968); FCC v. Midwest Video, ___ US ___ [24 RR 2d 2072], 0 USLW 4626 (June 6, 1972). Our action would be fully in accord with the Congressional scheme - especially as high-lighted by the recent amendment. But, even if not, once again Congress could, if it wished, review the matter.

The Commission cannot and does not assert that there is no need for improved performance. There clearly is, as shown by the legislative history of the 1971 Act and by our figures.

In 1968 in 25 Congressional election contests in which only two candidates were involved, 34% of the area broadcast stations gave some free time to the candidates. In the same year, in 78 races where three or more candidates were running, 45% of the area stations gave free time. In twelve state races with only two gubernatorial candidates, 35% of the stations gave some free time. Yet in nine states in which three or more candidates sought the governorship 48% of the stations allotted some free time to the candidates. (For similar 1960 figures see, Hearings on Section 315, before the Senate Subcommittee on Communications, 88th Cong., 1st Ses., pp. 70-73, 28-81(1963)).

Two conclusions are warranted. There is an appalling reluctance on the part of broadcasters to make free time available to candidates under any circumstances. To the extent they do so, however, they tend to give more time, not less, when more than two candidates are running. There is, thus, no evidence that repeal of Section 315 would increase free political time - if anything the contrary.

In the instances where data is available, access to the air has not been thwarted by the presence of third party candidates. The requirements of Section 315(a) do not seem to inhibit broadcasters as much as the majority

seems to have feared. The real question is why more stations haven't given free time. The answer does not lie in licensee fear of the application of Section 315, but rather in the fact that commercial programming is more in the licensee's economic interest than is exposing political candidates to the public. And yet in light of this the majority relies on voluntary efforts toward reform!

The Commission suggests that Congress should have acted long ago to revise the equal opportunities requirement of Section 315. Perhaps. But the Commission's reliance on this allegation as a grounds for no action is simply embarrassing in its irony. It is the very same ground that the Commission has used to criticize broadcasters.

The latter assert they would be willing to give free time if only Section 315 were repealed. While it may be true of the networks in a Presidential race, the record simply does not bear out the argument. Analysis shows that the broadcasters have simply used Section 315(a) as a shield to avoid giving free time.

And that is what the Commission is doing here, to avoid taking a needed action. We can act now in an effective way. Many important races do not have fringe party candidates. Even where there are so many candidates as to deter free time to the majority party candidates, the public could still be informed by presenting the leading spokesmen for the major candidates. Yet the Commission declines to take any action at all in this area.

I would issue a notice of proposed rulemaking to determine what amount of free time should be afforded in the even-numbered Federal election years, and for off-year elections. After a study of the Comments I would adopt a rule that did serve the "public interest on the larger and more effective use of radio" - a standard the majority cites and then ignores.

VIII. Old Policies

The Commission stands by its decision in Letter to Nicholas Zapple, 23 FCC 2d 707 [19 RR 2d 421] (1970), and by its rule which requires film supplied by a candidate, even if used in a bona fied newscast, be identified as to its source. While this failure to retreat further is perhaps laudable, it is not a substitute for a policy on political broadcasting. The discussion of Zapple offers little that is new to an already clear ruling. The film source rule is simply given additional publicity. As supplements to a broad policy statement it might be a worthwile discussion. In the Commission's document it is simply out of place.

As long as we are in the reaffirmation business, however, I believe that the Commission should not issue a statement on political broadcasts without reaffirming the position it took in Cullman Broadcasting Co., Inc., 40 FCC 576, [25 RR 895] (1963). At least with regard to ballot issues, if the licensee presents a sponsored program presenting one position on that issue, and sponsorship cannot be found for contrasting viewpoints, the contrasting viewpoints must be presented at the licensee's expense. Nor should a

nsee be allowed to reject a political program simply because he would be quired to present both sides, possibly one side at his own expense. See Capital Broadcasting, 40 FCC 563, 615 (1963).

IX. Conclusion

I find myself nearly a year after the Notice of Inquiry with the same fears that I expressed at that time. Namely, "(1) There is no reason whatsoever to believe that the majority is likely to change a position that has been so forcefully stated in such extreme cases. (2) I am fearful that this 'Inquiry' may well have serious national consequences - whether intended or not - of leaving the law in its current state of uncertainty and inequity through the 1972 Presidential election. (3) Those who now have cases on appeal, or who may be coming before the Commission in the near future, are entitled to the prompt rendition of justice on their complaints." 30 FCC 2d 26, 35.

I have no desire to play "I told you so." I had fervently hoped my predictions would be proved wrong. But, as it turns out, the Commission indeed leaves past inequities untouched, and does nothing to aid the prompt rendition of justice for either present or future complaints. The Commission has failed in its obligation to regulate this important aspect of broadcasting. Having shirked its responsibilities, it seeks to have Congress do the very work Congress established the FCC to do. It neither clarifies old policies nor establishes new ones. It leaves the incumbent President as politician in an unchallenged superior position to all his opponents. In short the Commission has taken forty paragraphs to state what it could have said in one sentence, "In the area of fairness in political broadcasting, the policy of the Commission is to do nothing." */

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*/ Since the preparation of this opinion I have waited to exchange views with Commissioner Wiley. Now that his opinion is available, I am disappointed there is almost nothing in his collection of ad hominem attacks to which I choose, or need, to respond. His flailing defense of the favorable political implications of the majority's decision is, to put it most graciously, a bit strained. But it is a role in which he seemingly feels comfortable. He believes I, too, would be more effective if only I would consent to play Faust. No doubt that is true - measured by his standards of what is effective use of a man's life. We happen to disagree on that issue as well as the substance before us.

Commissioner Wiley's one meager effort at a substantive defense fails once the facts are known. He suggests the Commission has provided "extensive" aid to Congress in dealing with these issues. In fact, virtually none of the Commission's Congressional appearances, directed mainly to a review of Section 315 in the context of a political campaign, have anything to do with the issues the majority avoids in this decision. I would be delighted if Commissioner Wiley would tell me what recommendations the majority has given to Congress to deal with the problems it says Congress should now solve. Changing equal time during political campaigns is not the problem here. Commissioner Wiley's high-sounding

[Footnote continued on following page]

SEPARATE STATEMENT OF
COMMISSIONER RICHARD E. WILEY

Last month, the Commission issued a First Report in connection with its new broad-ranging inquiry into the Fairness Doctrine. This First Report dealt with political broadcasts and, at least in my judgment as the Commissioner assigned by Chairman Burch to oversee the entire inquiry, was the product of a sincere, conscientious and thorough analysis of the issues in question. The result, again in my opinion, comported with both the intent and objective of the Fairness Doctrine and manifestly was in the public interest. This judgment was apparently ratified by five other Commissioners who voted to adopt the Report. In characteristic fashion, only one Commissioner saw it differently and chose to issue a dissent, a dissent to which this separate statement is specifically and briefly directed.

In an already too familiar style, by innuendo if not direct accusation, Commissioner Johnson has injected unsupported allegations of politics and impropriety into this proceeding by characterizing the Commission's action as a "blatently partisan gift to an incumbent President seeking re-election." The truth - as Commissioner Johnson must know - is that our effort has been completely devoid of partisan considerations or any other narrow appreciation of the goals of this highly important inquiry. The decision was prepared by a non-partisan staff committee whose membership from throughout the various bureaus and offices of the Commission represents widely disparate viewpoints and regulatory philosophies. It was adopted by a bi-partisan Commission which was in no way divided along party lines. The Commission sought with sincerity and honesty to set out a policy which would best serve the public interest over an extended period of time during which, given the normal vagaries of American politics, a number of Administrations - representing in all likelihood both major political parties - might come and go. The fact that only Commissioner Johnson perceived an improper purpose behind our action calls to mind the proverbial saying that, all too often in the company of man, it is he least free of suspicion who so easily questions the motives of his colleagues.

I also take strong issue with the dissenting Commissioner's denigration of the Commission's action as a "dodge", a "cop-out", a "punt on first down" and a Report "rushed into print". Again, the truth - as Commissioner Johnson must know - is that our decision was the result of an extensive treatment of every conceivable issue and point of view extant concerning the applicability of the Fairness Doctrine to political broadcasting.

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*/ [Footnote continued from preceding page]

phrases about defense to elected officials have not stood in the Commission's way to prevent it from acting on matters like cable television, despite our unsuccessful requests for Congressional action. I see no reason why we should ignore our responsibilities in this area either.

proposal that Commissioner Johnson apparently favors, that an automatic right to reply to Presidential appearances vests in the opposition party or some other presumably appropriate respondent, was discussed and debated over and over again, both in the context of specific prior requests to institute such a rule and again during the course of numerous meetings of the Fairness Committee which prepared the First Report in this inquiry. Rightly or wrongly, the Commission chose not to adopt such a proposal. To suggest that it did so without full consideration of the merits, however, is simply and utterly fallacious.

The irony here is that Commissioner Johnson may be quilty of the very transgression which he attributes to the majority. Some of the proposals outlined in his dissent were never advanced before the Commission. Even if our Report could be accurately labeled as "a punt on first down", a matter which I strenuously dispute, such a maneuver is clearly preferable to abandoning the playing field for the sidelines, waiting until the game is over and then second-guessing the manner in which it was played. The predictable result of such a procedure can only be publicity, not progress nor improvement.

Little needs to be added with regard to the merits of Commissioner Johnson's statement that our decision somehow has missed the mark with respect to insuring that the Fairness Doctrine's goal of an informed electorate is attained. Reasonable men may surely differ as to the appropriate applicability of the Doctrine to political broadcasting. In my opinion, Commissioner Johnson's proposals are unworkable without Congressional revision of Section 315(a). In any event, I support the Commission's view that an intelligent application of fairness, rather than rigid rule requirements or arbitrary formulae, better serves our goal of robust, wide-open debate (see majority opinion, p. 11).

Finally, Commissioner Johnson's statement that we have failed to "give Congress the materials upon which it can act" (dissenting opinion, p. 9), ignores the Commission's extensive treatment of the subject (see majority opinion, pp. 15-18). Our recommendations with regard to repeal or amendment of Section 315, the Voters Time proposal, The Federal Election Campaign Act of 1971, additional exemptions to Section 315(a), etc., are a matter of record. No further "materials" were necessary for enactment of The Federal Election Campaign Act and none are needed with respect to other proposals involving Section 315. In any event, the decision of Congress not to institute changes which the Commission may support is no warrant for this agency to arrogate to itself the power and authority which properly reside with the elected representatives of the American public.

While, as set forth herein, I generally disagree with Commissioner Johnson's position in this area, he – as an intelligent member of the Commission – is certainly entitled to his own viewpoint. I think it is unfortunate, however, that in expressing this viewpoint Commissioner Johnson finds it necessary to impugn the motives of his peers and fellow Commission employees and to assail the integrity of Commission action – especially when, as I have indicated, he really must know better. Sad to say, it is such conduct which, over the course of six long years, has done so much to diminish the credibility and effectiveness within the Commission which his abundant talents would otherwise command. It is my profound hope, vain though it may be, that Commissioner Johnson will devote his remaining time at the FCC and his estimable

abilities to help the rest of us realistically solve some of the monumental problems facing the Commission. It is only my view, but sincerely held nonetheless, that this would be a far more noble endeavor than reaping the barren harvest of publicity produced by double-spaced dissents.

APPENDIX A

I. Comments on the applicability of the fairness doctrine to political broadcasts were received from the following parties:

ACLU
American Broadcasting Company
Columbia Broadcasting Company
Democratic National Committee
Evening News Association, et al.
Haley, Barder & Potts
McKenna & Wilkinson
National Association of Broadcasters
National Broadcasting Company
Public Broadcasting Service
Republican National Committee
Storer Broadcasting
United Church of Christ
WGN Continental Broadcasting Company

II. The following parties participated in panel discussion on the applicability of the fairness doctrine to political broadcasts held, before the Commission, on March 29, 1972.

Roger E. Ailes, President, Roger Ailes & Associates, Inc.
Charles A. Wilson, Jr., for the Democratic National Committee
James J. Freeman, Associate Special Counsel, Republican National Committee
Reed J. Irvine, Chairman of the Board, Accuracy in Media, Inc.
Newton N. Minow; Leibman, Williams, Bennett, Baird & Minow, Chicago, Illinois
Harry M. Plotkin, Counsel, Public Broadcasting Service
Paul A. Porter; Arnold & Porter, Washington, D. C.
Allen U. Schwartz, Counsel, Communications Media Committee, ACLU
Rosel Hyde; Wilkinson, Cragun & Barker, Washington, D. C.

III. Oral arguments on all aspects of the fairness proceeding in Docket No. 19260 were made by the following parties on March 30 and 31, 1972:

Michael Valder, on behalf of Urban Law Institute
Bernard Segal, on behalf of National Broadcasting Company
Sam Love, on behalf of Environmental Action
Malin Perkins, on behalf of the American Association of Advertising Agencies
Geoffrey Cowan, on behalf of Friends of the Earth, et al.
Theodore Pierson, on behalf of Combined Communications Corporation, et al.
Joseph A. Califano, Jr., on behalf of the Democratic National Committee
James J. Freeman, on behalf of the Republican National Committee
Edgar F. Czarra, Jr., on behalf of the Corinthian Stations and the Orion Stations

cy Weston, on behalf of National Citizens Committee for Broadcasting
J. Roger Wollenberg, on behalf of Columbia Broadcasting System, Inc.
Robert A. Woods, on behalf of National Assn. of Educational Broadcasters
David Lichenstein, on behalf of Accuracy in Media, Inc.
Mrs. Cara Siller, on behalf of Women for the Unborn
Rev. Paul G. Driscoll, Human Life Coordinator of the Rockville Centre (New York) Archdiocese
James A. McKenna, Jr., on behalf of American Broadcasting Companies, Inc.
Ben C. Fisher, on behalf of Commission on Population Growth and the American Future, and Population Education, Inc.
Miles David, on behalf of Radio Advertising Bureau
Absalom Jordan, on behalf of the Black United Front
Peter W. Allport, on behalf of Association of National Advertisers
Dr. Blue Carstenson, on behalf of National Consumer Organizations Ad Hoc Advisory Committee to Virginia Knauer
Leo Perlis, on behalf of Radio and TV Subcommittee of the Ad Hoc National Voluntary Organizations Advisory Committee on Consumer Interests
Warren Zwicky, on behalf of Storer Broadcasting Company
Madalyn Murray O'Hair, on behalf of Society of Separationists
John Summers, on behalf of National Association of Broadcasters
Beverly Moore, on behalf of Corporate Accountability Research Group
Allen J. Potkin, on behalf of Concerned Citizens of West Virginia
Daniel W. Toohey, on behalf of Basic Communications, Inc.
mingo Nick Reyes, on behalf of National Mexican American Anti-Defamation Committee
Stewart Feldstein, on behalf of National Cable Television Assn.

F

NATIONAL B/CASTING CO., INC. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES

ACCURACY IN MEDIA, INC., Intervenor

U. S. Court of Appeals, District of Columbia Circuit, September 27, 1974

No. 73-2256

[¶10:315(G)(1)] Fairness doctrine.

The Commission misapplied the fairness doctrine when it ordered NBC to discharge its fairness obligations on the ground that an NBC program, "Pensions: The Broken Promise," was overwhelming anti-pensions and required further presentation of opposing views. The determination of the controversial issue allegedly presented, as well as the decision as to the number of views to be presented and the manner in which they are portrayed, is one initially for the licensee, who has latitude to make all pertinent judgments and is not to be overturned unless he forsakes the standards of reasonableness and good faith. In the present case, the Commission identified the principal controversial issue for the program as "the overall performance of the private pension plan system." The Commission made a mistake of law when it ruled that even though NBC was reasonable in saying that the subject of the program was "some problems in some pension plans," in determining that this was the essential subject of the program, its dominant force and thrust, NBC nevertheless violated its obligation because the Commission reached the conclusion that the program had the effect "in fact" of presenting only one side of a different subject, i. e., the overall performance of the private pension plan system. The error of law was that the Commission failed to apply the message of applicable decisions that the editorial judgments of the licensee must not be disturbed if reasonable and made in good faith. The licensee's wide discretion and latitude must be respected even though, under the same facts, the agency would reach a contrary conclusion. The Commission's proper function is to correct the licensee for abuse of discretion. The court thinks it plain that the licensee in this case was not guilty of an unreasonable exercise of discretion. National B/casting Co., Inc. v. FCC, 31 RR 2d 551 [US App DC, 1974].

[¶10:315(G)(1)] Fairness doctrine; function of court.

In the case of the fairness doctrine, a reviewing court is under a restraint against injecting its own preferences as the rule of decision. When the Commission affirms the licensee's exercise of its discretion, the role of the court is most restricted. But the court has a greater responsibility than is normally the case, when it reviews an agency's fairness rulings that upset the licensee's exercise of journalistic discretion, both because the area is suffused with First Amendment freedoms and because Congress has determined that the interest of the public, and its right to know, is furthered by giving primary discretion to the regulated licensee. National B/casting Co., Inc. v. FCC, 31 RR 2d 551 [US App DC, 1974].

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION
[27 RR 2d 1523; 28 RR 2d 1371]

Floyd Abrams with whom Dean I. Ringel and Howard Monderer, were on the motion for petitioners.

John W. Pettit, General Counsel, with whom Joseph A. Marino, Associate General Counsel and Lawrence W. Secrest, III, were on the motions for respondent.

Timothy B. Dyk, with whom J. Roger Wollenberg were on the brief for Columbia Broadcasting System, Inc., as amicus curiae.

J. Laurent Scharff, was on the brief for Radio Television News Directors Association and the Society of Professional Journalists, Sigma Delta Chi, as amicus curiae.

Ellen S. Agress, with whom Earle K. Moore was on the brief for the Office of Communication, United Church of Christ, as amicus curiae.

Stanley H. Kamerow was on the motion for intervenor, Accuracy in Media, Inc. Thomas F. Ragan also entered an appearance for Intervenor, Accuracy in Media, Inc.

John B. Summers was on the brief of National Association of Broadcasters, as amicus curiae.

Douglas Caddy was on the brief for the Center-for the Public Interest of the Robert M. Schuchman Memorial Foundation, Inc., as amicus curiae.

Ellen S. Agress was on the brief for National Citizens Committee for Broadcasting, as amicus curiae.

Henry Geller was on the brief for the Rand Corporation, as amicus curiae.

Alexander Greenfield, was on the brief for New York Times Company, as amicus curiae.

Carl D. Lawson, Attorney, Department of Justice, entered an appearance for Respondent, United States of America.

Before: Fahy, Senior Circuit Judge, Tamm and Leventhal, Circuit Judges.

Leventhal, Circuit Judge: On September 12, 1972, the television network of the National Broadcasting Company broadcast its documentary entitled "Pensions: The Broken Promise," narrated by Edwin Newman. On November 27, 1972, Accuracy in Media (AIM) filed a complaint with the Federal Communications Commission charging NBC had presented a one-sided picture of private pension plans. The handling of this case by the Commission will be discussed in more detail subsequently (section II). For introductory purposes it suffices to say that on May 2, 1973 – as it happens, the same day NBC received the George Foster Peabody Award 1/ for its production – the Commission's Broadcast Bureau advised NBC that the program violated the Commission's fairness doctrine. 2/ That decision was upheld by the Commission. We reverse.

I. The Program

The "Pensions" program is the heart of the case, and for that reason it is set out in Appendix A to this opinion.

For convenience, we will summarize the main outlines of the program – with notation that certain aspects are dealt with more fully subsequently.

The "Pensions" program studied the condition under which a person who had worked in an employment situation that was covered by a private pension plan did not in fact realize on any pension rights. Its particular focus was the tragic cases of aging workers who were left, at the end of a life of labor, without pensions, without time to develop new pension rights, and on occasion without viable income.

The program had no set format, but its most prominent feature was a presentation of tragic case histories, often through personal interviews with the persons affected.

One group of workers lost pension eligibility when their company decided to close the division in which they had worked. The first of these was Steven

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1/ In addition to the Peabody Award, the program was awarded a Christopher Award, a National Headliner Award, and a Merit Award of the American Bar Association. It was also an Emmy nominee. See Schmerler Affidavit ¶10, JA 121-22.

2/ See Letter of FCC to NBC, May 2, 1973, JA 55, 66-67 [27 RR 2d 1523].

Duane, who after 17 years with a large supermarket chain, lost his job as foreman of a warehouse when the company closed the warehouse and discharged all its employees, leaving them with no job and no pension rights. N[redacted]n his fifties, starting again with another company, he felt ill-used and f[redacted]ened of the future.

There were a number of other specific examples of employees terminated by closing of plants or divisions. The program also focused on the problems of vesting, the years of service with the company required for a worker to become eligible under its pension plan. NBC interviewed employees with many years of service who were suddenly discharged just prior to the date on which their pension rights were to have become vested. Thus Alan Sorensen asserted that he was the victim of a practice - a "very definite pattern" - under which his employer, a large department store chain, fired men just prior to vesting, assigning "shallow" reasons to men who had served with records beyond reproach.

A similar account was given by Earl Schroeder, an executive fired by Kelly Nut Company, after he more than met his 20 years of service requirement but was six months shy of the age 60 condition.

The program also set forth abuses in the literature given employees ostensibly explaining their plans - pictures of contented retirees and words comprehensible only to the most sophisticated legal specialist. It took up examples where the company had gone bankrupt prior to their date of retirement, leaving the employees without pension funds.

The documentary gave instances of pensions lost for lack of portability, cit[redacted]plans that required the employee be a member of the same local for the [redacted]uisite period. NBC interviewed a number of teamsters who had worked for the same employer for over twenty years, but who later found that certain changes in work assignment entailed changes in union local representation and ultimately loss of pension.

Much of the program was a recount of human suffering, interviews in which aging workers described their plight without comment on cause or remedy. They told of long years of working in the expectation of comfortable retirements, finding out that no pension would come, having to work into old age, of having to survive on pittance incomes. Interspersed with these presentations by workers were comments by persons active in the pension field, public officials, and Mr. Newman.

None of those interviewed - and these included two United States Senators, a state official, a labor leader, a representative of the National Association of Manufacturers, a consumer advocate, a bank president, and a social worker - disputed that serious problems, those covered by the documentary, do indeed exist. Some of the comments related to the overall performance of the private pension system. We shall discuss these later (Section VI B). In addition to comments on the private system generally, there were isolated expressions of views on the related but nonetheless quite distinct issue of the wisdon of reliance on private pensions, regardless of how well they function, to meet

the financial needs of retirees. 3/ Finally, several speakers gave broad, general views as to what could be done. 4/

There were also comments on legislative reforms that might be taken to cope with problems. These will be discussed separately in part VI D of this opinion.

Concluding Remarks

It may be appropriate to quote in full the concluding remarks of narrator Edwin Newman, since the FCC considered them "indicative of the actual scope and substance of the viewpoints broadcast in the 'Pensions' program." He said:

> "Newman: This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.
>
> "There are certain technical questions that we've dealt with only glancingly, portability, which means, being able to take your pension rights with you when you go from one job to another, vesting, the point at which your rights in the pension plan become established and irrevocable.
>
> "Then there's funding, the way the plan is financed so that it can meet its obligations. And insurance, making sure that if plans go under, their obligations can still be met.
>
> "Finally, there's what is called the fiduciary relationship, meaning, who can be a pension plan trustee? And requiring that those who run pension funds adhere to a code of conduct so that they cannot enrich themselves or make improper loans or engage in funny business with the company management or the union leadership.
>
> "These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.
>
> "Our own conclusion about all of this, is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.

3/ See Dennenberg Statement, Tr. at 4; Kramer Statement, Tr. at 13-14.

4/ See Dennenberg Statement, Tr. at 5; Newman description of Nader position, Tr. at 18; Hubbard Statement at 18; Anderson Statement, Tr. at 18-19; Gotbaum Statement, Tr. at 18; Schweiker Statement, Tr. at 19.

"The situation, as we've seen it, is deplorable.

"Edwin Newman, NBC News."

Success of Program

Like many documentaries, "Pensions" was a critical success (supra, note 1) but not a commercial success. We shall consider the television reviews in more detail subsequently, but it may be observed here that they were generally enthusiastic. Critics called it, "A potent program about pitfalls and failures of some private pension plans . . . ," "a harrowing and moving inquiry . . . ," and "a public service." 5/ Dissenting notes were also struck.

As to the viewing public, "Pensions" ran in competition with a popular medical drama and a crime movie, and ran a poor third, garnering only a 16% share of the viewing audience. In fact, NBC was able to sell only two-and-one-half minutes of advertising time out of an available six. 6/

II. Commission Proceeding

Watching the program with particular interest was Accuracy in Media ("AIM"), a "nonprofit, educational organization acting in the public interest" 7/ that seeks to counter, in part by demanding aggressive enforcement of the fairness doctrine, what it deems to be biased presentations of news and public affairs. On November 27, 1972, the Executive Secretary of AIM wrote to the FCC complaining of the following:

> "Our investigation reveals that the NBC report gave the viewers a grotesquely distorted picture of the private pension system of the United States. Nearly the entire program was devoted to criticism of private pension plans, giving the impression that failure and fraud are the rule. . . . The reporter, Mr. Newman, said that NBC did not want to give the impression that there were no good private pension plans, but he did not discuss any good plans or show any satisfied pensioners." 8/

In subsequent correspondence, AIM added the accusations that NBC was attempting "to brainwash the audience with some particular message that NBC is trying to convey" 9/ and that the program was "a one-sided, uninformative, emotion-evoking propaganda pitch." 10/ Thus AIM not only claimed that the

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5/ See summary of reviews, Appendix B.

6/ Frank Affidavit, JA 125-26.

7/ Letter of AIM to FCC, July 2, 1973, JA 143.

8/ Letter of AIM to FCC, November 27, 1972, JA 1.

9/ Letter of AIM to FCC, February 20, 1973, JA 48.

10/ Letter of AIM to FCC, April 11, 1973, JA 54.

program had presented one side of an issue of public importance, the performance of private pension plans, it also charged that NBC had deliberately distorted its presentation to foist its ideological view of events on the viewing public.

In its reply, NBC rejected the allegations of distortion. It asserted that the "Pensions" broadcast had not concerned a controversial issue of public importance:

> "The program constituted a broad over-view of some of the problems involved in some private pensions plans. It did not attempt to discuss all private pension plans, nor did it urge the adoption of any specific legislative or other remedies. Rather, it was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look." 11/

Since, in the view of NBC, there was no attempt to comment on the overall performance of private pension plans, no controversial issue had been presented, for all agreed that the examples of suffering depicted were not themselves subject to controversy. Even so, NBC pointed out that it had presented the view that the system as a whole was functioning well; consequently, it asserted, even if it had inadvertently raised the issue of the overall performance of private pension plans, the side generally supportive of the system had been heard. 12/

In a letter to NBC, 13/ the Broadcast Bureau of the Commission rejected AIM's allegations of distortion as being unsupported by any evidence but upheld the fairness doctrine complaint. The staff took issue with "the reasonableness of your [NBC's] judgment that the program did not present one side of a controversial issue of public importance" and concluded that the program's "overall thrust was general criticism of the entire pension system, accompanied by proposals for its regulation." 14/ The staff opinion included extensive quotation from the transcript of the documentary, but little explanation as to how the quoted portions sustained the staff's conclusion. Only four brief statements were singled out as containing "general views" on the overall performance of the private pension system. NBC appealed the Broadcast Bureau ruling to the entire Commission. 15/

11/ Letter of NBC to FCC, February 14, 1973, JA 41.

12/ Id., JA 45-46.

13/ Accuracy in Media, Inc., 40 FCC 2d 958 [27 RR 2d 1523] (1973).

14/ Id. at 963, 966.

15/ By letter of July 2, 1973, AIM replied to NBC's appeal and appended as an exhibit an article about pensions appearing in the Washington Post of November 26, 1972, written by Mr. Spencer Rich. AIM stated that this article "exemplifies good journalism." JA 155.

On December 3, 1973, the Commission issued a "Memorandum Opinion and Order" affirming the decision of its staff. 16/ Although it acknowledged that the broad issue upon review was "whether the Bureau erred in its ruling that N[illegible]s judgment on these matters was unreasonable," it emphasized that:

> "The specific question properly before us here is therefore not whether NBC may reasonably say that the broad, overall 'subject' of the 'Pensions' program was 'some problems in some pension plans,' but rather whether the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system." 17/

The Commission found that "Pensions" had in fact presented views on the overall performance of the private pension system. It took note of the "pro-pensions" views expressed during the documentary, but concluded that the "overwhelming weight" of the "anti-pensions" statements required further presentation of opposing views. The Commission commended NBC for a laudable journalistic effort, but found that the network had not discharged its fairness obligations and ordered it to do so forthwith. This petition for review followed.

NBC petitioned the Commission for a stay, but was informed that the Commission "expects prompt compliance with its ruling." NBC filed a motion in this court for an expedited appeal, a stay, and expedited consideration. That motion was heard and granted on February 14, 1974, and the case was heard on the merits on February 21, 1974. AIM has intervened on the side of the Commission. The stay that has been in effect during the pendency of this appeal r[illegible]flected, in part, an estimate of the likelihood of success by NBC as petiti[illegible]r. We now set forth the reasons why we have decided that the case s[illegible]uld be determined in favor of NBC. 18/

III. The Fairness Doctrine: General Considerations

Petitioners urge that the Commission's decision be set aside as a misapplication of the fairness doctrine and a violation of the First Amendment. Since we reverse on the former ground, we have no occasion to consider the latter.

Now twenty-five years old, the fairness doctrine imposes a double obligation on the broadcast licensee. First, he must devote a substantial portion of available time to the discussion of "controversial issues of public importance." 19/ When he presents such an issue, the licensee has a further duty

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16/ 44 FCC 2d 1027 [28 RR 2d 1371] (1973), JA 201.

17/ 44 FCC 2d at 1034-35, JA 210.

18/ This opinion also serves to explain the continuation of the February 14, 1974, stay order during the preparation of the opinion on the merits. See note 88 infra.

19/ In the Matter of Editorializing by Broadcast Licensees, 13 FCC 1246, 1249 [25 RR 1901] (1949).

to present responsible conflicting views. 20/ The doctrine, particularly as applied to newscasts and news documentaries, has been given statutory recognition in Section 315 of the Communications Act, 21/ and has been held to inhere in the "public interest" standard governing the grant of license applications and renewals. 22/

The essential task of the fairness doctrine is to harmonize the freedom of the broadcaster and the right of the public to be informed. Except for limited areas like libel and obscenity, the First Amendment generally forbids government regulation of the content of journalism. Not only is state censorship forbidden, so also is the government prohibited from compelling editors to include state approved material. Even a carefully limited statute giving political candidates attacked on a newspaper's editorial page the right to reply in kind was recently invalidated by the Supreme Court as an unconstitutional encroachment upon journalistic discretion. In Miami Herald Publishing Company v. Tornillo, 23/ a "right to reply" law – analogous to the personal attack rule that is part of the fairness doctrine – was ruled unconstitutional. The "benign" purposes of the state statute were deemed irrelevant:

> "[T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials – whether fair or unfair – constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental control of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." 94 S Ct at 2839-40.

But almost from the beginning, the broadcasting press has been treated differently. Congress created the Federal Communications Commission and its predecessor, the Federal Radio Commission, because the available space

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20/ Id. This duty extends to making free time available if those holding responsible conflicting views are unable to purchase air time. Cullman Broadcasting Co., 40 FCC 576, 577 [25 RR 2d 895] (1963).

21/ 47 USC §315(a) reads in part:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

22/ Red Lion v. FCC, 395 US 367, 379-86 [16 RR 2d 2029] (1969).

23/ 94 S Ct 2831 (1974).

on the electromagnetic spectrum was far exceeded by the number of those who would use it. 24/ It was necessary to ration this scarce resource, for "[w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." 25/

Scarcity required licensing in order to bring order to chaos, but the dangers of control in the hands of a relative few were early recognized. The public interest did not countenance delegation to a few licensees to pursue their purely private interests at the expense of listeners and viewers, and instead the broadcaster was held to have an obligation to serve and inform the public. 26/

Under the fairness doctrine the public is not to be confined to hearing only the views approved by those licensees, but is entitled to be informed of the diversity of opinion in the land, to have that presented by appropriate spokesmen for its consideration and judgment.

The salutary intent of the fairness doctrine must be reconciled with the tradition against inhibition of the journalists' freedom. That tradition, which exerts a powerful countervailing force, is rooted in the constitutional guarantee of freedom of the press, a guarantee that has vitality for broadcast journalists, though not in exactly the same degree as for their brethren of the printed word. 27/ And the same statute that provides authority for the FCC to implement the fairness doctrine for its licensees contains a clear provision (in Section 326) disclaiming and prohibiting censorship as part of the legislative scheme. In construing the fairness doctrine, both the Commission and the courts have proceeded carefully, mindful of the need for harmonizing these often conflicting considerations.

In Red Lion Broadcasting Company v. FCC, 395 US 367 [16 RR 2d 2029] (1969), the Supreme Court approved the Commission's personal attack and

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24/ National Broadcasting Company v. United States, 319 US 190, 210-14 (1943).

25/ Red Lion Broadcasting Co. v. FCC, supra, 395 US at 376.

26/ Other responses to the dangers of placing control over the broadcast media into the hands of a relative few include: the obligation of the licensee to operate in the public interest, see 47 USC §§307(a), 309(a) and 312(a)(2), the chain broadcasting and multiple ownership rules, see National Broadcasting Co. v. United States, 319 US 190 (1943) and 47 CFR §§73.131, 73.240, and the prime time access rule, 47 CFR §73.658(k) (1973). See also Columbia Broadcasting System v. Democratic National Committee, 412 US 94, 112 n. 10 [27 RR 2d 907] (1973).

27/ See id. at 117-18, 122.

political editorializing rules, 28/ which are relatively narrow corollaries of the general fairness obligation. Under the personal attack rules a licensee must afford reply time to "an identified person or group" whose "honesty, character, integrity, or like personal qualities" are attacked in the course of presentation of views on a controversial issue of public importance. The political editorializing rule imposes a reply obligation where the licensee endorses or opposes a candidate for public office.

28/ Red Lion v. FCC, 395 US at 373-75:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

"(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within [(3)], above, and, in a specific factual situation, may be applicable in the general area of political broadcasts [(2)], above. See, Section 315(a) of the Act, 47 USC §315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 FR 10415. The categories listed in [(3)] are the same as those specified in Section 315(a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of

[Footnote continued on following page]

These rules were the target of sharp attack. The essence of the challenge was that no matter how slight, how narrow, or how precise, any limitation on the freedom of the licensee to broadcast what he chooses perforce violates the First Amendment. Rejecting this contention, a unanimous 29/ Supreme Court reminded the broadcaster of the essential difference between the print and broadcast media: the physical limitations of the latter restrict the number of those who would broadcast whereas expression by publication is, at least in theory, available to all. To posit a First Amendment restriction on government action taken to enhance the variety of opinions available to the viewer is to protect those fortuitous enough to obtain broadcast licenses at the expense of those who were not. In now-famous language the Court stated:

> "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 30/

This has become the guiding principle of the fairness doctrine: limitations on the freedom of the broadcaster – even those that would be unacceptable when imposed on other media – are lawful in order to enhance the public's right to be informed. 31/ The Court's opinion, written by Justice White, reflects the circumspection of this principle of decision. While rejecting as unfounded claims that the personal attack and political editorializing rules would induce self-censorship by licensees in order to avoid the rigors of compliance with their requirements, the Court cautioned that its judgment might be different

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28/ [Footnote continued from preceding page]

> the candidate to respond over the licensee's facilities: provided, however, that where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§73.123, 73.300, 73.598, 73.679 (all identical).

29/ Justice Douglas did not participate, and said in CBS: "I did not participate in that decision and, with all respect, would not support it." 412 US at 154.

30/ 395 US at 390.

31/ "Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act." CBS, supra, 412 US at 110.

"if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage. 32/ . . . " And the Court expressly stated that in approving the personal attack and political editorializing rules, it did not "approve every aspect of the fairness doctrine. 33/ . . . "

Four years later, in Columbia Broadcasting System v. Democratic National Committee, 34/ the Court again discussed the fairness doctrine. The Commission had held that licensees could impose a blanket ban on all editorial advertising. An intermediate court ruling that such a ban, even if consistent with the fairness doctrine, violated the First Amendment, 35/ was reversed by the Supreme Court, in an opinion by Chief Justice Burger.

In CBS the Court reaffirmed the principle that scarcity requires that the broadcast media be treated differently than other forums of expression, but observed that this is not a principle without bounds, that not all regulation can be justified in the name of scarcity. Overzealous invocation of rules such as the fairness doctrine could cause an "erosion of the journalistic discretion of broadcasters in the coverage of public issues." 36/

Journalistic discretion, the Court emphasized, is the keynote to the legislative framework of the Communications Act. 37/

The limitations of broadcasting both spawned the fairness doctrine and establish that it is dependent primarily on licensee discretion. Perfect compliance is impossible. No broadcaster can present all colorations of all available public issues. 412 US at 111. Choices have to be made and, assuming that the area is one of protected expression, the choices must be made by those whose mission it is to inform, not by those who must rule. In the words of Chief Justice Burger:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors - newspaper or broadcast - can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which

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32/ 395 US at 393.

33/ Id. at 396.

34/ 412 US 94 (1973).

35/ Business Executives' Move for Peace v. FCC, 146 US App DC 181, 450 F2d 642 [22 RR 2d 2089] (1971).

36/ 412 US at 124.

37/ Id. at 110-11.

there was no acceptable remedy other than a spirit of moderation and a sense of responsibility - and civility - on the part of those who exercise the guaranteed freedoms of expression." 38/

There are no other decisions on the fairness doctrine from the Supreme Court, but this court has had occasion to consider the doctrine in several cases and it has endeavored to maintain the balance between broadcaster freedom and the public's right to know. Commercial advertising cases present different considerations than those before us and we need not reexamine the doctrine as there applied. 39/ More related to the present issue is the public service announcement discussed in Green v. FCC, 40/ where we refused petitioners' request to require a licensee to present a point of view on the Vietnam conflict that had already received extensive coverage. In Green, as in the instant case, there was some initial difficulty in defining the issue allegedly presented in the offending broadcast. We stated that this determination, as well as the decision as to the number of views to be presented and the manner in which they are portrayed, is one initially for the licensee, who has latitude to make all pertinent judgments and is not to be overturned unless he forsakes the standards of reasonableness and good faith. 41/ Reliance on the

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38/ Id. at 124-25. This same thought appears in the Tornillo case, 94 S Ct at 2840 and is obviously an abiding constitutional consideration.

39/ Neckritz v. FCC, ___ US App DC ___, ___ F2d ___ [30 RR 2d 997] (No. 71-1392, June 28, 1974); Friends of the Earth v. FCC, 146 US App DC 88, 449 F2d 1164 [22 RR 2d 2145] (1971); Banzhaf v. FCC, 132 US App DC 14, 405 F2d 1082 [14 RR 2d 2061] (1968), cert. denied, 396 US 842 (1969).

40/ 144 US App DC 353, 447 F2d 323 [22 RR 2d 2022] (1971).

41/ The Commission has said:

> "The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the 'equal opportunities' requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation - as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. See par. 9, Editorializing Report. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'equal opportunities' requirement."
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> In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 [2 RR 2d 1901] (1964).

reasonableness standard, "which is all that is required under the fairness doctrine" 42/ preserves licensee discretion and serves the essential purposes of the fairness doctrine "that the American public must not be left uninformed." 43/

In Democratic National Committee v. FCC, 44/ we faced knotty problems in sorting out the fairness obligations generated by a radio and television address by the President and a reply by the opposition political party. In upholding the Commission decision that the licensees had not abused their discretion, Judge Tamm, writing for the court, stressed the importance of reliance on licensee judgment:

> "By its very nature the fairness doctrine is one which cannot be applied with scientific and mathematical certainty. There is no formula which if followed will assure that the requirements of the doctrine have been met. Procedurally, the doctrine can only succeed when the licensee exercises that discretion upon which he is instructed to call upon in dealing with coverage of controversial issues." 45/

Finding no abuse of discretion, we affirmed.

In Healey v. FCC, 46/ petitioner claimed to be within the ambit of the personal attack rule, which requires the licensee to afford opportunity to reply to an individual attacked in the course of a discussion of a controversial issue of public importance. As in the case now before us, the critical question was whether the broadcast involved a controversial issue of public importance. Petitioner, an American Communist, claimed that her role as a Communist within her community was such an issue. Judge Wilkey, the author of the Green opinion, pointed out that there is a substantial difference between what is newsworthy, i. e., that which is interesting to the public, and what is controversial:

> "Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues." 47/

42/ 144 US App DC at 360, 447 F2d at 330.

43/ Id. at 359, 447 F2d at 329 (emphasis in original).

44/ 148 US App DC 383, 460 F2d 891 [23 RR 2d 2135], cert. denied, 409 US 843 (1972).

45/ Id. at 392, 460 F2d at 900 (emphasis added).

46/ 148 US App DC 409, 460 F2d 917 [23 RR 2d 2175] (1972).

47/ Id. at 414, 460 F2d at 922.

Converting every newsworthy matter into a controversial issue of public importance and requiring editors to "balance" every presentation creates a danger. Again in the words of Judge Wilkey:

> "To characterize every dispute of this character as calling for rejoinder under the fairness doctrine would so inhibit television and radio as to destroy a good part of their public usefulness. It would make what has already been criticized as a bland product disseminated by an uncourageous media even more innocuous." 48/

The principle of deference to licensee judgments, unless the licensee has simply departed from the underlying assumptions of good faith and reasonable discretion, is an integral part of the fairness doctrine, and a fixture that has been reiterated and applied with fidelity by the courts. 49/ It is the backdrop against which Judge Tamm's opinion for the court in the Democratic National Committee case takes note, that

> "in opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine. . . ." 50/

The question is whether NBC has been shown to have exceeded its "wide degree of discretion" in its "Pensions" documentary.

IV. Abstention from Preliminary Issue – Whether Fairness Doctrine Should be Reserved for License Renewals

A preliminary issue has been presented to us by amicus curiae Henry Geller, Esquire, formerly general counsel of the Commission, and a serious student of the fairness doctrine. 51/ Mr. Geller's view is that under the law the FCC could not properly issue the ad hoc fairness ruling on this program, but was limited to consideration of the matter only in connection with NBC's application for renewal of license, and then only to determine if some flagrant pattern of violation of the fairness doctrine is indicated by NBC's overall operation, with a renewal standard, comparable to that voiced in New York

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48/ Id. at 415, 460 F2d at 923.

49/ Brandywine-Main Line Radio, Inc. v. FCC, 153 US App DC 305, 473 F2d 16 [25 RR 2d 2010] (1972), cert. denied, 412 US 922 (1973). Judge Tamm's opinion restated that "[t]he cornerstone of the doctrine is good faith and licensee discretion." That opinion sustained the denial of the application to renew the license only on the ground that the record of the licensee was "bleak in the area of good faith . . . [and] . . . shows an utter disdain for Commission rulings and ignores its own responsibilities as a broadcaster and its representations to the Commission." 153 US App DC at 333, 335-36, 473 F2d at 44, 46-47 (1972).

50/ 148 US App DC at 395, 460 F2d at 903.

51/ See H. Geller, The Fairness Doctrine in Broadcasting: Problem and Suggested Courses of Action, (The Rand Corporation, R-1412-FF, Dec. 1973).

Times v. Sullivan, 376 US 254 (1964), requiring a showing of "malice" – either bad faith, or "reckless disregard" of fairness obligations.

Initially, it appears, it was the FCC's procedure to refer complaints to the station as received, obtain its response, and then consider the matter definitively at renewal in connection with the overall showing of the station. 52/ This practice was being followed in 1959, when the Communications Act was amended to codify the standard of fairness. 53/ In 1962, the Commission changed its procedure to resolve all fairness matters as they arose and, if the station were found to have violated the doctrine, to direct it to advise the Commission within 20 days of the steps taken "to assure compliance with the fairness doctrine." 54/

Mr. Geller puts it that the resulting series of ad hoc fairness rulings "have led the Commission ever deeper into the journalistic process, and have raised most serious problems." 55/ The effect, particularly on the small

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52/ See Testimony of Mr. Joseph Nelson, Chief, FCC Renewal and Transfer Division, Hearings before the Senate Freedom of Communications Subcommittee, March 27, 1961, 87th Cong, 1st Sess, Report 994, Pt. 5, p. 21; see, e.g., Dominican Republic Information Center, 40 FCC 457, 457-588 (1957).

53/ See Section 315(a), 47 USC §315(a); Red Lion Broadcasting Co. v. FCC, supra, 395 US at pp. 380-385.

54/ See Tri-State Broadcasting Co., Inc., 40 FCC 508, 509 (1962). This change apparently occurred in connection with personal attack cases, and was extended without discussion to all fairness cases. The only FCC treatment is in Honorable Oren Harris, 40 FCC 582 [3 RR 2d 163] (1963). Chairman Harris of the House Interstate and Foreign Commerce Committee criticized this new approach, and urged that fairness ". . . be applied periodically (i.e., at the time of renewal) and upon an overall basis." Id. at p. 583. In its response, the Commission gave three reasons for its policy of resolving fairness questions at time of complaint rather than awaiting renewal: (1) It is not fair to the licensee to wait; he should have a chance to contest the fairness ruling by appealing to the courts; (2) awaiting renewal is unfair to the public, which then does not have the opportunity to hear contrasting views, such as in programs dealing with ballot issues; and (3) similarly, it would be unfair to candidates in political campaigns.

55/ Amicus Brief at 3-5. These problems, which are under FCC consideration, may be grouped as follows:

(a) Defining balance or reasonable opportunity to afford contrasting viewpoints on an issue.

(b) The stopwatch problem. Apparently, the FCC has on occasion literally used a stopwatch to time the presentations made on the various sides on an issue. See Concurring Statement of Chairman

[Footnote continued on following page]

broadcaster, has been to inhibit the promotion of robust, wide-open debate. Thus, in a case where the FCC found that a licensee had afforded reasonable opportunity for opposing viewpoints, 56/ the FCC process was long (decision 2 months after broadcast) and arduous. The licensee's burden included not only substantial legal (about $25,000) and other expenses (e.g., travel), but also required top-level station personnel to devote substantial time and attention, with attendant dislocation of regular operational functions. In sum, Mr. Geller says that a substantial inhibiting effect derives not merely from any rulings adverse to the broadcaster, but the strain, time and resources involved in coping with particular challenges even if they are unsuccessful.

Amicus cites expressions in Columbia Broadcasting System v. Democratic National Committee, supra, rejecting a contention (right of access for editorial advertisements) that would involve the government too much in the "day-to-day operations of broadcasters' conduct," and stating the fairness doctrine, in terms of the legislative scheme and purpose, in these terms, 412 US at 127:

> "Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed. The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when."

We have stated the amicus position at some length because we do not wish our opinion to be misunderstood as inadvertent on the point. The position is a

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55/ [Footnote continued from preceding page]

Burch in Complaint of the Wilderness Society against NBC (ESSO), 31 FCC 2d 729, 735-739 [22 RR 2d 1023] (1971). See also Sunbeam TV Corp., 27 FCC 2d 350, 351 (1971).

Even an apparently mechanical stopwatch approach involves sensitive judgments in determining whether particular segments of a program tilt for or against, or are neutral on a particular issue.

(c) The "stop-time" program. During the period of FCC consideration, the licensee may offer additional broadcasts (perhaps, to cover new developments). And these may affect the FCC's judgment on whether reasonable opportunity has been presented. Complaint of Wilderness Society against NBC (ESSO), supra.

56/ Sherwyn M. Heckt, 40 FCC 2d 1150 [28 RR 2d 210] (1973). Licensee KREM-TV editorialized in favor of an Expo 74 for Spokane, and a supporting bond issue. There was a disparity in the time offered for anti-bond viewpoints. The station rejected an anti-bond spokesman, and was held to have a reasonable explanation (the spokesman did not appear to represent groups for which he claimed to speak). The station showed it had actively sought to obtain the views of leading spokesmen for the opposition, and did present them.

serious one, and it deserves serious consideration. 57/ The fact that Red Lion reviewed a particular ruling is no bar, for this point was not raised. Indeed, even as to points that were raised, the Court was careful to say that it would be alert to reexamine its assumptions upon an appropriate showing.

We do not think, however, that the present case is an appropriate vehicle for determination of the contention presented by amicus. It is resisted by petitioners, who seek reversal but not on this basis, which might enhance their risk. Moreover, it was not expressly considered by the Commission. While amicus states that a copy of the underlying study, see footnote 51, supra, was distributed to each Commissioner prior to the Commission's consideration of this case, that is not the same thing as putting the matter in issue in the proceeding. The proposal is one that merits consideration by the Commission before it can be discussed by this court as a legal imperative. 58/ We abstain, then, from any determination in this case concerning the merits of the proposition put by amicus curiae.

V. Application of the Fairness Doctrine to News Documentaries

Our assumption of the propriety of the FCC's current practice that it may make rulings whether particular programs violate the fairness doctrine does not lessen our concern as to those rulings; it rather enhances the need for careful scrutiny, particularly where, as here, a ruling is challenged on the ground that it displaces the judgment entrusted to the broadcast journalist.

A. The Function of the FCC

The principal controversial issue the Commission identified for the "Pensions" program is "the overall performance of the private pension plan system." In NBC's submission, the focus of the program was the existence of abuses, of "some problems in some pension plans." While one understands NBC's point as made, it might be refined as a statement that NBC was engaged in a study in abuses and did not separately examine how pervasive those abuses were. On what basis did the Commission reject NBC's position, and accept AIM's view that the point of the program was the performance of the common run of pension plans?

57/ The specter of renewal jeopardy for failure to comply fully with the fairness doctrine can have a serious inhibiting effect, as the Commission recognized in saying that it would consider refusing renewal only when a most substantial and fundamental issue is presented. See Hunger in America, 20 FCC 2d 143, 150 [17 RR 2d 674] (1969).

58/ Amicus himself recognizes the desirability of particular rulings for the personal attack and political editorializing rules. See Amicus Brief at 14 n. 28: "[T]hese are specific rule situations which do not involve any 'stop-time' or 'stop-watch' considerations. There is also a need for prompt rulings as to political broadcasts."

The staff ruling of May 2, 1973, said this (p. 11):

> "The Pensions program thus did in fact present views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all pension plans. Your judgments to the contrary, therefore, cannot be accepted as reasonable."

One is struck by the palpable flaw in the staff's reasoning. The staff actually put it that because the staff found as a fact that the program was broadly critical of the entire private pension plan system, NBC's contrary judgment "therefore" cannot be accepted as reasonable. The flaw looms the larger, in that it appears in the ruling of the staff of an agency operating under the Rule of Administrative Law. Under that Rule, agencies daily proclaim that their findings of fact must be upheld if reasonable and if supported by substantial evidence, even though there is equal and even preponderant evidence to the contrary, and even though the courts would have found the facts the other way if they had approached the issue independently.

The Commission's opinion of De ember 3, 1973, corrected the staff's error of logic, but it made a mistake of law. It stated (see para. 17, JA 210):

> "The specific question properly before us here is therefore not whether NBC may reasonably say that the broad, overall 'subject' of the 'Pensions' program was 'some problems in some pension plans,' but rather whether the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system." [Emphasis added.]

Thus the Commission ruled that even though NBC was reasonable in saying that the subject of "Pensions" program was "some problems in some pension plans," in determining that this was the essential subject of the program, its dominant force and thrust, nevertheless NBC had violated its obligation as a licensee, because the Commission reached a different conclusion, that the program had the effect "in fact" of presenting only one side of a different subject.

The Commission's error of law is that it failed adequately to apply the message of applicable decisions that the editorial judgments of the licensee must not be disturbed if reasonable and in good faith. The licensee has both initial responsibility and primary responsibility. It has wide discretion and latitude that must be respected even though, under the same facts, the agency would reach a contrary conclusion.

The pertinent principle that the Commission will not disturb the editorial judgment of the licensee, if reasonable and in good faith, is applicable broadly in fairness doctrine matters. It has distinctive force and vitality when the crucial question is the kind raised in this case, i.e., in defining the scope of the issue raised by the program, for this inquiry typically turns on the kind of communications judgments that are the stuff of the daily decisions of the licensee. There may be mistakes in the licensee's determination. But the

review power of the agency is limited to licensee determinations that are not only different from those the agency would have reached in the first instance but are unreasonable. 58a/

In Columbia Broadcasting System v. Democratic National Committee, supra, the Court stressed the wide latitude entrusted to the broadcaster. See 412 US at 110-111:

> "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.
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> . . . . . .

58a/ Subsequent to the preparation of this opinion, a recent notice setting forth the FCC's present views on the fairness doctrine came to our attention. Fairness Doctrine and Public Interest Standards: Fairness Report Regarding Handling of Public Issues, 39 FR 26372 [30 RR 2d 1261] (1974). That order is presently being challenged on appeal in National Citizens Committee v. FCC, No. 74-1700 (DC Cir, filed July 3, 1974). In paragraphs 32-35, the Commission considers the problems in "the determination of the specific issue or issues raised by a particular program." The Commission states: "This would seem to be a simple task, but in many cases it is not. Frequently, resolution of this problem can be of decisional importance. . . . [A] broadcast may avoid explicit mention of the ultimate matter in controversy and focus instead on assertions or arguments which support one side or the other on that ultimate issue. [The Commission offers a hypothetical instance of a heated community debate over a proposed school bond, with the broadcast referring to conditions stressed by advocates of the bond although the spokesman does not explicitly mention or advocate passage of the bond.] [W]e would expect a licensee to exercise his good faith judgment as to whether the spokesman had in an obvious and meaningful fashion presented a position on the ultimate controversial issue [approval of a bond]. . . . If a licensee's determination is reasonable and arrived at in good faith, however, we will not disturb it." Id. at 26376.

We find this exposition congruent with -- and indeed supportive of -- the approach taken in this opinion. The Commission also states, in a preceding section, that on the question whether an issue is "controversial" and of "public importance" it has not been able to develop detailed criteria, and continues (par. 29): "For this very practical reason, and for the reason that our role must and should be limited to one of review, we will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area." Id. at 26376.

While the Supreme Court's recent opinions in non-broadcast areas do not undercut a role for the Commission in the fairness doctrine, the underlying principles underscore the appropriateness of confining that role. In addition to Tornillo, quoted above, see e.g., Gertz v. Robert Welch, Inc., 94 S Ct 2997, 3010 (1974), referring to the "difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not."

"The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations, although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered."

While the government agency has the responsibility of deciding whether the broadcaster has exceeded the bounds of discretion, the Court makes clear that any approach whereby a government agency would undertake to govern "day-to-day editorial decisions of broadcast licenses" endangers the loss of journalistic discretion and First Amendment values. (412 US at 120-21)

What is perhaps most striking and apt for present purposes is the figure used by Chief Justice Burger wherein the licensee is identified as a "free agent" who has "initial and primary responsibility for fairness, balance, and objectivity," with the Commission serving as an "overseer" and "ultimate arbiter and guardian of the public interest." 59/ [Emphasis added.]

Our own decisions 60/ amplify these basic propositions. Judge Tamm's opinion for the court in Democratic National Committee v. FCC, 148 US App DC 383, 460 F2d 891 [23 RR 2d 2035] (1972) serves as a compendium and a wrap-up. That opinion refers to:

(1) Mid-Florida Television Corp., 40 FCC 620, 621 [4 RR 2d 192] (1964), that the mechanics of achieving fairness "is within the discretion of each licensee, acting in good faith."

(2) Applicability of the Fairness Doctrine, 29 FR 10416, 40 FCC 598, 599 (1964):

59/ See 412 US at 117:

"The regulatory scheme evolved solely, but very early the licensee's role developed in terms of a 'public trustee' charged with the duty of fairly and impartially informing the listening and viewing public. In this structure the Commission acts in essence as an 'overseer,' but the initial and primary responsibility for fairness, balance and objectivity rests with the licensee. This role of the Government as an 'overseer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act."

While this part (III) of the opinion of Chief Justice Burger was written for himself and Justices Stewart and Rehnquist, this particular paragraph is not contrary to the views of the other justices.

60/ See Part III, supra.

"[T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation – as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present such viewpoints, and all the other facets of such programming."

(3) The concept that the Commission will "exercise substantial restraint in this area." Id.:

"[T]he Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith."

(4) This court's other opinions 61/ and such references therein as "the permissive 'reasonableness' standard of the fairness doctrine." The court therefore concluded (460 F2d at 903):

"Thus, in opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine. . . ."

The range of journalistic discretion is not limited to the issue of how to comply with the fairness doctrine in the details of presenting both (or more) sides of an issue when the issue has been subsequently defined by the Commission. This would be narrow and artificial. In CBS, the Court, in discussing the broadcaster's "significant journalistic discretion" under the fairness doctrine pointed out that the licensee must consider "such questions as whether the subject is worth considering" (412 US at 111 & n. 9). 62/ And the Court cited with approval a passage, as old as the fairness doctrine itself, wherein the Commission stated that the licensee "is called upon to make reasonable judgments in good faith on the facts of each situation – as to whether a controversial issue of public importance is involved." 63/

Where the Commission has relatively specific rules under the fairness doctrine, as in the personal attack and political editorializing rules, it has a more ample role in determining whether the licensee was in compliance with

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61/ E.g., in Green v. FCC, 144 US App DC 353, 447 F2d 323 [22 RR 2d 2022], and in BEM for Vietnam Peace v. FCC, 146 US App DC at 187, 450 F2d at 648 [22 RR 2d 2089].

62/ Quoting Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1251-2 (1949). See also L. Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv L Rev 768, 772 (1972). "[T]he broadcaster has considerable discretion in operating the doctrine. He is to decide whether a question raises an issue of public importance."

63/ Applicability of the Fairness Doctrine, supra, 40 FCC at 599, approved by the courts in e.g., DNC v. FCC, supra, 148 US App DC at 392, 460 F2d at 900.

his obligations. But when the claim is put in terms of the general obligation concerning controversial issues of public importance, there is primary reliance on the journalistic discretion of the licensee, subject to supervision by the government agency only in case he exceeds the bounds of his discretion. This yields as a corollary that if the broadcast licensee was reasonable in his premise, and his projection of the subject-matter of the program, he cannot be said by the supervising agency to have abused or exceeded his sound discretion.

The FCC's function becomes that of correcting the licensee for abuse of discretion, as our function on judicial review is that of correcting the agency for abuse of discretion.

The Commission in this case agreed that there was wide latitude of journalistic discretion in regard to news and news documentary programs. It said (par. 25), that it "cannot uphold a patently unreasonable exercise of that discretion which would deny the right of the public to be informed as to both sides of a controversial issue which in fact has been presented by such programming." The Commission's reference to "patently unreasonable exercise of discretion" by the licensee, as the standard that warrants agency intervention, captures the spirit of the scope of discretion entrusted to the licensee. We need not dwell on abstract issues such as whether a licensee whose exercise of discretion is unreasonable may validly claim it was not "patently" unreasonable; this is more a matter of mood than rule. In this case, we think it plain that the licensee has not been guilty of an unreasonable exercise of discretion. Where the Commission may have started on the wrong path in its approach is the place where the Commission undertook to determine for itself as a fact whether "the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system." This is not a sufficient basis for overturning the licensee. It is not clear from the Commission's opinion that it also appreciated the need for a finding of abuse of discretion by the licensee in concluding that no controversial issue had been presented. In any event, we are clear that the licensee's discretion was not abused in this respect.

On this issue, whether there was an abuse of discretion in NBC's determination concerning the subject matter of the "Pensions" documentary, the staff – which did see that this was the real issue – proceeded to resolve it adversely to the licensee by concluding that NBC was unreasonable in determining that the subject of the program was some problems of private pension plans. The Commission backed away from that staff conclusion.

A substantial burden must be overcome before the FCC can say there has been an unreasonable exercise of journalistic discretion in a licensee's determination as to the scope of issues presented in the program. Where, as here, the underlying problem is the thrust of the program and the nature of its message, whether a controversial issue of public importance is involved presents not a question of simple physical fact, like temperature, but rather a composite editorial and communications judgment concerning the nature of the program and its perception by viewers. In the absence of extrinsic evidence that the licensee's characterization to the Commission was not made in good faith, the burden of demonstrating that the licensee's judgment was unreasonable to the point of abuse of discretion requires a determination that reasonable

men viewing the program would not have concluded that its subject was as described by the licensee. 64/

Here the Commission concluded that the program involved a controversial issue, namely the overall performance of the private pension plan system. If the agency had free rein to make the critical finding we might well support this conclusion as a reasonable exercise of agency discretion. But here the primary discretion was not vested in the government agency but in the licensee. And the agency could not premise any order on a conclusion contrary to that of the licensee unless it was willing and able to take the additional step – which it deliberately avoided – of finding the licensee's conclusion to be unreasonable. "A conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." 65/

The situation here is unlike the case of an agency's review of a fact finding proposed by its hearing officer. In that situation, it is the agency that has the primary discretion, and it may differ with its hearing officer even though his finding is supported by substantial evidence. 66/ Even there, where the agency has primary discretion, its "departures from the Examiner's findings are vulnerable if they fail to reflect attentive consideration to the Examiner's decision. 67/ Certainly in a situation where it is the licensee that has primary discretion, and his judgment as to dominant impact is substantially supported by responsible persons skilled in judging these matters, this must be given attentive consideration before determining the licensee's judgment was unreasonable.

B. The Function of the Reviewing Court

When an agency purports to exercise regulatory discretion conferred by Congress, a court reviewing its order generally accords wide latitude to the agency. The court has responsibilities and restraints. Its responsibility is to assure that the agency has not abused or exceeded its authority, that every essential element of the order is supported by substantial evidence, and that the agency has given reasoned consideration to the pertinent factors. 68/ The

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64/ In this regard, see the discussion of the conclusions of professional reviewers, part VI. A, infra.

65/ Western Airlines v. CAB, ___ US App DC ___, 495 F2d 145, 152 (1974).

66/ Id. at ___; 495 F2d at 153. Lorain Journal Co. v. FCC, 122 US App DC 127, 351 F2d 824 [5 RR 2d 2111] (1965), cert. denied, 383 US 967 (1966).

67/ Greater Boston Television Corp. v. FCC, 143 US App DC 383, 395, 444 F2d 841, 853 [20 RR 2d 2053] (1970), cert. denied, 403 US 923 (1971), and case cited.

68/ Mobil Oil Co. v. FPC, 94 S Ct 2328 (1974); see also Permian Basin Area Rate Cases, 390 US 747, 791-2 (1968).

restraint arises out of the consideration that industry regulation has been entrusted by Congress "to the informed judgment of the Commission, and not to the preferences of reviewing courts." 69/ If an agency has "genuinely engaged in reasoned decision-making . . . the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards." 70/

In the case of the fairness doctrine, a reviewing court is under the same injunction against injecting its own preferences as the rule of decision. And so when the Commission, in the exercise of its discretion, affirms the licensee's exercise of its discretion, the role of the court is most restricted. 71/ But the court has a greater responsibility than is normally the case, when it reviews an agency's fairness rulings that upset the licensee's exercise of journalistic discretion, both because the area is suffused with First Amendment freedoms 72/ and because Congress has determined that the interest of the public, and its right to know, is furthered by giving primary discretion not to the government agency but instead to the regulated licensee. Congress has sharply narrowed the scope of agency discretion – which the court must see is not exceeded – to a government intervention permissible only for abuse of the licensee's journalistic judgment. If the Commission can claim wide latitude in and deference for its exercise of prerogative to overrule and discard the journalistic judgments of the broadcast licensees, the very premise of the legislative structure is undermined.

In Judge Tamm's phrase, in another case involving a Commission determination that the licensee violated the fairness doctrine, and aspects of intrusion on the licensee's journalistic freedoms: "Not only must the Commission take a hard look at the case in this light but so must this court." 73/

69/ 390 US at 767.

70/ Greater Boston TV Corp. v. FCC, supra, 143 US App DC at 393, 444 F2d at 851.

71/ E.g., DNC v. FCC, supra, 148 US App DC at 404, 460 F2d at 912; Neckritz v. FCC, 446 F2d 501 [22 RR 2d 2142] (9th Cir 1971), citing American Tel. & Tel. v. United States, 299 US 232 (1936).

72/ Compare WAIT Radio v. FCC, 135 US App DC 317, 418 F2d 1153 [16 RR 2d 2107] (1969).

73/ Brandywine-Main Line Radio, Inc. v. FCC, supra, 153 US App DC at 341, 473 F2d at 52 (1972). Judge Wright did not consider the fairness doctrine ruling. Chief Judge Bazelon, dissenting, stated that the Commission's application of the fairness doctrine violated constitutional safeguards.

The general "hard look" doctrine of the Rule of Administrative Law originated in a case reviewing an FCC action, see WAIT Radio v. FCC, supra, though it has been extended to other areas, see e.g., Natural Resources Defense Council v. Morton, 148 US App DC 5, 458 F2d 827 (1972).

To restate, even in a fairness doctrine case the court is not given carte blanche or an authority to interpolate its own discretion or judgment as to what should be done by the agency or what should have been done by the licensee. But a court is properly exercising the high judicial function of assuring that agencies respect legislative mandates 74/ when it studies the record to make certain that the Commission has not interpolated its own judgment and wrested the primary discretion Congress placed in the licensee, without making the requisite showing of abuse of the licensee's journalistic discretion.

C. The Need for Selection Latitude of Broadcast and Investigative Journalism

The doctrine that respects licensee determination, if not unreasonable, concerning the issues tendered in a news broadcast, is a matter of concern for the vitality of broadcast journalism generally, and for investigative journalism in particular.

The Commission's opinion in this case reaffirmed –

> "our recognition of the value of investigative reporting and our steadfast intention to do nothing to interfere with or inhibit it. See WBBM-TV, 18 FCC 2d 124, 134 [16 RR 2d 207] (1969); Hunger in America, 20 FCC 2d 143, 150 [17 RR 2d 674] (1969). "

In Hunger in America, supra, it not only commended CBS "for undertaking this documentary on one of the tragic problems of today" but it undertook to clarify its policy as to a claim that a licensee deliberately distorted the news, to avoid concern lest its inquiry in that case "may tend to inhibit licensees' freedom or willingness to present programming dealing with the difficult issues facing our society. "-20 FCC 2d at 150. It reiterated the ruling of ABC, 16 FCC 2d 650 [15 RR 2d 791] (1969), that it would require extrinsic evidence of e.g., a charge that a licensee staged news events. "Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented – a judgmental area for broadcast journalism which this Commission must eschew. " 16 FCC 2d at 657-58.

In the world of news documentaries, there is inherently an area of "judgment as to what was presented. " And if its judgment is not unreasonable, the licensee cannot fairly be held faithless to fairness doctrine responsibilities.

Investigative reporting has a distinctive role of uncovering and exposing abuses. It would be undermined if a government agency were free to review the editorial judgments involved in selection of theme and materials, to overrule the licensee's editorial "judgment as to what was presented, " though not unreasonable, to conclude that in the agency's view the expose had a broader message in fact than that discerned by the licensee and therefore, under the balancing obligation, required an additional and offsetting program.

74/ National Automatic Laundry & Cleaning Council v. Shultz, 143 US App DC 274, 281, 443 F2d 689, 696 (1971).

The field of investigative exposures, as the Commission has noted, is one in which "[p]rint journalism has long engaged [and] been commended." 75/ and to which broadcast journalism, also part of the press is "no less entitled." E[illegible] for print journalism, not subject to the extreme time coverage limitati[illegible] of broadcasters, a requirement like the Commission's would be considered a "millstone" burdening investigative reporting. We refer to the affidavit supplied to the Commission by J. Edward Murray, associate editor of the Detroit Free Press and immediate past president of the American Society of Newspaper Editors. These are representative excerpts:

> "The whole process of investigative reporting is a complex and sensitive equation involving editors with high purpose and intuition, reporters with skill and courage, and publishers willing to incur heavy expense and the risk of offending both public opinion and advertisers. This equation, as I said, is powered by the drive to correct evils in the society.
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> "If we weight the equation with the requirement that the press look for, and report, good wherever it finds and reports evil, we might as well forget investigative reporting. We will have overwhelmed it with the deadly commonplace of things as they are.
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> "[I]t would be commonplace newspaper procedure that if an editor decided that some private pensions are flawed or useless, and published a typical expose to this effect, the expose would simply assume that the majority of private pension plans were more or less [illegible]n acceptable shape. Otherwise, the forces of both law and busi[illegible]ness would have corrected so obvious a deficiency.
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> "The investigative reporter's thrust is against presumed evils in society. If he must always give an equivalent weight to the good (which is now presumed) in the situation he is investigating, his thrust would become so dulled as to be boring – and unread. Newspapers, including the Detroit Free Press, investigate and expose policemen who are on the 'take' in the dope rackets. If an equivalent weight or time must be given to policemen who are not on the 'take', the whole campaign becomes so unwieldy and pointless as to be useless.
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> "The suggestion of a positive non-expose, in the wake of an original negative expose, falls of its own weight. No one would read it. It would thus be a waste of space. And it would add one more millstone to the already considerable burden of legitimate investigative reporting." (JA 140-42.)

75/ WBBM-TV, 18 FCC 2d 124, 134 [16 RR 2d 207] (1969).

To like effect are affidavits in the record from broadcast journalists. 76/

The basic point merits emphasis: A report that evils exist within a group is just not the same thing as a report on the entire group, or even on the majority of the group. An expose that establishes that certain policemen have taken bribes, or smoked pot, or participated in a burglary ring, is not a report on policemen in general. It may be that the depiction of particular abuses will lead to broader inferences. Certainly severe deficiencies within an industry may reflect on the industry as a whole. When one bank fails, others may suffer a run. But the possible inferences and speculations that may be drawn from a factual presentation, are too diverse and manifold – ranging, as they inevitably must, over the entire span of viewer predilections, characteristics and reactions – to serve as a vehicle for overriding the journalistic judgment.

There is residual latitude in the Commission to condemn the journalist's vision as an unreasonable exercise of discretion. But if the Commission is to condemn a journalist's vision as excessively narrow, it must show that its own vision is broadgauged. Yet here we are reviewing a Commission opinion that says: "It is difficult to see why a network would devote its time and effort to a program with no broad impact or value." (Par. 20.) But abuses in an industry are of interest to the public, and merit a documentary, if they exist in any significant amount, even though they are not the general rule. Failures on automobiles are an example. Yet this obvious underpinning for an editorial judgment to run a limited expose was not referred to by the Commission.

The Commission simply neglected our caution in Healey v. FCC, supra, 460 F2d at 922:

> "Petitioner's basic misapprehension here is a confusion of an issue over newsworthiness with a 'controversial issue of public importance.' Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance."

The point is fundamental. In a case where NBC has made a reasonable judgment that a program relates to, and the public has an interest in knowing about, the "broken promise" abuses that its reporters have identified in various private pension plans, and there is no controversy concerning the existence in fact of such abuses, then the balancing of the fairness doctrine cannot permit the intrusion of a government agency to make its own determination of the subject and thrust of the program as a report that such abuses feature private pensions generally, and with such enlargement to a controversial status to burden the reporting with the obligation of providing an opposing view of the escalated controversy.

76/ An apt example appears in Mr. David Brinkley's affidavit concerning a program he narrated on highway construction: "I did not think at that time that I was obliged to recite (or find someone to recite) that not all highway construction involves corruption, that many highways are built by honorable men, or the like." JA 132-33.

VI. The Present Record Sustains the Licensee's Editorial Judgment Against a Charge of Requisite Bad Faith or Unreasonableness

This is the first case in which a broadcaster has been held in violation of the fairness doctrine for the broadcasting of an investigative news documentary that presented a serious social problem. We have already stated that the Commission used an unsound legal standard in reviewing the licensee's exercise of discretion. What result ensues – on the record before us – from application of the sound legal standard?

A. The Issue as to the Issue

In law, as in philosophy, the task of ascertaining the sound rule or precept often turns significantly on rigor in the statement of the problem. Nowhere is this more the case than in the application of the fairness doctrine, for in regard to the determination that a program raised a "controversial issue of public importance," the first and often most difficult step is "to define the issue." 77/

In holding that "Pensions" presented views advocating only one side of a controversial issue of public importance, the Commission defined that issue in these terms: "that issue being the overall performance of the private pension system and the need for governmental regulation of all private pension plans." (Par. 19.)

In so defining the issue, the Commission overruled NBC's judgment. NBC was called to answer AIM's complaint that NBC had given a one-sided view of a controversial issue of public importance – in its "picture of the private pension system of the United States." 78/ NBC responded that "Pensions" was primarily designed to expose failures found in some private plans rather than to evaluate the overall performance of the private pension system and that the program did not urge any specific legislative or other remedies. 79/

The controversial "issue" identified by the Commission reflects a compound of issues – one, whether problems exist in private pension plans generally, and two, whether overall legislation should be enacted to remedy those problems. In aid of analysis, these issues will be discussed separately.

77/ Green v. FCC, 144 US App DC 353, 359, 447 F2d 323, 329 [22 RR 2d 2022] (1971); Healey v. FCC, 148 US App DC 409, 412, 460 F2d 917, 920 [23 RR 2d 2175] (1972).

78/ AIM also said this was a "distorted" picture, but the FCC dropped the "distortion" charge out of the case. See text accompanying notes 10-13, supra.

79/ Letter of February 14, 1973 to FCC (JA 40), recording NBC's judgment that the program "constituted a broad overview of some of the problems involved in some private pension plans" and "did not attempt to discuss all private pension plans, nor . . . urge the adoption of any specific legislative or other remedies." JA 41.

In our view, the present record sustains NBC as having exercised discretion, and not abused discretion, in making the editorial judgment that what was presented, in the dominant thrust of the program, was an expose of abuses that appeared in the private pension industry, and not a general report on the state of the industry. If this judgment of NBC may stand, there is no showing of a controversial issue. The staff's ruling that NBC was unreasonable in this judgment was not sustained by the Commission. And in our view, the present record does not establish a basis for the conclusion that the licensee's judgmental conclusion may be set aside as unreasonable and as constituting an abuse rather than a permissible exercise of discretion.

1. The description of the program in TV columnist reviews.

NBC offered the Commission an exhibit showing the appraisal of some 25 television critics who reviewed the program, appraisals made contemporaneously, in September, 1972, immediately or shortly after the broadcast. Typically, the critical comments were favorable, reporting that the program was an important and worthwhile public news service, "superlative investigative reporting." Many noted that most viewers were likely glued elsewhere, as was apparently the case, though perhaps one may take heart from Clarence Peterson's observations in the Chicago Tribune: "Most viewers will have watched Marcus Welby instead but it takes only a few hard-nosed skeptics to rattle the cage."

More important for present purposes are the reviewers' descriptions of the program. These appear in Appendix B to this opinion. In general, the reviewers' appraisals of the nature of the program are consistent with NBC's editorial judgment. Examples include the Philadelphia Daily News: "A potent program about pitfalls and failures of some private pension plans of business and unions . . . it was an angry, incisive study that focused on some people who felt cheated by their blind faith in Pensions." More succinct was UPI: "Tough study of the failure of some private pension systems."

The note that the program undercut a "blind faith" in pensions program was struck in a constructive way in reviews like that in the Chicago Tribune: "Pension administrators may face some hard questions from employees when they get to work this morning. If so, NBC Reports will have done its job."

Other comments cut from a different angle. Thus, the review in Business Insurance put it: "The program was by no means objective; it could not have been . . . there was just not enough time to do it thoroughly. [Newman did] point out that there were many good pension plans." The Denver Post said the documentary had "a disorganized approach" and added: "Likewise nothing was said about what makes good pension systems work . . . but NBC should be commended for publicizing a condition of social anarchy." And intervenor AIM brings to our attention that John J. O'Connor in the New York Times has written: "The NBC program strongly implied that 90 percent were failures. The title was, 'Pensions: The Broken Promise,' not 'Pensions: Broken Promises.'" AIM stresses that reviews in the Boston Globe, Chicago Today and Hollywood Reporter, reflected reactions to the program as commenting on the private pension system as a whole.

The Commission's opinion dismissed the newspaper reviews. It stated its determination of the question must rest with the program itself, and added (fn. 4): "Such brief and general one-line summaries provide no information as to what particular views on the subject of pensions may have been presented in the one-hour documentary, and hence are of little value in determining the applicability of the fairness doctrine. . . ."

Obviously, television reviews cannot be conclusive, for the obligation of licensees and the Commission to determine fairness doctrine questions is not delegable. The opinion of this court does not depend in any critical measure on television reviews. Yet we are here concerned, not with some broad question of fairness doctrine responsibility, but with something that is not only closer to a question of fact - the description of the program - but is a matter on which the reviewer is expected to make an accurate report to the public as his primary task. Even if the Commission believed the reviewer to be wrong, it should have considered whether the review did not have more than minimal value on the issue of the NBC's reasonableness in saying that the subject of the program was that of abuses discovered, of some problems in some pension plans. If this was the primary thrust of the program, as discerned by persons trained to view such programs attentively and report their description to the public, it is a substantial factor - though, we repeat, not a conclusive one - to an agency exercising its surveillance role under correct standards of review. As for the Commission's comment that the brief format itself undercuts any significance for these newspaper reviews, this is belied by the quite different reactions recorded in the different newspaper reviews.

2. Application of the correct standard.

If the Commission applied the correct standard of review, the consequence clearly would have been an acceptance of NBC's position as a reasonable statement of the subject of the "Pensions" broadcast. There were a few explicit statements of views on the overall performance of private pension plans that are of no consequence in terms of fairness doctrine, as will be presently seen. */ Otherwise, the plain heft of the program was the recitation of case histories that identified shortcomings of private pensions, and various interviews that identified the abuses in more general terms. But effective presentation of problems in a system does not necessarily generate either comment on the performance of the system as a whole, or a duty to engage in a full study. This is plain from our discussion of investigative journalism.

The licensee does not incur a balancing obligation solely because the facts he presents jar the viewer and cause him to think and ask questions as to how widespread the abuses may be.

The licensee's judgment on an issue of investigative journalism is not to be overturned unless the agency sustains a heavy burden and makes a clear showing that the licensee has been unreasonable, that there has been an abuse of journalistic discretion rather than an exercise of that discretion. We have been presented no basis for sustaining the view that there is such unreasonableness on the part of a licensee who presents undisputed facts - and no party

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*/ In Part V-B.

has contended that the abuses identified by NBC do not exist – because it has failed to treat them as a general indictment of a system.

B. Comments on the "Overall" Performance of the Private Pension Plan

In previous sections of this opinion we have identified the dangers to broadcast journalism, and investigative reporting in particular, if descriptions of abuses in a system are converted inferentially into a broadside commenting adversely on the overall system.

A separate question is presented, however, by the comments in the program that differs from the description of particular evils.

1. Adverse comments on overall performance.

We examine, seriatim, those passages of the "Pensions" program that may be taken as adverse comments on overall performance. We need not refine whether a fairness doctrine obligation is generated by this kind of comment, either alone or with some kind of FCC determination. For in this case, as we shall see, NBC provided offsetting material on the overall performance of pension plans. But this discussion will at least identify our concern with some of the problems. As we shall see, some statements are unquestionably to be given a different reading.

(1) The short passage spoken by a MAN (Tr. 1), who begins that the pension system is essentially a consumer fraud, and ends by saying it is "an insurance contract that can't be trusted." Overall-Adverse.

(2) Edwin Newman's statement (p. 2) that the availability of annual reports filed in the Labor Department "is a meager protection for the twenty-five million Americans who are in private pension plans."

Neither this nor the next sentence, that "very many of the hopes will prove to be empty" says that all, or even most, of the 25 million Americans will be unprotected. The statement that the mere filing of the reports is meager protection hardly seems controversial, as to the "very many" whose pension hopes will be lost by e. g., inability to meet stringent vesting provisions.

(3) Herbert Dennenberg, at Tr. 4: Paragraph ending "most pension funds are inadequate." This is Overall-Adverse – Arguable.

(a) Mr. Dennenberg says that those who retire under the plans typically receive only a thousand dollars a year, which is inadequate even with social security. This is a general comment, but we do not see what has been identified as a controversial issue. AIM's complaint of November 27, 1972, stresses:

> "More than 5 million retired employees are receiving benefits from them [the plans] to the tune of about $7 billion a year."

This datum in AIM's complaint palpably confirms rather than contradicts $1,000 as a typical figure. 80/ But if there is a controversial issue here which requires reference to AIM's datum, then it should be noted that this very fact was brought out on the "Pensions" program by Mr. Russell Hubbard of the National Association of Manufacturers (see Tr. 18).

(b) Whether a $1,000 annual amount is "adequate even with social security, is a value question."

The complaint of inadequacy of pensions is also, perhaps, one meaning that might be given to the caption of "broken promise" – if one posits that there was a promise of an "adequate" retirement income. There is plainly no unreasonable abuse of discretion for the licensee to determine that the complaint of "inadequacy," though surfacing in the program, is simply not the main thrust of the program, which basically turns on whether pension plans do pay out the amounts that were held out to the employees when their work was done, and if not, why not. The FCC, disagreeing with its staff, has held the fairness doctrine would be both unworkable, and an intolerably deep involvement in broadcast journalism, if every single statement, inference, or sub-issue, could be built up into a requirement of countering presentation. 81/

(c) Mr. Dennenberg also says that over half the people will have nothing at all from pension plans. See also Tr. 5: "There have been studies that indicate that most people won't collect." Under current plans, pension rights depend on a combination of longevity, endurance in specified employment for a minimum vesting period, and lack of termination of the plan, and Dennenberg describes this as "an obstacle course."

Again AIM does not contradict the basic fact asserted by Mr. Dennenberg. Its complaint compares 5 million receiving pensions with 30 million workers now covered. But it does not assert that the number who worked under pension plans but have failed to qualify for pensions stands below 5 million. And Mr. Dennenberg's statement is not too different in impact from one in a Washington Post article that AIM lauds as balanced journalism. 82/ Obviously a greater burden would have to be met by the FCC in identifying the existence and nature of a controversial issue of importance.

80/ And AIM later cited with approval a Washington Post article that quoted Mr. Donald Landay of the Bureau of Labor Statistics as saying: "The median benefit being paid is slightly over $100 a month."

81/ In re NBC (Fairness ruling re Aircraft Owners and Pilots Assn.), 25 FCC 2d 735, 736 [20 RR 2d 301] (1970).

82/ After referring to instances of pensions lost by Mr. Duane, and by an employee whose company went out of business, the Post article states:

"These are not simply isolated horror stories. Experts say up to half the 30 to 35 million people now in jobs with pension plans may never receive a cent, because of shifts to another job, company shutdowns or employer bankruptcy – a prospect that threatens millions of Americans with economic insecurity in old age."

The Post article is discussed further in fn. 86 and text thereto.

(4) Senator Harrison Williams (Tr. 4-5). Following a statement by Mr. Newman that many plans have restrictions and exclusions buried in fine print, comes Senator Williams' comment that the plans "suggest the certainty of an assured benefit upon retirement" which gives "a sense of false security."

> "Newman: Senator, the way private pension plans are set up now, are the premises real?
>
> "Williams: The answer is, they are not."

Senator Williams enlarges that he wants descriptions of the realities of plans that are clear and that do not require a lawyer.

Here again we have a general comment on the plans, that the eligibility requirements are not clearly identified. But we do not see wherein this comment has been identified by AIM, the Commission or its staff, as inaccurate, or as presenting a controversial issue.

(5) Victor Gotbaum (Tr. 12).

In these four lines appears: "Pensions in the private area are a mockery." Overall-Adverse.

(6) Edward Kramer (Tr. 12-13): Mr. Kramer and Mr. Gotbaum identify the feelings of people who have retired only to find they are living in squalor. These people, says Mr. Kramer, feel "cheated by the pension system, cheated by social security." This is essentially a complaint of the inadequacy of amounts of payments, rather than denial of pensions. See comment as to Mr. Dennenberg under (3).

(7) Mr. Ralph Nader (at Tr. 18): "I think time is running out. On the private pension systems. And it [sic] its abuses continue to pile up, and if its enormous popular disappointments begin to be more and more revealed, it might collapse of its own weight, and social security will have to take up the slack." Overall-Adverse.

2. Favorable comments on overall performance.

Toward the conclusion of the program, comments were made, by Messrs. Hubbard, of the National Association of Manufacturers, and Anderson of the Bank of America, which the Commission recognized as generally favorable to the performance of the private pension plan system:

> "Hubbard: Over a good number of years, the track record is excellent. It's unfortunate that every now and then some of the tragic cases make the newspapers and the headlines. But it's a question of perspective and balance. When you consider that there are thirty million people covered by the plans, that there are five million people receiving about seven billion dollars in benefits. I think that's a pretty good record. That's not to say that there aren't a few remaining loopholes that need closing but we ought to make sure that we don't throw out the baby with the wash water. (Tr. at 18.)

"Anderson: You must remember that the corporation has set this plan up voluntarily. They have not been required by law to set it up. (Tr. at 18.)

"Anderson: These pension plans are a part of a fringe benefit package. Like hospitalization insurance and so forth, but it's still a voluntary thing on the part of the corporation. (Tr. at 19.)

"Newman: This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said." (Tr. at 19.)

Moreover, Mr. Newman, earlier in the program, made specific reference to some generally good pension programs operated by Teamsters Unions:

"Newman: . . . [I]n most respects, the pension programs run by the Chicago teamsters union locals are among the best. Benefits are generous and a teamster can retire as early as age fifty-seven." (Tr. at 9-10.)

C. Reasonable Balance

As the foregoing shows, there were a handful of comments on "overall performance" of the private pension plan system. Some were favorable, more were adverse, but there was adequate balance of both sides of that issue and reasonable opportunity for presentation of both sides of that issue. The fairness doctrine "nowhere requires equality but only reasonableness." Democratic National Committee v. FCC, supra, 148 US App DC at 397, 460 F2d at 905. On this aspect of the program, the FCC did not say, and in our scrutinizing review we do not consider it could rightfully say, that the licensee had failed to provide a reasonable opportunity for the presentation of contrasting approaches.

We repeat that Mr. Hubbard of N. A. M. brought out the fact given primary stress in AIM's complaint – that 5 million retirees were receiving $7 billion under private pension plans. As for AIM's notation that only 1 percent of pension plans have been terminated, while this precise statistic was not mentioned by Mr. Hubbard, he made the basic point that the overall track record is excellent, and the question is one of perspective and balance.

D. The Non-Controversial Nature of the Issue Whether Some Reform Legislation Should be Enacted.

The FCC concluded that the "Pensions" program "supported proposals to regulate the operation of all private pension plans." NBC does not deny, and it would be patently unreasonable for NBC to deny, that it broadcast its view that there was a need for legislative reform. We refer to Edwin Newman's concluding paragraph, in which he capped his notation that the situation involved various technical problems (portability, funding, insurance, fiduciary relations) by saying (Tr. 20):

"These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.

"Our own conclusion about all of this, is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.

"The situation, as we've seen it, is deplorable."

An entirely different problem is presented by the Commission's conclusion that there was a controversial issue in "the need for governmental regulation of all private pension plans." The Commission stressed (para. 19) that at the time of the program "Congress was engaged in a study of private pension plans and considering proposed legislation for their regulation – legislation which was opposed in whole or in part by various private and public groups and spokesmen."

The fairness doctrine would require that when a controversial bill is pending, if advocates of its passage have access to a licensee's facilities, so must opponents. 83/ But the Commission wholly failed to document its premise that there is a controversial issue in the assertion that there is a need for some remedial legislation applicable generally to pension plans. The record does not support the Commission's statements in its opinion (at para. 16, 23):

". . . NBC does not dispute the Bureau's finding that at the time the 'Pensions' program was broadcast the overall performance and proposed regulations of the private pension system constituted a controversial issue of public importance within the meaning of the fairness doctrine. 3

"3 The Bureau based this finding on AIM's uncontradicted submissions that proposals for the regulation of all private pension plans were pending before the Congress and that such proposals were opposed in whole or in part by 'various groups and spokesmen including the National Association of Manufacturers, several labor unions, the Chamber of Commerce of the United States, and the Nixon administration.' 40 FCC 2d 958, at 967.

. . . . . .

"NBC does not dispute that there are many private and public groups and spokesmen who oppose the view that the overall performance of the private pension system is so 'deplorable' as to require remedial legislation."

83/ In the Matter of Editorializing by Broadcast Licensees, 1-3 FCC 1246, 1250-51 (1949).

There was no occasion for NBC to reply to a claim that was never made. AIM's complaint to the FCC dated November 27, 1972, made no reference whatever to a stand on legislation as a controversial issue; it said criticism of pension plans was such an issue. AIM's letter to NBC dated December 6, 1972, stated that it was struck by a reference in NBC's letter to the FCC that it had concluded that a program on pensions would be timely in view of Senate Reports 92-1150 and 92-1224. AIM added that this bill was opposed by some labor unions, the Chamber of Commerce and the NAM. AIM added: "While your program did not endorse any specific legislative proposal, it did emphasize the need for new regulatory legislation and it pointed out that the Senate Labor Committee had the matter under consideration." From this circumstance, and the fact that Senator Schweiker had inserted the transcript of the Pensions program in the Congressional Record for October 3, 1972, as dramatically showing the need for pension reform, 84/ AIM evolved a contention this was a program "inspired by a contested legislative proposal" and presenting one side of that contest. Neither the staff nor the Commission supported AIM's efforts at such extrapolation or extreme conjecture. 85/

This case does not involve any controversial issue derived from favoring certain specific proposals under consideration by Congress. 86/ And AIM did not contend before the FCC that at the time of the broadcast there were any significant groups opposed in principle to the idea of remedial legislation. Since NBC was not called on to dispute what was not asserted, the staff's statement is lacking in support and too lifeless to be a basis for a key Commission premise.

AIM transmitted a Washington Post article on pensions as one "exemplifying good journalism." In certain respects, the Post article, which recites the case of Stephen Duane (A&P) and others, and states these are not simply isolated horror stories (see fn. 82, supra) resembles the NBC program. In other respects it is different, for the Post article does undertake to examine and analyze the different specific legislative proposals made, and the arguments for and against, including "strong business and Nixon administration opposition to some of the more stringent reform proposals." But the fact that the Post ran an article on specific legislative proposals, their pros and

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84/ 118 Cong Rec, S 16,599 (daily ed. Oct. 3, 1972). Senator Schweiker stated: "This outstanding television special portrayed vividly the plight of the individual worker who is faced with the loss of expected pensions because of situations totally beyond the worker's control."

85/ AIM's pleading in this court goes so far as to say: "AIM has suggested that NBC produced the documentary in collaboration with the promoters of this legislation with the intention of arousing public opinion in favor of the legislation in question." AIM's Opposition to Motion for Expedited Appeal at 3.

86/ What the Post article indicated were controversial issues in regard to legislative matters related to items as to which no sides were taken in the "Pensions" broadcast – such as issues as whether regulation should be by the Labor Department, a new agency, or through the Internal Revenue Code; details of eligibility, vesting formulae, funding, portability, fiduciary duties and disclosure standards.

cons, does not mean NBC was obligated to do so. In NBC's program Edwin Newman said that the question of particular approaches was difficult, beyond the scope of the program and "matters for Congress to consider."

We know as judges, as we knew as lawyers, that there is a profound difference between the kind of materials that can be presented effectively in oral form (on argument) and in written form (in briefs).

NBC specifically pointed out to the Commission on appeal that the Post article esteemed by AIM had stated: "The problem, then, is not whether there will eventually be pension reform legislation, but what kind."

NBC's letter of July 13, 1973, called the Commission's attention to the wide span of sources supporting some form of remedial legislation. 87/ And NBC specifically emphasized that there was no indication of any meaningful view opposing the concept of some reform legislation (JA 163, 171-172):

> "In the 786 page transcript of the most recently published Congressional hearings with respect to pensions, in which 35 witnesses testified on all sides with respect to pensions, not one took the position that some kind of meaningful reform (usually mandated by legislation) of the pension system was unwarranted or should not be instituted. (Hearings of Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, US Senate, 93rd Cong, 1st Sess, 1973). Nor is that view attributed to anyone in the Washington Post article on pensions annexed to Mr. Kalish's letter, the article that has apparently been awarded the AIM imprimatur for 'good' journalism (p. 13)." (Emphasis in original.)

In the light of this record, it is plain that while the "Pensions" program recommended that legislation regulating pension plans be passed, it did not address controversial issues, and there is no reasonable basis for invoking the fairness doctrine on this ground.

VII. Conclusion

The First Amendment is broadly staked on the view that our country and our people – rich in diversity of strains and viewpoint – is best served by widest latitude to the press, as broadening input and outlook, through a robust and uninhibited debate that is subject only to minimum controls necessary for the vitality of our democratic society.

The Court has sustained the fairness doctrine in broadcasting as an instance of a necessary control in the public interest. The broadcaster cannot assert

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87/ The letter noted, inter alia: "Support for some form of remedial legislation has come, for example, from the American Bankers Association, American Life Insurance Association, American Society for Personnel Administration Members, American Society of Pension Actuaries, Chamber of Commerce of the United States, Investment Counsel Association of America and the National Association of Manufacturers.

a right of freedom of press that transcends the public's right to know. But application of the doctrine must still recognize the enduring values of wide latitude of journalistic discretion in the licensee. And when a court is called on to take a "hard look" whether the Commission has gone too far and encroached on journalistic discretion, it must take a hard look to avoid enforcing judicial predilections.

And so it is that a natural judicial tendency to respond to such conditions as conciliation, and recognition of the other's viewpoint in the broad interest of fairness, must yield to a vigilant concern that a government agency is not to intervene or burden or second-guess the journalist given primary discretion and responsibility, unless there is documentation of unreasonableness on the part of the licensee.

The foregoing observations are supported by, and indeed are a distillate of, pertinent decisions – including notably the opinions of the Supreme Court in CBS v. DNC, Tornillo, and Red Lion – all of which have been carefully studied and discussed.

Their application to this case convinces us that the Commission did not guide itself by the appropriate restrictive standards. The Commission has not acted in a rigidly bureaucratic manner, and it has in good faith sought to meet its responsibilities under the Act. There are areas where the Commission's duty of surveillance is considerable, and where there have been abuses on the part of licensees. But we are here concerned with the area of investigative journalism, where there is greatest need for self-restraint on the part of the Commission, and for keen awareness of the inhibitory dimension of impermissible intrusion of a government agency. Investigative journalism is portrayal of evils, and there may be a natural tendency to suspect that the evils shown are the rule rather than the exception. But the question is not the Commission's view of what was broadcast, and what would have been reasonable if it were the Commission's role to determine what should be broadcast, but whether the licensee, who had this role, had been demonstrated to have maintained an approach that was an abuse rather than an exercise of its discretion.

We find no basis for the Commission's conclusion that the need for reform legislation in the pensions field was a controversial issue. There are controversies as to specific proposals, but they were not the subject of the Pensions broadcast.

The complaint is made that a more balanced presentation was made in a newspaper article that did consider specific proposals and their various pro's and con's. But there are different strengths and weaknesses in printed and oral presentation, as lawyers and judges well know, and it would be an impermissible intrusion on broadcast journalism to insist that it adopt techniques congenial to newspaper journalism. This approach might well undercut the particular values, of intensity of communication through interviews, that make broadcast journalism so effective in enhancing public awareness. The fairness doctrine – which rests, says Red Lion, on the distinctive characteristic of broadcasting – cannot be applied by the government to alter broadcasting's distinctive quality.

We have analyzed the various segments of the "Pensions" broadcast, and have not found them to justify the Commission's invocation of the fairness doctrine. We also take account of the Commission's statement that its decision was based upon the "overall impact" of the program. In some fields, the whole may be greater than the sum of its parts – according to the precepts of Gestalt Psychology. In general, however, the evils of communications controlled by a nerve center of Government loom larger than the evils of editorial abuse by multiple licensees who are not only governed by the standards of their profession but aware that their interest lies in long-term confidence. The fairness doctrine requires a demonstrated analysis of imbalance on controversial issues. This cannot be avoided by recourse to a subjective and impressionistic recording of overall impact.

This has not been an easy case to decide. But after sorting out all the strands of decision, we conclude that the Commission has not presented a justification sufficient to sustain its order under review. 88/ The case will be remanded to the Commission with instructions to vacate its order adopted November 26, 1973.

So ordered.

88/ We conclude our opinion on the merits with a brief comment explaining that it has not been mooted by the passage of the Employment Retirement Income Security Act of 1974 (Public Law 93-406) signed by the President on Labor Day, September 2, 1974, while this opinion was being distributed to our colleagues for information, and readied for publication. First, the passage of the act does not technically moot any aspect of this case because legislation is always subject to reconsideration and modification. Second, we think the principle of Southern Pacific Terminal Co. v. ICC, 219 US 498, 515-16 (1911) on recurring controversies is properly invoked.

Third, this opinion sets forth the reasons for maintenance of the stay pending appeal (see note 18 and text thereto). The case was expedited because the pensions bill was on a current legislative time table. Following oral argument on the merits the panel voted, with one dissent, that it would vacate the Commission's order, and continue the stay pending preparation of the opinion. All votes are subject to reconsideration, and if in the course of preparation of the opinion it had become evident that an opinion for reversal "would not write," the court would have reversed course. But the court continued to adhere to its vote, and this opinion on the merits is also, therefore, an opinion explaining why the court continued its stay in effect.

Fahy, Senior Circuit Judge: "I concur in the well reasoned and comprehensive opinion of Judge Leventhal for the court. The opinion upholds the wide latitude to be accorded the press as essential to the mandate of the First Amendment, notwithstanding the limitation upon complete freedom imposed by the Fairness Doctrine which is applicable to broadcasting licensed under the standards of the Communications Act. One may hope that this latitude will not encourage in a different context abuses which, even though protected by the First Amendment, should be discouraged, 1/ or lead to claims of such protection which could not be sustained.

1/ An example of abuses in an important area of national concern is documented in the well-balanced treatment of the relation of television broadcasting to the violence afflicting the nation contained in the Report of the President's National Commission on the Causes and Prevention of Violence (1969). This Commission was composed of an exceptional group of men and women under the Chairmanship of Dr. Milton Eisenhower, distinguished brother of the late President. The Report states in part:

"We do not suggest that television is a principal cause of violence in society. We do suggest that it is a contributing factor. Television, of course, operates in a complex social setting and its effects are undoubtedly mitigated by other social influences. But it is a matter for grave concern that at a time when the values and the influence of traditional institutions such as family, church, and school are in question, television is emphasizing violent, anti-social styles of life.

. . . . . .

"The television industry has consistently argued that its standards for the portrayal of violence and its machinery for enforcement of these standards are adequate to protect the public interest. We do not agree. . . .

. . . . . .

"We believe that the television networks, network affiliates, independent stations, and other members of the broadcasting industry should recognize the strong probability that a high incidence of violence in entertainment programs is contributing to undesirable attitudes and even to violence in American society. It is time for them to stop asserting "not proved" to charges of adverse effects from pervasive violence in television programming when they should instead be accepting the burden of proof that such programs are not harmful to the public interest. Much remains to be learned about media violence and its effects, but enough is known to require that constructive action be taken at once to reduce the amount and alter the kind of violent programs which have pervaded television." pp. 199-202.

The matter of course is aggravated by the lack of adequate control of firearms.

Leventhal, Circuit Judge, supplemental concurring statement:

I append a concurring statement in which I speak for myself, even though I have authored the opinion for the court, because I find that this device, which I have used in other cases, 1/ gives reasonable latitude to offer comments that occurred to me in the course of my researches and reflections on the subject under consideration, but which for one reason or another are not appropriate for the opinion of the court.

. . . . . .

A judge confronted with a problem like this one has a natural tendency, born of his years of lawyering and judging, to try to strike a middle ground between the antagonists – here, between NBC and AIM.

The Commission's recognition of latitude to NBC as to how to give access to an opposing viewpoint tempts a judge to be swayed by the submission of Commission counsel that the "cost of presenting an opposition spokesman should be minimal." 2/

It is doubtless tempting not only to the judge but to counsel for a licensee – particularly if the problem should arise not for a network but as to a station owner – to say: "See if you can't run something that will satisfy the government officials."

What is overlooked is the stultifying burden on journalism. Even the monetary burden is not inconsequential, as the record indicates, and it is no answer to say that the license is profitable, because the problem is that the incremental burden will lead a licensee to acquiesce in the Government's instruction as to what he should broadcast. More important, however, is the unquantified burden, the bureaucrat peeking over the journalist's shoulder.

In the context of the fairness doctrine, the twin principles of latitude for the licensee and narrow review for the Federal Communications Commission merit special vigilance when the question is whether the "issue" in a program of investigative reporting is one of evils described or a broad subject canvassed, because government latitude to redefine the issue enfleshes the specter of a subtle and self-serving government censorship impeding the ventilation of abuses.

While journalists on the public airwaves are subject to fairness doctrine responsibilities, the risks of government interference are so oppressive as to require a plain showing of journalistic abuse before a government official can issue a direction that the journalist's report must be supplemented with a codicil. The danger of intrusion on journalistic discretion is no less real and profound because it rests, at base, in the spirit, in the way men carry

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1/ United States v. Poole, 495 F2d 115 (1974); United States v. Ammidown, 497 F2d 615 (1973); Bellei v. Rusk, 296 F Supp 1247 (D DC 1969) (3-judge court), reversed, 401 US 815 (1971).

2/ Opposition to Motion for Stay, at 16.

on their functions. Journalism in America has had its evils and abuses, but in the large they are outweighed by its achievements in liberating the questing mind and spirit. The public interest pulses in the investigative reporting that depicts whatever evils are seen wherever they are seen, and asks provocative questions.

Journalists may be stifled if they are steered from the way in which their profession looks at things, and channeled to another way, which however congenial to men of the law, dampens the investigative spirit.

> "The major item in the diet of the press is controversy and confrontation. Lawyers are usually working to compose and accommodate differences. The press must try to make simple that which in fact is complex and to suppress factual detail in favor of the emotional jugular. The lawyers pull exactly the other way. "3/

The First Amendment freedoms established in the interest of an informed citizenry "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. Little Rock, 361 US 516, 523 (1960).

Tamm, Circuit Judge dissenting:

This case presents us squarely with questions arising from the head-on collision of First Amendment rights of freedom of the media and the right of the people to know. It requires again "an expression of the pervasive precept of fairness between government and governed that runs thru American jurisprudence. . . ." Trailways of New England, Inc. v. CAB, 412 F2d 926, 931 (1st Cir 1969). Involved is not the so-called "on the spot reporting" which makes up a substantial portion of television newscasts but a documentary type of presentation referred to in these proceedings as investigative reporting. The editorial supervision and selectivity frequently approved in judicial decisions was not herein discharged under the pressure of time considerations essential to the preservation of news values, but permitted, according to representations made to us, the digesting of eighty thousand feet of film into a two thousand foot final product. Most importantly we are not dealing with a printed publication utilizing its private property to disseminate its news and views in the exercise of that freedom of the press which is the central freedom of the whole democratic process. Our petitioner, the National Broadcasting Company, Inc. is the temporary licensee of a right to utilize the public's airways in the public interest and for the public welfare. To me this is the dominant element in distinguishing the rights and obligations of a telecaster from those of the press, which under controlling Supreme Court opinions has an unlimited freedom to report events in the public domain.

No right is absolute. It is elementary that each right carries with it an obligation. In accepting the right to use the public airways our petitioner,

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3/ B. Manning, If Lawyers were Angels: A Sermon in One Canon, 60 ABAJ 821, 822 (July, 1974). Mr. Manning is focusing on the lawyer advising the client as distinguished from the litigating lawyer.

willingly or reluctantly, assumed the obligation of utilizing those airways in the public interest. The public interest in television programming expressed in fundamentals is to know the facts.

Petitioner argues that investigative reporting is somehow a special specie to which the application of a fairness requirement is constitutionally repugnant. The majority opinion supports in substance this position and capsulized into its basic and ultimate holding concludes that fairness, meaning a presentation of both sides of a question of public interest, is not a practically enforceable obligation of a licensee of the public airways. This position means that a telecaster's presentation under the label of investigative reporting of a few factual bones covered with the corpulent flesh of opinion and comment fulfills the obligation of the network to give a fair picture to the public and to assist the public in knowing the facts essential to a determination of basic policies. The majority opinion fails to recognize that as a practical matter there is no real distinction between this type of so-called investigative reporting and propaganda. The investigative reporter, regardless of his initial motivation, too often reaches a point where objectivity disappears and he becomes an ardent advocate for a particular position or viewpoint. Developing a feeling for what might or should be, rather than awareness of what is, he produces a manipulated and selective presentation which ignores all viewpoints and positions other than his own. There is no doubt but that embellishment, color and opinion often prove to be more interesting than objective presentation of both sides of an issue of public interest but is such a production a discharge of the responsibility of the telecaster to give a fair picture and a presentation of all points of view?

The history of democracy is a record of the fear and distrust by the people of unrestrained power. This is the womb in which was gestated the constitutional amendments which we identify as the Bill of Rights. First Amendment guarantees were and are designed to afford the people an effective weapon against the existence or use of d structive and abusive power. Does anyone doubt that a tremendous reservoir of power exists today in the radio and television industry? Are not television and radio newscasters and commentators dominant in the shaping of the public's viewpoints and opinions? Does not their ability to capture the public attention arm them with a weapon of such magnitude that public officials are too often completely subject to their influence? Is it an exaggeration to say that the telecasting industry constitutes a power system comparable if not superior to government itself but basically free of the restraints imposed on government power? We proudly proclaim that in our democracy all power is in the people, but is this power impartially exercised today upon a full knowledge of all facts which affect the public order? The answer is obviously dependent upon the public's ability to learn the facts and again we are face to face with the use which is made of the public airways by the licensees.

I recognize and will readily defend the constitutionally mandated right of the licensed media to exercise its choice of what to report and what not to report. Beyond this the right to editorialize with properly descriptive identification is judicially recognized, but confining my position to the record before us, in the presentation of a so-called investigative or documentary report I believe that there is a legally enforceable obligation on broadcasters to present a

report in which all conflicting positions and viewpoints are fairly portrayed. To require less in my view is to permit an abuse of the public's right to know and a desecration of the license to use the public airways in the public interest.

"Freedom of the Press" as a generic term has long been prominent in the lexicon of judicial opinions. It will never be fully defined because it is not a static phrase with final and permanent meaning. It defines a continuously evolving phenomenon with changing, disappearing, materializing and sometimes almost mystifying significance. Rapid development of the utilization of the public airways as a means of informing the public has placed tremendous power in these media. The fairness doctrine, as the Federal Communications Commission has exercised it in this case, is not a censorship, is not a prior (or subsequent) restraint, is not a usurpation of what the majority describes as "Journalistic Discretion" but is merely a policy that requires in the public interest all viewpoints be presented in factual matters of public interest. The doctrine, as it has been utilized here, is the yeast of fairness in the dough of the telecaster's right to exercise his journalistic freedom. The resulting problem of the Commission is then the securing of responsibility in the exercise of the freedom which the broadcasting industry enjoys. We are asked to rule that on the traditional scales of justice the right of the people to know is outweighed by the claimed right of the telecasters to exercise a constitutional infallibility in determining what the public is entitled to know. I cannot so hold. I would affirm the Commission's action.

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FCC 74-702
18425
39 FR 26372

In the Matter of)
)
The Handling of Public Issues)
Under the Fairness Doctrine and the)
Public Interest Standards of the) Docket No. 19260
Communications Act)

Adopted: June 27, 1974
Released: July 12, 1974

[¶10:315(G)(1)] Inhibitory effect of fairness doctrine.

When a licensee presents one side of a controversial issue, he is not required to provide a forum for opposing views on that same program or series of programs. He is simply expected to make provision for the opposing views in his overall programming. Further, there is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesmen and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith. Complaints received by the Commission are not forwarded to the licensee for comments unless they present prima facie evidence of a violation. For example, the Commission received some 2,400 fairness complaints in fiscal 1973, only 94 of which were forwarded to licensees for their comments. The Commission finds it difficult to believe that these policies add significantly to the overall administrative burdens involved in operating a broadcast station. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Adequate time for discussion of public issues.

Determining what constitutes a reasonable amount of time to be provided for programs devoted to the discussion and consideration of public issues is a responsibility of the individual broadcast licensee. The individual broadcaster is also the person who must select or be responsible for the selection of the particular news items to be reported on the particular local, state, national or international issues or question of public interest to be

considered. Some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Reasonable opportunity for opposing viewpoints.

The Commission rejects the suggestion that individual stations should not be expected to present opposing points of view and that it should be sufficient for the licensee to show that the opposing viewpoint has been adequately presented on another station in the market or in the print media. Congress has given statutory approval to the fairness doctrine, including the requirement that broadcasters themselves provide an opportunity for opposing viewpoints. It would be an administrative nightmare for the Commission to attempt to review the overall coverage of an issue in all the broadcast stations and publications in a given market. Perhaps most importantly, the requirement that each station provide for contrasting views greatly increases the likelihood that individual members of the public will be exposed to varying points of view. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] What is a controversial issue of public importance.

As to whether an issue is "controversial", and of "public importance," the Commission will continue to rely heavily on the reasonable, good faith judgments of licensees. An issue is not necessarily a matter of significant "public importance" merely because it has received broadcast or newspaper coverage. Nevertheless, the degree of media coverage is one factor which clearly should be taken into account in determining an issue's importance. It is also appropriate to consider the degree of attention the issue has received from government officials and other community leaders. The principal test of public importance, however, is a subjective evaluation of the impact that the issue is likely to have on the community at large. The question of whether an issue is "controversial" may be determined more objectively. It is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Reasonable opportunity for contrasting viewpoints.

The obligation to present contrasting views cannot be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. The licensee must play a conscious and positive role in encouraging the presentation of opposing viewpoints. The Commission does not believe, however, that it is necessary for it to establish a formula for all broadcasters to follow in their efforts to find a spokesman for an opposing viewpoint. If a licensee fails to present an opposing viewpoint on the ground that no appropriate spokesman is available, he should be prepared to show that he has made a diligent, good faith effort to communicate to such potential spokesmen his willingness to present their views on the issue presented. In cases involving major issues discussed in depth, such a showing should include specific offers of response time to appropriate individuals in addition to general over-the-air announcements. In evaluating a "spectrum" of contrasting viewpoints on an issue, the licensee should make a good faith effort to identify the major viewpoints and shades of opinion being debated in the community, and to make provision for their presentation. As to the selection of a spokesman and the format, licensees have a duty not "to stack the cards" by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Complaint procedure.

The Commission believes that its present procedure of reviewing fairness complaints on an ongoing basis is preferable to reviewing complaints when a station's license comes up for renewal. It would not be possible to make an overall assessment of licensee performance at renewal time without considering the specifics of individual complaints. Consideration of complaints only at renewal time would be an inadequate safeguard of the public's paramount right to be timely informed on public issues. A review only at renewal time would also remove a major incentive for interested citizens to file fairness complaints – that is, the chance to have an opposing view aired before the issue has become stale. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Complaint procedure.

The Commission does not require that fairness complainants constantly monitor a station to determine whether the licensee has presented opposing views on controversial issues of public importance. The claim might be based on an assertion that the complainant is a regular listener or viewer, e.g., a viewer who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station. An assumption that a station has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners join together in a statement that they have not heard a presentation of that viewpoint. In responding to an inquiry from the Commission, a station is not required to research everything it has broadcast on the subject over a considerable period of time, unless it believes it is necessary to do so in order to establish its compliance with the fairness doctrine. If the complainant specifies only a single program, it would be sufficient for the licensee to furnish evidence of having broadcast another program which afforded a reasonable opportunity for contrasting views. The Commission suggests that the keeping of records of public issue programming would make it easier for a licensee to satisfy himself that his station has achieved fairnes on the various issues presented. Complainants should first go to the station or network involved before coming to the Commission. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Fairness Doctrine – editorial advertising.

Some "commercials" actually consist of direct and substantial commentary on important public issues. For the purpose of the fairness doctrine, these announcements should be recognized as editorials paid for by the sponsor. There is no reason why the fairness doctrine should not apply to these "editorial advertisements" in the same manner that it applies to the commentary of a station announcer. For example, the fairness doctrine would apply to a 30-second announcement sponsored by an organization urging a constitutional amendment to override the Supreme Court's abortion decision. The doctrine may also be applicable to promotional or institutional advertising designed to present a favorable image of a particular corporation or industry. Licensees are expected to do nothing more

than to make a reasonable, common sense judgment as to whether the "advertisement" presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1), ¶10:315(G)(2)] Product or service advertising.

If in the future the Commission is confronted with a case similar to that presented by the cigarette controversy, it may be more appropriate to refer the matter to Congress for resolution. It is questionable whether the Commission has a mandate so broad as to permit it to scan the airwaves for offensive material with no more discriminating a basis than the "public interest" or even the "public health". The Commission does not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. In the future, the Commission will apply the fairness doctrine only to those "commercials" which are devoted in an obvious and meaningful way to the discussion of public issues. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Federal Trade Commission proposal.

The Commission will not adopt a proposal of the Federal Trade Commission to create a right of access to respond, in effect, to all product commercials. The decision to cover consumer issues appropriately lies with individual licensees in fulfillment of their public trustee responsibilities. The fairness doctrine does not provide an appropriate vehicle for the correction of false and misleading advertising. If an advertisement is found by the FTC to be false and misleading, the proper course is to ban it altogether. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Access to broadcast media for discussion of public issues.

The Commission has not found any scheme of Government-dictated access (free or paid) to the broadcast media for discussion of public issues which is both practicable and desirable. On the contrary, the public's interest in free expression

through broadcasting will best be served and promoted through continued reliance on the fairness doctrine. Fairness Doctrine, 30 RR 2d 1261 [1974].

[¶10:315(G)(1)] Fairness Doctrine - ballot propositions.

With respect to ballot propositions, such as referenda, initiative or recall propositions, bond proposals and constitutional amendments, the fairness doctrine will be applied. Fairness Doctrine, 30 RR 2d 1261 [1974].

FAIRNESS REPORT

By the Commission: (Commissioner Hooks concurring in part and dissenting in part and issuing a separate statement; Commissioner Quello concurring and issuing a separate statement.)

I. Introduction

1. By Notice issued June 11, 1971 (Docket No. 19260, 30 FCC 2d 26), we instituted a broad-ranging inquiry into the efficacy of the fairness doctrine and related public interest policies. Observing that almost 22 years had passed since we last gave comprehensive consideration to the fairness doctrine, 1/ we stated that the time had come for a reassessment and clarification of basic policy. While we noted that in view of Sections 315(a) and 3(h) of the Communications Act, the Commission could not "abandon the fairness doctrine or treat broadcasters as common carriers who must accept all material offered by any and all comers," we did emphasize that these statutory standards were broad in nature and that therefore "there can and must be considerable leeway in both policy formulation and application in specific cases." In this regard, we asked that interested parties formulate their specific comments in light of two general but fundamental considerations of Commission policy. First, in view of the profound, unquestioned national commitment embodied in the First Amendment, our goal in this area must be to foster "uninhibited, robust, wide-open" debate on public issues. New York Times Co. v. Sullivan, 376 US 254, 270 (1964). Our inquiry was therefore directed in primary part to the question of whether the Commission's application of the doctrine has indeed been consistent with that goal and has promoted it to the maximum extent. Secondly,

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1/ The Commission's first general statement on fairness doctrine principles was set forth in the Report on Editorializing by Broadcast Licensees, 13 FCC 1246 [25 RR 1901] (1949). Briefly stated, "the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 US 94, 111 [27 RR 2d 907] (1973) (hereinafter cited as BEM).

we also stressed that any promotion of this objective must be compatible with the public interest in "the larger and more effective use of radio." 47 USC §303(g). Noting that ". . .to a major extent, ours is a commercially-based broadcast system and that this system renders a vital service to the nation," we emphasized that "[a]ny policies adopted by this Commission. . . should be consistent with the maintenance and growth of that system and should, among other appropriate standards, be so measured." These basic policy considerations have led the Commission to initiate this inquiry and have continued to guide us in the review and reformulation of the fairness doctrine set forth in this Report.

2. To facilitate consideration of the many complex problems involved, we divided the inquiry into four parts, entitled: II. The Fairness Doctrine Generally; III. Application of the Fairness Doctrine to the Broadcast of Paid Announcements; IV. Access Generally to the Broadcast Media for the Discussion of Public Issues; and V. Application of the Fairness Doctrine to Political Broadcasts. 2/ Interested parties were invited to comment on any issue or aspect of these subjects. We have received and reviewed the written comments of numerous parties representing the advertising and broadcasting industries, labor unions, public interest, environmental and consumer groups, law schools, and other interested individuals and organizations. 3/ Finally, in March 1972, we devoted a full week to panel discussions and oral arguments on the issues raised in this inquiry. Some fifty persons participated in the panel discussions and about thirty additional persons presented oral argument to the Commission. While this Report does not specifically address every suggestion which has been raised in the proceeding, we have given them all careful consideration in reaching the conclusions and policy judgments set forth herein.

II. The Fairness Doctrine Generally

A. Broadcasting and Free Speech

3. We believe that it is appropriate to begin or evaluation of the fairness doctrine with a consideration of the underlying purposes of the doctrine and its

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2/ The Commission's First Report – Handling of Political Broadcast, 36 FCC 2d [24 RR 2d 1917] (1972), was issued on June 22, 1972, and dealt with the issues raised in Part V of the inquiry. A copy of this First Report is attached hereto as Appendix A [Appendix omitted]. We expedited consideration of this portion of the inquiry in order to clarify and treat the major questions presented therein prior to the 1972 general election campaign period. We believe, however, that it is desirable in the context of this Report to supplement our treatment of the political fairness issues discussed in our First Report.

3/ A list of major contributors can be found in Appendix B [omitted]. Some submitting comments after filing deadlines may not be included therein.

[Footnote continued on following page]

relationship to freedom of speech. In 1949, we set forth the basic premises of the doctrine in these terms:

> "It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." Report on Editorializing, 13 FCC 1246, 1249 [25 RR 1901] (1949).

4. At first appearance, this affirmative use of government power to expand broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision or control. Throughout most of our history, the principal function of the First Amendment has been to protect the free marketplace of ideas by precluding governmental intrusion. However, the continuing evolution of the media of mass communications – both technologically and in terms of concentration of control – has led gradually to a different approach to the First Amendment. This approach – an affirmative one – recognizes the responsibility of government in maintaining and enhancing a system of freedom of expression. See generally T. Emerson, The System of Freedom of Expression, chapter XVII (1970).

5. In the 1949 Report on Editorializing, the Commission expressed the view that a requirement that broadcast licensees present contrasting views on public issues was "within both the spirit and letter of the First Amendment." 13 FCC at 1956. This conclusion was based, in large measure, on the decision of the Supreme Court in Associated Press v. United States, 326 US 1 (1945), which concerned anti-competitive practices in the newspaper industry. In that decision, the Court emphasized the affirmative aspects of the First Amendment:

3/ [Footnote continued from preceding page]

Over 20 parties filed comments and/or replies in Part II; over 40 parties filed in Part III(an additional 71 comments were received in response to the statement of the Federal Trade Commission in Part III); more than 30 comments were filed in Part IV; and approximately 15 comments in Part V.

"It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of the information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom." 326 US at 20.

6. In the field of broadcasting, the principal impediment to free expression arises not from any anti-competitive practices, but from the physical characteristics of the medium itself. Practical experience in the early years of radio made it obvious that a complete laissez-faire policy on the part of the government would lead to the destruction of effective radio communication and thus to a frustration of the basic goals of the First Amendment. For a brief period during the nineteen twenties, government regulation of broadcasting was virtually non-existent, and broadcasters had the same freedom of action traditionally afforded the publishers of newspapers or magazines. The underlying policy was that "anyone who will may transmit." 67 Cong. Rec. 5479 (1926) (remarks of Congressman White). The results of this system were disastrous both for the broadcasting industry and for the listening public:

"From July 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927 almost 200 new radio stations went on the air. These new stations used any frequency they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard." FCC Office of Network Study, Second Interim Report on Television Network Procurement, 65-66 (1965).

7. In 1927, Congress acted to end the crisis by establishing an effective system of government licensing. It would have been unthinkable, of course, for the government to have been in the business of deciding who could publish newspapers and magazines and who could not. In purely practical terms, however, it was obvious that licensing was essential to the development of an effective system of broadcasting. In the case of National Broadcasting Co. v. United States, 319 US 190 (1943), the Supreme Court concluded that, because of the scarcity of available frequencies, the licensing system established by Congress did not violate the First Amendment. In an opinion written by Justice Frankfurter, the Court found that the freedom of speech did not include "the right to use the facilities of radio without a license." Id. at 227. It made it clear, furthermore, that the Commission was not limited to the role of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other." Id. at 215. "[T]he Act," the Court held, "does not restrict the Commission merely to supervision of the traffic. It puts upon the

Commission the burden of determining the composition of that traffic." Id. at [illegible]16. But, while the NBC case did establish an expansive view of Commission powers, it still left a great many First Amendment questions unanswered.

8. Some twenty-six years later, in the landmark decision in Red Lion Broadcasting Co. v. FCC, 395 US 367 [16 RR 2d 2029] (1969), the Court set forth a comprehensive First Amendment theory which vindicated both the licensing system and the Commission's fairness doctrine. Justice White, writing for a unanimous Court, reaffirmed Justice Frankfurter's thesis that because of the scarcity factor, licensing was permissible. 4/ The First Amendment, in the Court's opinion, did not confer upon anyone the right to operate a radio station:

> "[I]f there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licensees so as not to overcrowd the spectrum" Id. at 389.

It was thus concluded that the basic purposes of the First Amendment would be undermined if there were "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id. at 388.

9. While the licensing system was thus designed to further First Amendment interests in the broadcast medium, it was necessary to define those interests and identify their focus and means of implementation. 5/ Should the licensees chosen by the government be accorded an absolute and unrestricted right to advance their own views to the exclusion of those of their less privileged fellow citizens? Or should there be some provision made to insure the recognition of the First Amendment interests of those citizens who are of necessity denied the opportunity to operate a broadcasting station? In language strikingly close

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4/ This scarcity principle is not predicated upon a comparison between the number of broadcast stations and the number of daily newspapers in a given market. The true measure of scarcity is in terms of the number of persons who wish to broadcast and, in Justice White's language, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate." 395 US at 388.

5/ Professor Emerson has outlined this problem in the following terms:
> "[o]nce it is assumed that a scarcity of broadcasting facilities exists the next question becomes, what follows from that? . . . In purely common-sense terms it would seem to follow that, if the government must choose among applicants for the same facilities, it should choose on some sensible basis. The only sensible basis is the one that best promotes the system of freedom of expression." T. Emerson, The System of Freedom of Expression 663 (1970).

to that found in our earlier Report on Editorializing, the Red Lion Court stated that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id. at 390. While private businessmen were licensed to operate radio stations, "[t]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purpose of the First Amendment." Ibid. (emphasis supplied). That Amendment, as it has long been recognized, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." Associated Press v. United States, 326 US 1, 20 (1945). In this respect, the purpose of the First Amendment is not simply to protect the speech of particular individuals, but rather to preserve and promote the informed public opinion which is necessary for the continued vitality of our democratic society and institutions. As the Supreme Court has elsewhere stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government," Garrison v. Louisiana, 379 US 64, 74-5 (1964), and "[t]hose guarantees [of the First Amendment] are not for the benefit of the press so much as for the benefit of all of us," Time, Inc. v. Hill, 385 US 374, 389 (1966).

10. In light of this fundamental purpose of the First Amendment and the paramount right of the public to have that purpose implemented in the broadcast medium, it became clear that the license granted by the government to a chosen few could not be considered as a privilege to "ignore the problems which beset the people or . . . exclude from the airways anything but their own views of fundamental questions." 395 US at 394. As the Red Lion Court stated, "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government had denied others the right to use." 395 US at 391. Rather, the constitutional status of the broadcast licensee was identified in the following terms:

> "[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." Id. at 389.

11. Thus, in the context of the scarcity of broadcast frequencies and the resulting necessity for government licensing, the First Amendment impels, rather than prohibits, governmental promotion of a system which will ensure that the public will be informed of the important issues which confront it and of the competing viewpoints on those issues which may differ from the views held by a particular licensee. The purpose and foundation of the fairness doctrine is therefore that of the First Amendment itself: "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." 395 US at 390. In accordance with this view and theory, the Court in Red Lion held that

"It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press." 395 US at 394.

12. That the government should act affirmatively to preserve and promote the greater listening and viewing public's First Amendment interests in broadcasting is a concept which some quarters still find difficult to accept. But while arguments have been and will continue to be made as to the wisdom of the fairness doctrine and its application in particular cases, its statutory support 6/ and constitutionality are firmly established. BEM, 412 US 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 US 367 (1969).

13. Although the legality of the fairness doctrine is thus well-established, Chief Judge Bazelon of the District of Columbia Circuit has suggested that the time has come for "the Commission to draw back and consider whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances. . . ." Brandywine-Main Line Radio, Inc. v. FCC, 473 F2d 16, 80 [25 RR 2d 2010] (DC Cir. 1972) (dissenting opinion). We believe, however, that the problem of scarcity is still very much with us, and that despite recent advances in technology, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate." Red Lion Broadcasting Co. v. FCC, 395 US at 388. The effective development of an electronic medium with an abundance of channels (through the use of cable, or otherwise) is still very much a thing of the future. For the present, we do not believe that it would be appropriate – or even permissible – for a government agency charged with the allocation of the channels now available to ignore the legitimate First Amendment interests of the general public. We recognize, however, that there exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's legitimate First Amendment interests. It is with a real sensitivity to this potential danger and an equal awareness of our responsibilities to promote the ends and purposes of the First Amendment that we have confronted the task of restating and reformulating our approach to the

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6/ From the earliest days of radio regulation, it was recognized that a standard of fairness was an essential element of regulation in the "public interest." Great Lakes Broadcasting Co., 3 FRC Ann Rep 32, 33 (1929), rev'd on other grounds, 59 App DC 197, 37 F2d 993, cert. dismissed, 281 US 706 (1930). In 1959, Congress specifically amended the Communications Act so as to vindicate the Commission's view that fairness inhered in the general public interest standard of the Act. 47 USC §315(a); see Red Lion Broadcasting Co. v. FCC, 395 US at 380-81.

fairness doctrine and the broadcasters' obligations thereunder. 7/

B. Does the Fairness Doctrine Inhibit Broadcast Journalism?

14. A number of commentators have argued that, in spite of its worthy purposes, the actual effect of the fairness doctrine can only be to restrict and inhibit broadcast journalism. Far from inhibiting debate, however, we believe that the doctrine has done much to expand and enrich it.

15. We have already noted that, stripped to its barest essentials, the fairness doctrine involves a two-fold duty: (1) the broadcaster must devote a reasonable percentage of this broadcast time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view. It is impossible to believe that the first of these obligations could hamper broadcast news and commentary in any way. While such a requirement might be viewed as a restriction on the broadcaster as a businessman, there is no doubt that "it is a positive stimulus to broadcast journalism." Wood, Electronic Journalism 127 (1967).

16. We do not believe that the second part of the fairness doctrine should inhibit broadcast journalism any more than the first. It has frequently been suggested, however, that many broadcasters will avoid the coverage of controversial issues if they are required to present contrasting views. These broadcasters, it is argued, will find the opposing viewpoints too offensive, or their presentation too disruptive to their broadcast schedules, too expensive (assuming they are unable to find sponsorship for the presentation of contrasting views), or simply too much trouble. Our first response to this argument is that it represents an attitude which is completely inconsistent with the broadcaster's role as a public trustee. 8/

7/ Judge Skelly Wright of the District of Columbia Circuit has made the following observations with regard to the difficulties inherent in fairness regulation:

> "The problems of figuring out the right thing to do in this area – the system that will best serve the public's First Amendment interest – are enormous. In some areas of the law, constitutional values are clearly discernible, as where one is required to balance some right protected by the Constitution against an asserted countervailing governmental interest. . . .[I]n some areas of the law it is easy to tell the good guys from the bad guys. In the current debate over the broadcast media and the First Amendment, however, each debater claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication." Commencement address, National Law Center, George Washington University, Washington, D.C., June 3, 1973.

8/ We concur with the views expressed on this subject by former Commissioner Cox several years ago:

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The Supreme Court in Red Lion considered the possibility that fairness principles might have a "chilling effect" on broadcast journalism, and found that this

> "possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard. It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect." 395 US at 393.

In the years since Red Lion was decided, we have seen no credible evidence that our policies have in fact had "the net effect of reducing rather than enhancing the volume and quality of coverage."

18. In evaluating the possible inhibitory effect of the fairness doctrine, it is appropriate to consider the specifics of the doctrine and the procedures employed by the Commission in implementing it. When a licensee presents one side of a controversial issue, he is not required to provide a forum for opposing views on that same program or series of programs. He is simply expected to make a provision for the opposing views in his overall programming. Further, there is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesmen and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith.

19. As a matter of general procedure, we do not monitor broadcasts for possible violations, but act on the basis of complaints received from interested citizens. These complaints are not forwarded to the licensee for his comments

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8/ [Footnote continued from preceding page]

> "[a]s a trustee for the public, a broadcaster must use his facilities to enlighten the public about the critical issues which it faces, and this obviously requires substantial effort and may involve presenting some viewpoints with which the licensee totally disagrees. But so long as he is permitted to express his own view editorially with respect to the matters discussed and is allowed to choose the formats to be employed and the spokesmen for the respective positions, he cannot, it seems to me, claim that his freedom to report and analyze the news has been impaired." Cox, The FCC and the Future of Broadcast Journalism in Survey of Broadcast Journalism 1969-1970 at 115.

unless they present prima facie evidence of a violation. Allen C. Phelps, 21 FCC 2d 12 [17 RR 2d 1113] (1969). Thus, broadcasters are not burdened with the task of answering idle or capricious complaints. By way of illustration, the Commission received some 2,400 fairness complaints in fiscal 1973, only 94 of which were forwarded to licensees for their comments.

20. While there may be occasional exceptions, we find it difficult to believe that these policies add significantly to the overall administrative burdens involved in operating a broadcast station. It is obvious that any form of governmental regulation will impose certain costs or burdens of administration on the industry affected. The point is not whether some burden is involved, but rather whether that burden is justified by the public interest objective embodied in the regulation. Broadcasters are licensed to act as trustees for a valuable public resource and, in view of the public's paramount right to be informed, some administrative burdens must be imposed on the licensee in this area. These burdens simply "run with the territory." Furthermore, any licensee who might be discouraged by such a burden will have to take into account this Commission's requirement that he must provide a forum for the discussion of public issues. The Supreme Court has made it clear and it should be reemphasized here that "if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues." Red Lion Broadcasting Co. v. FCC, 395 US at 393.

C. The Specifics of the Fairness Doctrine

21. In developing and implementing the fairness doctrine it has never been our intention to force licensees to conform to any single, preconceived notion of what constitutes the "ideal" in broadcast journalism. Our purpose has merely been to establish general guidelines concerning minimal standards of fairness. We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. Fairness Doctrine Primer, 40 FCC 598, 599 [2 RR 2d 1901] (1964). In this regard, we are still convinced that

> "there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." Report on Editorializing, 13 FCC 1246, 1251 (1949).

22. It is obvious that under this method of handling fairness, many questionable decisions by broadcast editors may go uncorrected. But, in our judgment, this approach represents the most appropriate way to achieve "robust, wide open debate" on the one hand, while avoiding "the dangers of censorship and pervasive supervision" by the government on the other. Banzhaf v. FCC, 405 F2d 1082, 1095 [14 RR 2d 2061] (DC Cir. 1968), cert. denied sub nom. Tobacco Institute v. FCC, 396 US 842 (1969). In this respect, we are not unmindful of the dangers alluded to by the Court in BEM:

Congress appears to have concluded. . . that of these two choices – rivate or official censorship – Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." 412 US 94 at 105.

We therefore recognize that reaching a determination as to what particular policies will best serve the public's right to be informed is a task of "great delicacy and difficulty," and that the Commission must continually walk a "tightrope" between saying too much and saying too little. Id. at 102, 117. However, we also believe that this Commission has a clear responsibility and obligation to assume this task.

1. Adequate Time for the Discussion of Public Issues

23. The first, and most basic, requirement of the fairness doctrine is that it establishes an "affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues. . . ." Report on Editorializing, 13 FCC at 1249. Determining what consitutes a "reasonable amount of time" is – like so many other programming questions – a responsibility of the individual broadcast licensee. It is the individual broadcaster who, after evaluating the needs of his particular community, "must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than t[illegible]ther legitimate services of radio broadcasting. . . ." Id. at 1247.

2[illegible] In reviewing the adequacy of the amount of a licensee's public issue programming, we will, of course, limit our inquiry to a determination of its reasonableness. We wish to make it plain, however, that we have allocated a very large share of the electromagnetic spectrum to broadcasting chiefly because of our belief that this medium can make a great contribution to an informed public opinion. See Democratic National Committee, 25 FCC 2d 216, 222 [19 RR 2d 977] (1970). We are not prepared to allow this purpose to be frustrated by broadcasters who consistently ignore their public interest responsibilities. Indeed, "we regard strict adherence to the fairness doctrine" – including the affirmative obligation to provide coverage of issues of public importance – "as the single most important requirement of operation in the public interest – the 'sine qua non' for grant of a renewal of license." Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 292 [19 RR 2d 1103] (1970).

25. The individual broadcaster is also the person "who must select or be responsible for the selection of the particular news items to be reported or the particular local, state, national or international issues or questions of public interest to be considered. . . ." Report on Editorializing, 13 FCC at 1247. 9/ We have, in the past, indicated that some issues are so critical or

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Ordinarily, the problems which are identified by a station's ascertainment of its community's needs and interests would be featured prominently in

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of such great public importance that it would be unreasonable for a licensee to ignore them completely. See Gary Soucie (Friends of the Earth), 24 FCC 2d 743, 750-51 [19 RR 2d 994] (1970). But such statements on our part are the rare exception, not the rule, and we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community.

26. We wish to emphasize that the responsibility for the selection of program material is that of the individual licensee. That responsibility "can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments." Report on Editorializing, 13 FCC at 1248. We believe that stations, in carrying out this responsibility, should be alert to the opportunity to complement network offerings with local programming on these issues, or with syndicated programming.

2. A Reasonable Opportunity for Opposing Viewpoints

27. The usual fairness complaint does not involve an allegation that the licensee has not devoted sufficient time to the discussion of public issues. Rather, it concerns a claim that the licensee has presented one viewpoint on a "controversial issue of public importance" and has failed to afford a "reasonable opportunity for the presentation of contrasting viewpoints."

28. It has frequently been suggested that individual stations should not be expected to present opposing points of view and that it should be sufficient for the licensee to demonstrate that the opposing viewpoint has been adequately presented on another station in the market or in the print media. See WSOC Broadcasting Co., 17 P&F Radio Reg. 548, 550 (1958). While we recognize that citizens receive information on public issues from a variety of sources, other considerations require the rejection of this suggestion. First, in amending Section 315(a) of the Communications Act in 1959, Congress gave statutory approval to the fairness doctrine, including the requirement that broadcasters themselves provide an opportunity for opposing viewpoints. See BEM, 412 US at 110, note 8. 10/ Second, it would be an administrative nightmare for this

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9/ [Footnote continued from preceding page]

the list of public issues selected by the station for program coverage. See generally, Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650 [21 RR 2d 1507] (1971).

10/ One United States Senator has proposed that it might be desirable to apply the fairness doctrine only where less than four broadcast signals are received in a given area. See 119 Cong. Rec. S20358-62 (November 14, 1973) (remarks of Senator Ervin). We believe that such a proposal is clearly beyond our statutory authority. However, it may be appropriate at some future date to examine the possibility of a different application of the fairness doctrine to new technologies of electronic communication or of a different application in broadcast markets of varying size.

Commission to attempt to review the overall coverage of an issue in all of the broadcast stations and publications in a given market. Third, and perhaps most importantly, we believe that the requirement that each station provide for contrasting views greatly increases the likelihood that individual members of the public will be exposed to varying points of view. The fairness doctrine will not insure perfect balance in debate and each station is not required to provide an "equal" opportunity for opposing views. Furthermore, since the fairness doctrine does not require balance in individual programs or series of programs, but only in a station's overall programming, there is no assurance that a listener who hears an initial presentation will also hear a rebuttal. Compare 47 USC §396(g)(1)(A). However, if all stations presenting programming relating to a controversial issue of public importance make an effort to round out their coverage with contrasting viewpoints, these various points of view will receive a much wider public dissemination. This requirement, of course, in no way prevents a station from presenting its own opinions in the strongest terms possible.

a. What is a "Controversial Issue of Public Importance"?

29. It has frequently been suggested that the Commission set forth comprehensive guidelines to aid interested parties in recognizing whether an issue is "controversial" and of "public importance." However, given the limitless number of potential controversial issues and the varying circumstances in which they might arise, we have not been able to develop detailed criteria which would be appropriate in all cases. For this very practical reason, and the reason that our role must and should be limited to one of review, we continue to rely heavily on the reasonable, good faith judgments of our licensees in this area.

30. Some general observations, however, are in order. First of all, it is obvious that an issue is not necessarily a matter of significant "public importance" merely because it has received broadcast or newspaper coverage. "Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues." Healy v. FCC, 460 F2d 917, 922 [23 RR 2d 2175] (DC Cir. 1972). Nevertheless, the degree of media coverage is one factor which clearly should be taken into account in determining an issue's importance. It is also appropriate to consider the degree of attention the issue has received from government officials and other community leaders. The principal test of public importance, however, is not the extent of media or governmental attention, but rather a subjective evaluation of the impact that the issue is likely to have on the community at large. 11/ If the issue involves a social or political choice,

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11/ In this regard, we note that the fairness doctrine was not designed for the purpose of providing a forum for the discussion of mere private disputes of no consequence to the general public. Rather, its purpose is to insure that the public will be adequately informed on matters of importance to major segments of the community.

the licensee might well ask himself whether the outcome of that choice will have a significant impact on society or its institutions. It appears to us that these judgments can be made only on a case-by-case basis.

31. The question of whether an issue is "controversial" may be determined in a somewhat more objective manner. Here, it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. The licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another. It is possible, of course, that "programs initiated with no thought on the part of the licensee of their possible controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views." Report on Editorializing, 13 FCC at 1251. In such circumstances, it would be appropriate to make provision for opposing views when the opposition becomes manifest.

b. What Specific Issue Has Been Raised?

32. One of the most difficult problems involved in the administration of the fairness doctrine is the determination of the specific issue or issues raised by a particular program. This would seem to be a simple task, but in many cases it is not. Frequently, resolution of this problem can be of decisional importance. See, e.g., David C. Green, 24 FCC 2d 171 [19 RR 2d 498] (1970); WCBS-TV, 9 FCC 2d 921, 938 [11 RR 2d 1901] (1967).

33. This determination is complicated by the fact that it is frequently made without the benefit of a transcript or tape of the program giving rise to the complaint. Hence, it is necessary in such cases to rely on the recollections of station employees and listeners. While the availability of an accurate transcript would facilitate the determination of the issue or issues raised, it would not in many cases clearly point up those issues. This is true because a broadcast may avoid explicit mention of the ultimate matter in controversy and focus instead on assertions or arguments which support one side or the other on that ultimate issue. This problem may be illustrated by reference to a hypothetical broadcast which takes place during the course of a heated community debate over a school bond issue. The broadcast presents a spokesman who forcefully asserts that new school construction is urgently needed and that there is also a need for substantial increases in teachers' salaries, both principal arguments advanced by proponents of the bond issue. The spokesman, however, does not explicitly mention or advocate passage of the bond issue. In this case, the licensee would be faced with a need to determine whether the spokesman had raised the issue of whether the school bonds should be authorized (which is controversial), or whether he had merely raised the question of whether present school facilities and teacher salaries are adequate (which might not be at all controversial).

34. In answering this question, we would expect a licensee to exercise his good faith judgment as to whether the spokesman had in an obvious and meaningful fashion presented a position on the ultimate controversial issue of

whether the school bond issue should be approved. 12/ The licensee's inquiry should focus not on whether the statement bears some tangential relevance to the school bond question, but rather on whether that statement, in the context of the ongoing community debate, is so obviously and substantially related to the school bond issue as to amount to advocacy of a position on that question. If, for example, the arguments and views expressed over the air closely parallel the major arguments advanced by partisans on one side or the other of the public debate it might be reasonable to conclude that there had been a presentation on one side of the ultimate issue, i.e., authorization of the school bonds. Obviously, licensees in specific cases may differ in their answers to this inquiry. If a licensee's determination is reasonable and arrived at in good faith, however, we will not disturb it. Cf., Media Access Project (Georgia Power), 44 FCC 2d 755 [28 RR 2d 1567] (1973).

35. Before leaving this subject, we wish to make it clear that a fairness response is not required as a result of offhand or insubstantial statements. As we have stated in the past, "[a] policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open' (New York Times Co. v. Sullivan, 376 US 254, 270)." National Broadcasting Co. (AOPA complaint), 25 FCC 2d 735, 736-37 [20 RR 2d 301] (1970).

c. What is a "Reasonable Opportunity" for Contrasting Viewpoints?

36. As noted above, the Commission's first task in handling a typical fairness complaint is to review the licensee's determination as to whether the issue specified in the complaint or the Commission's inquiry has actually been raised in the licensee's programming. Secondly, we must review the licensee's determination of whether that issue is "controversial" and of "public importance." If these questions are answered in the affirmative, either by admission of the licensee or by our determination upon review, we must then determine whether the licensee has afforded a "reasonable opportunity" in his overall programming for the presentation of contrasting points of view.

37. The first point to be made with regard to the obligation to present contrasting views is that it cannot be met "merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time." Report on Editorializing, 13 FCC at 1251. The licensee has a duty to play a conscious and positive role in encouraging the presentation of opposing viewpoints. 13/ We do not believe, however, that it is

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12/ See discussion of the application of this standard to "editorial" advertising in Part III, infra.

13/ This duty includes the obligation defined in Cullman Broadcasting Co., 40 FCC 576, 577 [25 RR 2d 895] (1963):

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necessary for the Commission to establish a formula for all broadcasters to follow in their efforts to find a spokesman for an opposing viewpoint. As we stated in Mid-Florida Television Corp., 40 FCC 620 [4 RR 2d 192] (1964):

> "The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often combinations of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to such an individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue. Other licensees consult with community leaders as to who might be an appropriate individual or group for such a purpose. Still others announce at the beginning or ending (or both) of programs presenting opinions on controversial issues that opportunity will be made available for the expression of contrasting views upon request by responsible representatives of such views." Id. at 621.

If a licensee fails to present an opposing viewpoint on the ground that no appropriate spokesman is available, he should be prepared to demonstrate that he has made a diligent, good faith effort to communicate to such potential spokesmen his willingness to present their views on the issue or issues presented. Columbia Broadcasting System, Inc., 34 FCC 2d 773 [24 RR 2d 183] (1972). There may well be occasions, particularly in cases involving major issues discussed in depth, where such a showing should include specific offers of

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13/ [Footnote continued from preceding page]

> "where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee – and thus leave the public uninformed – on the ground that he cannot obtain paid sponsorship for that presentation." (emphasis in original).

We do not believe that the passage of time since Cullman was decided has in any way diminished the importance and necessity of this principle. If the public's right to be informed of the contrasting views on controversial issues is to be truly honored, broadcasters must provide the forum for the expression of those viewpoints at their own expense if paid sponsorship is unavailable.

response time to appropriate individuals in addition to general over-the-air announcements. 14/

38. In making provision for the airing of contrasting viewpoints, the broadcaster should be alert to the possibility that a particular issue may involve more than two opposing viewpoints. Indeed, there may be several important viewpoints or shades of opinion which warrant broadcast coverage. 15/

39. In deciding which viewpoints or shades of opinion are to be presented, licensees should employ a standard similar to that used to decide which political parties or candidates represent a viewpoint of sufficient importance to deserve coverage. As we stated in Lawrence M. C. Smith, 40 FCC 549 [25 RR 291] (1963), the broadcaster (in programs not covered by the "equal time" requirement of 47 USC §315) is not expected to present the views of all political parties no matter how small or insignificant, but rather:

> "the licensee would be called upon to make a good faith judgment as to whether there can reasonably be said to be a need or interest in the community calling for some provision of announcement time to these other parties or candidates and, if so, to determine the extent of that interest or need and the appropriate way to meet it." 40 FCC at 550.

In evaluating a "spectrum" of contrasting viewpoints on an issue, the licensee should make a good faith effort to identify the major viewpoints and shades of opinion being debated in the community, and to make a provision for their presentation. In many, or perhaps most, cases it may be possible to find that

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14/ In a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 18859, 23 FCC 2d 27, we proposed the adoption of specific procedures to be followed under certain circumstances in seeking an opposition spokesman. We believe, however, that the policy set forth above adequately covers all situations, and consequently that it is now appropriate to terminate that proceeding.

15/ One student commentator has outlined this problem in the following terms:

> "A principal purpose of the fairness doctrine is to educate the public on the major alternatives available to it in making social choices . . . . Acknowledging that there is a 'spectrum' of opinion on many issues, it is nonetheless true that there are often clearly definable 'colors' in the spectrum, even though the points at which they blend into one another may be unclear. The controversy concerning American policy in Indochina is illustrative. The alternatives [prior to America's withdrawal from the war] include[d] increasing military activity, maintaining the [then] present level of commitment, a phased withdrawal and an immediate withdrawal. It might be argued that any licensee who does not present some coverage of at least these views has failed to educate the public about the major policy alternatives available." Note, The FCC Fairness Doctrine and Informed Social Choice, 8 Harv. J. Legis. 333, 351-52 (1971).

only two viewpoints are significant enough to warrant broadcast coverage. 16/ However, other issues may involve a range of markedly different and important policy alternatives. In such circumstances, the broadcaster must make a determination as to which shades of opinion are of sufficient public importance to warrant coverage, and also the extent and nature of that coverage.

40. The question of the reasonableness of the opportunity for opposing viewpoints goes considerably deeper, however, than a mere finding that some provision has been made for the opposing viewpoints. Indeed, it has frequently been suggested that the wide discretion afforded the licensee in selecting a reply spokesman and format may undermine any possibility that treatment of the opposition view will be either reasonable or fair. Accordingly, it has been argued that the Commission should promulgate regulations establishing standards for the selection of an appropriate reply spokesman and format. We believe, however, that it should be adequate to remind licensees that they have a duty not "'to stack the cards' by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other. . . ." Report on Editorializing, 13 FCC at 1253. In the final analysis, fairness must be achieved, "not by the exclusion of particular views because of. . .the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation." Id. at 1253-54. (emphasis supplied); see also Brandywine-Main Line Radio, Inc., 24 FCC 2d 18, 23-24 [19 RR 2d 433] (1970).

41. In providing for the coverage of opposing points of view, we believe that the licensee must make a reasonable allowance for presentations by genuine partisans who actually believe in what they are saying. The fairness doctrine does not permit the broadcaster "to preside over a 'paternalistic' regime," BEM, 412 US at 130, and it would clearly not be acceptable for the licensee to adopt a "policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner. . . . " Democratic National Committee, 25 FCC 2d 216, 222 [19 RR 2d 977] (1970). Indeed, this point has received considerable emphasis from the Supreme Court:

> "[n]or is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." Red Lion Broadcasting Co. v. FCC, 395 US at 392, n. 18, quoting J.S. Mill, On Liberty 32 (R. McCallum ed. 1947).

16/ This is not to say that a broadcaster is barred from presenting the views of small minorities, but only that the government will not require the coverage of every possible viewpoint or shade of opinion regardless of its significance.

42. This does not mean, however, that the Commission intends to dictate the selection of a particular spokesman or a particular format, or indeed that partisan spokesmen must be presented in every instance. We do not believe that it is either appropriate or feasible for a governmental agency to make decisions as to what is desirable in each situation. In cases involving personal attacks and political campaigns, the natural opposing spokesmen are relatively easy to identify. This is not the case, however, with the majority of public controversies. Ordinarily, there are a variety of spokesmen and formats which could reasonably be deemed to be appropriate. We believe that the public is best served by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation.

43. Frequently, the question of the reasonableness of the opportunity provided for contrasting viewpoints comes down to weighing the time allocated to each side. Aside from the field of political broadcasting, the licensee is not required to provide equal time for the various opposing points of view. Indeed, we have long felt that the basic goal of creating an informed citizenry would be frustrated if for every controversial item or presentation on a newscast or other broadcast the licensee had to offer equal time to the other side. Our reasons for granting the licensee broad discretion with respect to the amount or nature of time to be afforded can be summarized as follows:

> "In our judgment, based on decades of experience in this field, this is the only sound way to proceed as a general policy. A contrary approach of equal opportunities, applying to controversial issues generally the specific equal-opportunities requirements for political candidates would in practice not be workable. It would inhibit, rather than promote, the discussion and presentation of controversial issues in the various broadcast program formats (e.g., newscasts, interviews, documentaries). For it is just not practicable to require equality with respect to the large number of issues dealt with in a great variety of programs on a daily and continuing basis. Further, it would involve this Commission much too deeply in broadcast journalism; we would indeed become virtually a part of the broadcasting 'fourth estate' overseeing thousands of complaints that some issue had not been given 'equal treatment'. We do not believe that the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open' (New York Times v. Sullivan, 376 US 254, 270) would be promoted by a general policy of requiring equal treatment on all such issues, with governmental intervention to insure such mathematical equality." Committee For the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 292 [19 RR 2d 1103] (1970).

Similarly, we do not believe that it would be appropriate for this Commission to establish any other mathematical ratio, such as 3 to 1 or 5 to 1, to be applied in all cases. We believe that such an approach is much too mechanical in nature and that in many cases our pre-conceived ratios would prove to be far from reasonable. In the case of a 10-second personal attack, for example, fairness may dictate that more time be afforded to answer the attack than was given the attack itself. Moreover, were we to adopt a ratio for fairness

programming, the "floor" thereby established might well become the "ceiling" for the treatment of issues by many stations, and such a ratio might also lead to preoccupation with a mathematical formula to the detriment of the substance of the debate. It appears to us, therefore, that no precise mathematical formula would be appropriate for all cases, and the licensee must exercise good faith and reasonableness in considering the particular facts and circumstances of each case.

44. While the road to predicting Commission decisions in this area is not fully and completely marked, there are, nevertheless, a number of signposts which should be recognizable to all concerned parties. We have made it clear, for example, that "it is patently unreasonable for a licensee consistently to present one side in prime time and to relegate the contrasting viewpoint to periods outside prime time. Similarly, there can be an imbalance from the sheer weight on one side as against the other." Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d at 293. This imbalance might be a reflection of the total amount of time afforded to each side, of the frequency with which each side is presented, of the size of the listening audience during the various broadcasts, or of a combination of factors. It is incumbent upon a complainant to bring to the Commission's attention any specific factors which he believes point to a finding that fairness has not been achieved. From the standpoint of the licensee, however, the most important protection against arbitrary Commission rulings is the fact that we will not substitute our judgment for his. Our rulings are not based on a determination of whether we believe that the licensee has acted wisely or whether we would have proceeded as he did. Rather, we limit our inquiry to a determination of whether, in the light of all of the facts and circumstances presented, it is apparent that the licensee has acted in an arbitrary or unreasonable fashion.

45. The danger of an unwise Commission decision in this area is considerably reduced by the fact that no sanction is imposed on the broadcaster for isolated fairness violations during the course of the license term. The licensee is simply asked to make an additional provision for the opposing point of view, and this is certainly not too much to ask of a licensee who has been found to be negligent in meeting his fairness obligations. Indeed, it is to the benefit of both the licensee and his listening audience if broadcasters are informed of their fairness duties and given an opportunity to fulfill them on a timely basis.

D. The Complaint Procedure

46. It has sometimes been suggested that fairness complaints should not be considered at the time they are presented to the Commission, but with few exceptions should simply be placed in the station's license file to be reviewed in connection with its renewal application. This review would focus on the station's overall performance for the license period, and not on the specific facts of individual fairness violations. Some have argued that this approach would have two major advantages over present procedures. First, it might considerably reduce the Commission's administrative workload, since complaints would not be given any consideration unless there were a number of complaints against a single station which indicated a serious pattern of violations. Secondly, it has been suggested that by avoiding a detailed review of individual complaints the Commission would be able to insure that it did not become too deeply involved in the day-to-day operations of broadcast journalism.

47. After giving careful consideration to this proposal, we believe that our present procedure of reviewing complaints on an ongoing basis is preferable. 17/ First, we do not believe it would be possible to make an "overall" assessment of licensee performance at renewal time without considering the specifics of individual complaints. It simply would not be possible to look at the bare complaints on file and make any knowledgeable assessment of licensee performance. Secondly, we view consideration of fairness compliance only at renewal time as an inadequate safeguard of the public's paramount right to be informed and believe that we should continue our ongoing effort (through the complaint process) to advance the public's interests in receiving timely information on public issues. This, we believe, will provide an opportunity to remedy violations before a flagrant pattern of abuse develops. In addition to the benefits which flow to the listening public, this procedure aids the broadcaster by helping to head off practices which could (if left uncorrected) place his license in jeopardy. For this reason, we believe that most licensees welcome the opportunity to receive guidance on specific fairness matters on a timely basis.

48. Finally, a review only at renewal time would remove a major incentive for interested citizens to file fairness complaints – that is, the chance to have an opposing view aired over the station before the issue has become stale with the passage of time. At present, citizen complaints provide the principal means of insuring compliance with the fairness doctrine. If we were to remove the possibility that these complaints might result in broadcast time for a neglected point of view, we might well have to rely on government monitoring to carry out our investigative role. Such monitoring, of course, would represent an unfortunate step in the direction of deeper government involvement in the day-to-day operation of broadcast journalism.

49. There appears to be a misunderstanding on the part of some persons as to the manner in which the Commission administers the complaint process. On the one hand, some complainants have asserted that the Commission's procedures impose too great a burden on the complainant; on the other, some licensees and networks have claimed that our application of the doctrine may impose such a heavy burden on them as to discourage presentation of subjects which may be found to involve controversial issues of public importance.

50. We believe a brief explanation and restatement of our procedures is in order. As we stated in our Fairness Doctrine Primer, 40 FCC 598 [2 RR 2d 1901] (1964): 18/

> "Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the

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17/ Some have argued that "[t]he practical effect of this approach [review at time of renewal] to fairness is that the doctrine would have been abandoned." Barrow, The Equal Opportunities and Fairness Doctrine in Broadcasting, 37 Cin. L. Rev. 447, 493 (1968).

18/ Because of the many developments which have taken place since 1964, we plan to issue a new fairness "Primer" in the near future.

particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints." Id. at 600.

51. The Commission requires that a complainant state the "basis for the claim that the station has presented only one side of the question" because the fairness doctrine does not require that each program present contrasting views on an issue; only that a licensee in its overall programming afford reasonable opportunity for presentation of contrasting views. Thus, when a complainant states that he heard or viewed a program which presented only one side of an issue, he has not, on the basis of this statement alone, made a fairness complaint upon which the Commission can act. Rather, we expect the complainant to state his reasons for concluding that in its other programming the station has not presented contrasting views on the issue.

52. This does not require, as some appear to believe, that the complainant constantly monitor the station. Although some groups having a particular interest in a controversial issue and a licensee's presentation of it have monitored such a station for periods of time and thus been able to offer conclusive evidence that contrasting views were not presented, the Commission realizes that such a requirement for every individual complainant would be an unduly burdensome one. While the complainant must state the basis for this claim that the station has not presented contrasting views, that claim might be based on an assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station involved. This does not require that the complainant listen to or view the station 24 hours a day, seven days a week. One example of a "regular" television viewer would be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station. In the case of radio, a regular listener would include a person who, as a matter of routine, listens to major representative segments of the station's news and public affairs programming. Also, the assumption that a station has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners join together in a statement that they have not heard a presentation of that viewpoint. Complainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience. We do not believe this requirement to be unduly burdensome, as contrasted to the heavy burden we would place on all stations if we required them to provide evidence of compliance with the fairness doctrine based on complaints which assert merely that one program has presented only one side of an issue.

53. The fact that regular viewers or listeners have not been exposed to an opposing viewpoint is obviously not conclusive evidence that the viewpoint has not been presented, but it does indicate that there is a reasonable basis for the viewer's conclusion that such is the case. See Alan C. Phelps, 21 FCC 2d 12 [17 RR 2d 1113] (1969). Accordingly, we believe that it is a sufficient basis for a Commission inquiry to the station.

54. In responding to such an inquiry, a station is not required to research everything it has broadcast on the subject over a considerable period of time, unless it believes it is necessary to do so in order to establish its compliance with the fairness doctrine with respect to the issue involved. The complaint must specify the date and time of the particular program or programs which presented one side of the issue. If the complaint specifies only a single program, it would be sufficient for the licensee to furnish evidence of having broadcast another program which did afford a reasonable opportunity for contrasting views. Thus, the licensee is not expected to make a showing as to his overall programming, but merely that he has provided contrasting viewpoints an opportunity to be heard which is reasonable when considered in relation to the specific programs complained of. 19/ In this regard, it should be kept in mind that the fairness doctrine does not require exact equality in the time provided for contrasting points of view, but only that a reasonable opportunity be afforded for their presentation.

55. After a complaint has been filed, some licensees have found it to be something of a burden to go back through their files and to question their news staff so as to construct a record of the programming they have carried on a given issue. For this reason, some licensees now keep a record of their public issue programming throughout the period of the license term. It should be a relatively simple matter for these stations to respond to a citizen complaint or to a Commission inquiry. Also, the keeping of such records should make it much easier for a licensee to satisfy himself that his station has achieved fairness on the various issues presented. While this Commission does not require the maintenance of a fairness log or diary, we expect that licensees will be cognizant of the programming which has been presented on their stations, for it is difficult to see how a broadcaster who is ignorant of such matters could possibly be making a conscious and positive effort to meet his fairness obligations.

56. The fifth requirement set forth in the above excerpt from our Public Notice – relating to "whether the station has afforded or has plans to afford, an opportunity for the presentation of contrasting viewpoints" – also may require explanation. We have found in many cases that if the complainant first addresses his complaint to the station, the licensee is able to provide an explanation satisfactory to the complainant of what steps it has taken to broadcast contrasting views, or what steps it plans to take to achieve this end. It is for this

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19/ The procedure which we are outlining here is the one which we will follow in the ordinary case. It is possible, however, that in some circumstances the Commission may find it necessary to inquire into a station's total programming effort on an issue or at least a significant portion of that programming. Also, in cases where a message on one side of an issue has obviously been repeated many times (as in "editorial" advertising campaign), the complainant could not be expected to provide a list showing the time and date of each presentation. This information would have to be provided by the licensee in his response to a Commission inquiry.

reason that we ask complainants first to go to the station or network involved. If the station or network fails to answer the complaint at all, or to provide what complainant considers to be a satisfactory answer, then the complainant should address the complaint to the Commission, enclosing a copy of the complaint he sent to the station and a copy of its reply – or, if no response has been received after a reasonable period of time, so stating.

57. One further matter with respect to complaints and licensee responses thereto deserves some discussion. It would be a great assistance to the Commission, and would greatly expedite the handling of complaints, if all parties would be as specific as possible in defining the controversial public issue involved in the programs complained of. Also, it would save everyone concerned a great deal of time if, in listing those presentations on each side of an issue, parties would include only those programs which are truly germane to that specific issue. 20/

E. Fairness and Accurate News Reporting

58. In our 1949 Report on Editorializing, we alluded to a licensee's obligation to present the news in an accurate manner:

> "It must be recognized, however, that the licensee's opportunity to express his own views. . .does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend. . . .A licensee-would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy." 13 FCC at 1254-55.

It is a matter of critical importance to the public that the basic facts or elements of a controversy should not be deliberately suppressed or misstated by a licensee. But, we must recognize that such distortions are "so continually done in perfect good faith, by persons who are not considered. . .ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentations as morally culpable. . . ." J. S. Mill,

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20/ One station, in responding to a complaint concerning the issue of gasoline and air pollution, provided the Commission with a list of programs which included the following: "The Great Red Apes," "Turtle of the Sulu Sea," "The Night of the Squid," and "Return of the Sea Elephants." While such programming obviously would provide information on a part of the world's environment, it may not be germane to any specific issue concerning gasoline and air pollution.

On Liberty 31 (People's ed. 1921). Accordingly, we do not believe that it would be either useful or appropriate for us to investigate charges of news misrepresentations in the absence of substantial extrinsic evidence or documents that on their face reflect deliberate distortion. See The Selling of the Pentagon, 30 FCC 2d 150 [21 RR 2d 912] (1971).

III. Application of the Fairness Doctrine to the Broadcast of Paid Announcements

59. We turn now to the fairness doctrine problems which stem from the broadcast of paid announcements. For the purpose of this discussion, we will consider three general categories of such announcements: (1) advertisements which may properly be classified as "editorial" in nature; (2) advertisements for commercial products or services; and (3) advertisements included in the Federal Trade Commission's so-called "counter-commercial" proposal.

The role of advertising in broadcasting and its relationship to the licensee's responsibility to broadcast in the public interest was considered by the Federal Radio Commission in 1929. 3 FRC Ann. Rep. 32 (1929). It seems to us that the Commission at that time placed advertising in its proper context and perspective. It first noted that broadcasters are licensed to serve the public and not the private or selfish interests of individuals or groups. The Commission then stated that "[t]he only exception that can be made to this rule has to do with advertising; the exception, however, is only apparent because advertising furnishes the economic support for the service and thus makes it possible." Id. "The Commission. . . must recognize that, without advertising, broadcasting could not exist, and must confine itself to limiting this advertising in amount and in character so as to preserve the largest possible amount of service for the public." Id. at 35. Accordingly, we believe that any consideration of the applicability of the fairness doctrine to broadcast advertising must proceed with caution so as to ensure that the policies and standards which are formulated in this area will serve the genuine purposes of the doctrine without undermining the economic base of the system.

A. Editorial Advertising

60. Some "commercials" actually consist of direct and substantial commentary on important public issues. For the purpose of the fairness doctrine, these announcements should be recognized for what they are – editorials paid for by the sponsor. We can see no reason why the fairness doctrine should not apply to these "editorial advertisements" in the same manner that it applies to the commentary of a station announcer. At present, editorial advertising represents only a small percentage of total commercial time, and we cannot believe that an application of fairness here would have any serious effect on station revenues.

61. An example of an overt editorial advertisement would be a thirty or sixty second announcement prepared and sponsored by an organization opposed to abortion which urges a constitutional amendment to override a decision of the Supreme Court legalizing abortion under certain circumstances. While the brevity of such announcements might make it difficult to develop the issue in great detail, they could, nevertheless, make a meaningful contribution to the public debate, and we believe that the fairness doctrine should be fully applicable to them.

62. Editorial advertisements may be difficult to identify if they are sponsored by groups which are not normally considered to be engaged in debate on controversial issues. This problem is most likely to arise in the context of promotional or institutional advertising; that is, advertising designed to present a favorable public image of a particular corporation or industry rather than to sell a product. Such advertising is, of course, a legitimate commercial practice and ordinarily does not involve debate on public issues. See, e.g., Anthony R. Martin-Trigona, 19 FCC 2d 620 [17 RR 2d 704] (1969). In some cases, however, the advertiser may seek to play an obvious and meaningful role in public debate. In such instances, the fairness doctrine - including the obligation to provide free time in the circumstances described in the Cullman decision - applies.

63. In the past, we have wrestled with the application of the fairness doctrine to institutional advertisements which appeared to have discussed public issues, but which did not explicitly address the ultimate matter in controversy. An example of this problem may be found in the so-called "ESSO" case. National Broadcasting Co., 30 FCC 2d 643 [22 RR 2d 407] (1971). Here, the Commission found that certain commercials for Standard Oil Company constituted a discussion of one side of a controversial issue involving construction of the Alaskan pipeline. These advertisements did not explicitly mention that pipeline, but they did present what could be termed arguments in support of its construction. Specifically, we found that the advertisements argued that the nation's urgent need for oil necessitated a rapid development of reserves on Alaska's North Slope. Id. at 643. The commercials also referred to the ability of an ESSO affiliate to build a pipeline in the far north, and yet "preserve the ecology." Ibid. As we noted on rehearing, the problem involved here "is indeed a difficult one. . .because the pipeline controversy is not specifically referred to. . . ." Wilderness Society, 31 FCC 2d 729, 733 [22 RR 2d 1023], reconsideration denied 32 FCC 2d 714 [23 RR 2d 431] (1971).

64. In the face of such difficulties, what guidance can the Commission give to its licensees and to the public? Professor Louis Jaffe has offered the following suggestion:

> "[I]t is not easy to formulate a fully satisfactory rule for applying the fairness doctrine to advertising. Its application is most obvious where the advertisement is explicitly controversial. But the advertiser may avoid the explicit precisely to foreclose a claim of rebuttal, or because he believes the subliminal is more effective. It should suffice to trigger the doctrine that by implication he intends to speak to a current, publicly-acknowledged controversy." Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 777-78 (1972).

We believe that this suggestion comes close to the mark, but what we are really concerned with is an obvious participation in public debate and not a subjective judgment as to the advertiser's actual intentions. Accordingly, we expect our licensees to do nothing more than to make a reasonable, common sense judgment as to whether the "advertisement" presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance. This determination cannot be made in a vacuum; in

addition to his review of the text of the ad, the licensee must take into account his general knowledge of the issues and arguments in the ongoing public debate. Indeed, this relationship of the ad to the debate being carried on in the community is critical. If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference, the fairness doctrine would clearly not be applicable.

65. The situation would be different, however, if that relationship could be shown to be both substantial and obvious. For example, if the arguments and views expressed in the ad closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue involved had been presented thereby raising fairness doctrine obligations. See, e.g., Media Access Project (Georgia Power), 44 FCC 2d 755, 761 [28 RR 2d 1567] (1973). We fully appreciate that, in many cases, this judgment may prove to be a difficult one and individual licensees may well reach differing conclusions concerning the same advertisement. We will, of course, review these judgments only to determine their reasonableness and good faith under the particular facts and circumstances presented and will not rule against the licensee unless the facts are so clear that the only reasonable conclusion would be to view the "advertisement" as a presentation on one side of a specific public issue.

B. Advertisements for Commercial Products or Services

66. Many advertisements which do not look or sound like editorials are, nevertheless, the subject of fairness complaints because the business, product, or service advertised is itself controversial. This may be true even though the advertisement does not mention any aspect of a controversy. Commercial announcements of precisely this type led to the current debate over fairness and advertising. This debate began in 1967 with our decision to extend the fairness doctrine to advertisements for cigarettes. WCBS-TV, 8 FCC 2d 381, [9 RR 2d 1423], stay and reconsideration denied 9 FCC 2d 921 [11 RR 2d 1901] (1967). These advertisements, like many others, addressed themselves solely to the desirability of the product. They tended to portray "the use of the particular cigarette as attractive and enjoyable. . . ." but avoided any mention of the then raging smoking-health controversy. 8 FCC 2d at 382. At the time, broadcasters argued that, in the absence of an affirmative discussion of the health issue, the commercials could not realistically be viewed as part of a public debate. 9 FCC 2d at 938. We rejected this argument and insisted that the issue should be defined in terms of the desirability of smoking. Id. With the issue defined in this fashion, it was a simple mechanical procedure to "trigger" the fairness doctrine and treat all cigarette advertisements – regardless of what they actually said – as being presentations on one side of a controversial issue. It seemed to be clear enough that all cigarette advertisements suggested that the use of the product was desirable.

67. In retrospect, we believe that this mechanical approach to the fairness doctrine represented a serious departure from the doctrine's central purpose which, of course, is to facilitate "the development of an informed public opinion." Report on Editorializing, 13 FCC 1246, 1249 (1949) (emphasis supplied). We believe that standard product commercials, such as the old cigarette ads, make no meaningful contribution toward informing the public on any side of any issue. Indeed, as the D.C. Circuit Court of Appeals succinctly stated:

"Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. . . .Accordingly, even if. . . [such] commercials are protected speech, we think they are at best a negligible part of any exposition of ideas, and are of. . . slight social value as a step to truth. . . ." Banzhaf v. FCC, 405 F2d 1082, 1101-02 [14 RR 2d 2061] (D.C. Cir. 1968), quoting Chaplinsky v. New Hampshire, 315 US 568, 572 (1942).

In this light, it seems to us to make little practical sense to view advertisements such as these as presenting a meaningful discussion of a controversial issue of public importance.

68. In our view, an application of the fairness doctrine to normal product commercials would, at best, provide the public with only one side of a public controversy. In the cigarette case, for example, the ads run by the industry did not provide the listening public with any information or arguments relevant to the underlying issue of smoking and health. At the time of our ruling, Commissioner Loevinger suggested that we were not really encouraging a balanced debate but, rather, were simply imposing our view that discouraging smoking was in the public interest. 9 FCC 2d at 953. 21/ While such an approach may have represented good policy from the standpoint of the public health, the precedent is not at all in keeping with the basic purposes of the fairness doctrine. 22/

21/ Following the Congressional ban on cigarette advertising, the Commission was criticized even more strongly for taking sides on this issue. At that time, we ruled that stations were free to broadcast anti-smoking messages without incurring any obligation to carry arguments in favor of smoking. This holding was based on a Commission determination that the issue was no longer controversial. Cigarette Advertising and Anti-Smoking Presentation, 27 FCC 2d 453 [20 RR 2d 1669] (1970), aff'd sub nom. Larus & Brother Co. v. FCC, 477 F2d 876 [22 RR 2d 2154] (4th Cir. 1971).

22/ In the conclusion to our second opinion in the cigarette case, we tried to make it clear that our holding was based more on public health considerations than on "the specifics of the Fairness Doctrine." WCBS-TV, 9 FCC 2d 921, 949 (1967). We recognized that, in view of the overwhelming evidence of danger to the public health, the question presented would ordinarily be "how the carriage of such commercials is consistent with the obligation to operate in the public interest." Id. We felt, however, that the question of removing these commercials from the air was one Congress had reserved to itself, and that the only remedy we were free to implement was one along the lines suggested by the fairness doctrine. The fairness doctrine, therefore, served "chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours

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69 This precedent would not have been particularly troublesome if it had been limited to cigarette advertising as the Commission originally intended. 23/ In 1971, however, the D.C. Circuit ruled that the cigarette precedent could not logically be limited to cigarette advertising alone. Friends of the Earth v. FCC, 449 F2d 1164 [22 RR 2d 2145] (D.C. Cir. 1971). In this decision, it was suggested that high-powered cars pollute the atmosphere more than low-powered cars. 24/ It was then determined that the fairness doctrine was triggered by the advertisements there involved because they extolled the virtues of high-powered cars and thus glorified product attributes aggravating an existing health hazard, namely air pollution. The commercials, of course, made no attempt at all to discuss the product in the context of the air pollution controversy. If these advertisements presented one point of view on the issue, then, by the same reasoning, the "contrasting" viewpoint must have been similarly presented in ads for low-powered cars. The problem with this kind of logic is that it engages both broadcasters and the Commission in the trivial task of "balancing" two sets of commercials which contribute nothing to public understanding of the underlying issue of how to deal with the problem of air pollution. 25/

22/ [Footnote continued from preceding page]

of the obligation imposed." Banzhaf v. FCC, 405 F2d at 1093. Subsequent to our action in the cigarette case, the Congress developed a more complete remedy of its own by banning the broadcast of cigarette ads entirely in the Public Health Cigarette Smoking Act of 1969. See generally Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 [23 RR 2d 2001] (D. D.C. 1971), aff'd mem. sub nom. Capital Broadcasting Co. v. Kleindienst, 405 US 1000 (1972). If in the future we are confronted with a case similar to that presented by the cigarette controversy, it may be more appropriate to refer the matter to Congress for resolution. For Congress is in a far better position than this Commission to develop expert information on whether particular broadcast advertising is dangerous to health or otherwise detrimental to the public interest. Furthermore, it is questionable whether this Commission has a mandate so broad as to permit it "to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health.'" Banzhaf v. FCC, 405 F2d at 1090.

23/ At the time, cigarettes were thought to be a unique product because their "normal use has been found by congressional and other Governmental action to pose. . .a serious threat to general public health. . . ." 9 FCC 2d at 943. In a concurring opinion, Commissioner Johnson expressed the view that "[b]y drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began." Id. at 958. In affirming our ruling, the D.C. Circuit agreed that cigarettes were, in fact, "unique." Banzhaf v. FCC, 405 F2d 1082, 1097 n. 63 (D.C. Cir. 1968).

24/ The case also considered a comparison of high-test and "regular" gasoline.

25/ The court has further suggested that the cigarette precedent might logically have to be extended out of the health area entirely to cover some labor-management disputes. Retail Store Employees Union v. FCC, 436 F2d 248

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70. We do not believe that the underlying purposes of the fairness doctrine would be well served by permitting the cigarette case to stand as a fairness doctrine precedent. In the absence of some meaningful or substantive discussion, such as that found in the "editorial advertisements" referred to above, we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. It would be a great mistake to consider standard advertisements, such as those involved in the Banzhaf and Friends of the Earth, as though they made a meaningful contribution to public debate. It is a mistake, furthermore, which tends only to divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion. Accordingly, in the future, we will apply the fairness doctrine only to those "commercials" which are devoted in an obvious and meaningful way to the discussion of public issues.

C. The Federal Trade Commission Proposal

71. The Federal Trade Commission has filed a statement in this inquiry which proposes the creation of a right of access to respond to four categories of commercial announcements. Very generally, these categories are as follows: (a) those advertisements that explicitly raise controversial issues; (b) those that raise such issues implicitly; (c) those that make claims based on scientific premises that are in dispute; and (d) those that are silent about negative aspects of the advertised products.

72. We have already discussed the first two categories and the applicability of the fairness doctrine with respect thereto. One of our major difficulties with the FTC's categories is that they seem to include virtually all existing advertising. As one commentator has stated, "it is hard to imagine a product commercial so pure that it would not be viewed as implicitly raising some controversial issue or resting upon some disputed scientific premise or remaining silent about negative aspects of the product." Putz, Fairness and

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25/ [Footnote continued from preceding page]

[20 RR 2d 2005] (D.C. Cir. 1970). The court, however questioned whether such an application would truly serve the underlying purposes of the fairness doctrine:

> "Stripped to its essentials, this dispute is one facet of the economic warfare that is a recognized part of labor management relations. . . . Part of the Union's campaign was publicity for its boycott; part of management's arsenal was advertising to persuade the public to patronize its stores. If viewed in this light, it could well be argued that the traditional purposes of the fairness doctrine are not substantially served by presentation of advertisements intended to less inform than to serve merely as a weapon in a labor-management dispute." Id. at 259. (emphasis supplied.)

mercial Advertising: A Review and a Proposal, 6 US FL Rev. 215, 246 (1972). We believe that the adoption of the FTC proposal – wholly apart from a predictable adverse economic effect on broadcasting – might seriously divert the attention and resources of broadcasters from the traditional purposes of the fairness doctrine. We are therefore not persuaded that the adoption of these proposals would further "the larger and more effective use of radio in the public interest. . ." 47 USC §303(g), or contribute in any way to the promotion of genuine debate on public issues.

73. We do not believe that our policy will leave the public uninformed on important matters of interest to consumers. Certainly, we expect that consumer issues will rank high on the agenda of many, if not most, broadcasters since their importance to the public is self-evident. But our point is that the decision to cover these and other matters of similar public concern appropriately lies with individual licensees in the fulfillment of their public trustee responsibilities, and should not grow out of a tortured or distorted application of fairness doctrine principles to announcements in which public issues are not discussed.

74. A matter which relates directly to the FTC proposal was considered in the so-called "Chevron" case. Alan F. Neckritz, 29 FCC 2d 807 [21 RR 2d 1097] (1971), reconsideration denied 37 FCC 2d 528 [25 RR 2d 631] (1972). This case involved a claim made by Chevron that its F-310 additive would reduce exhaust emissions and contribute to cleaner air. Chevron did not claim that its product would solve the air pollution problem caused by automobiles, but did extol the product's virtues in reducing pollution. Complainants argued that the claim was controversial within the meaning of the fairness doctrine. They supported this argument by pointing to a pending FTC complaint which alleged that the claims made on behalf of F-310 were false and misleading. 29 FCC 2d at 816. While the F-310 claim obviously did relate to a matter of public concern, we do not believe that the ads engaged in an obvious and meaningful discussion of a controversial issue of public importance. As we stated in "Chevron,"

> "making a claim for a product is not the same thing as arguing a position on a controversial issue of public importance. That the claim is alleged to be untrue or partially deceptive does not change its nature. . . . It would ill suit the purposes of the fairness doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility. The merits of any one gasoline, weight reducer, breakfast cereal or headache remedy – to name but a few examples that come readily to mind – do not rise to the level of a significant public issue. . . . We think this conclusion is required not only as a matter of reason, but also of practical necessity if fairness is to work for the public and not to its detriment." Alan F. Neckritz, 29 FCC 2d at 812.

75. We do not believe that the fairness doctrine provides an appropriate vehicle for the correction of false and misleading advertising. The fairness doctrine is only one aspect of the public interest. A Congressionally-mandated remedy for deceptive advertising already exists in the form of various FTC

sanctions. 26/ If an advertisement is found to be false or misleading, we believe that the proper course is to ban it altogether rather than to make its claims a subject of broadcast debate. We believe that the approach to advertising outlined here will do much to reduce the confusion which has existed in this area. Under the general fairness doctrine, broadcasters – as trustees for their communities – are required to make a positive effort to implement a meaningful discussion of major public issues and in practical effect consumer issues will receive a significant amount of coverage. But at the same time, we do not believe that it is in the public interest to stretch the fairness doctrine in an artificial way by applying it to commercials which play no meaningful or significant role in the debate of controversial issues.

76. In the separate but related area of deceptive advertising, we believe that the public interest can be best served through the existing, Congressionally-mandated scheme of regulation, and by a conscientious effort on the part of broadcasters to meet their obligations in this area. 27/

IV. Access Generally to the Broadcast Media for the Discussion of Public Issues

77. Various parties to this proceeding have argued that, quite aside from the traditional fairness doctrine, there should be a system of mandated access, either free or paid, for persons or groups wishing to express a viewpoint on a controversial public issue. In the "BEM" case, 28/ the Supreme Court made it clear that such access is not a matter of either constitutional or statutory right. The Court noted, however, that Congress has left the Commission with "the flexibility to experiment with new ideas as changing conditions require." Id. at 122. It was further stated that "at some future date Congress or the Commission – or the broadcasters – may devise some kind of limited right of access that is both practicable and desirable." Id. at 131.

78. Our studies during the course of this inquiry have not disclosed any scheme of government-dictated access which we consider "both practicable and desirable." We believe, to the contrary, that the public's interest in free expression through broadcasting will best be served and promoted through continued reliance on the fairness doctrine which leaves questions of access

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26/ The problem may be further alleviated by the FTC's newly developed ad substantiation program. See 36 Fed. Reg. 12,058 (1971); and generally, Note, The FTC Ad Substantiation Program, 61 Geo. L.J. 1427 (1973).

27/ See Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising, 32 FCC 2d 396 (1971); Consumer Association of District of Columbia, 32 FCC 2d 400 [23 RR 2d 187] (1971).

28/ Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 US 94 (1973).

and the specific handling of public issues to the licensee's journalistic discretion. This system is far from perfect. However, in our judgment, it does represent the most appropriate accommodation of the various First Amendment interests involved, and provides for maximum public enlightenment on issues of significance with a minimum of governmental intrusion into the journalistic process.

79. In our opinion, this Commission would not be justified in dictating the establishment of a system of access to particular spokesmen on either a free or paid basis. If the access were free, the government would inevitably be drawn into the role of deciding who should be allowed on the air and when. 29/ This governmental involvement in the day-to-day processes of broadcast journalism would, we believe, be antithetical to this country's tradition of uninhibited dissemination of ideas. With regard to the suggestion that we establish a system of paid access, we believe that "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth," BEM, 412 US at 123, or wherein "money alone determines what issues are to be aired, and in what format," Business Executives' Move for Vietnam Peace v. FCC, 450 F2d 642, 666 [22 RR 2d 2089] (D.C. Cir. 1971) (McGowan, J., dissenting). This problem would in no way be alleviated by the application of the fairness doctrine, including the Cullman corollary, to editorial advertising, since the agenda for public debate would be set solely by those financially able to take advantage of the right to purchase time in the first instance. Furthermore, there would be elements of unfairness in applying the Cullman principle in this situation, for it would require the licensee to correct an imbalance – at its own expense – which it had not created. On the other hand, if Cullman were suspended in the case of editorial advertisements, the public would be left in many if not most instances with one-sided presentations of those issues which the financially able chose to discuss.

80. We have given serious thought to the suggestion that broadcasters be required to maintain a policy of examining and considering – but not necessarily accepting – editorial advertisements tendered for broadcast. While this suggestion has some surface appeal, we believe that such a requirement would, in our judgment, inevitably draw this Commission into deciding a broadcaster's good faith in accepting or rejecting proffered material and into adjudicating competing claims to buy limited time on the basis of criteria that would necessarily favor one person's speech over another's. This is precisely the

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29/ The only alternative to governmental involvement of this type would appear to be access on a first-come-first-served basis (or by lot or drawing). This system would, however, give no assurance that the most important issues would be discussed on a timely basis. Moreover, as the Supreme Court observed in BEM, "[t]he public interest would no longer be 'paramount' but rather subordinate to private whim especially since. . .a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster." 412 US at 124.

sort of governmental intrusion which we have sought to avoid in developing and administering the fairness doctrine, and why we believe that our present policy of leaving such decisions initially to the editorial discretion of the licensee, though imperfect, must be maintained. As Chief Justice Burger stated for the Court in BEM:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors – newspaper or broadcast – can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values." 412 US at 124-25.

81. While we have rejected the suggestion that the Commission should establish a system of mandated access (either free or paid), we certainly do not mean to suggest any disapproval of efforts by broadcasters to provide for access to their stations. Indeed, the fairness doctrine itself insures that many citizens will be afforded a type of access, for the licensee

> "is required to 'present representative community views and voices on controversial issues which are of importance to [its] listeners,' and it is prohibited from 'excluding partisan voices and always itself presenting views in a bland, inoffensive manner.' 25 FCC 2d at 222. A broadcaster neglects that obligation only at the risk of losing his license." BEM, supra at 131.

Under this system, many representative community spokesmen do express their views in newscasts, interviews, call-in programs, editorial replies, and through various other formats. Thus, while no particular individual has a guaranteed right of access to the broadcast microphone for his own self-expression, the public as a whole does retain its "paramount" right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . . " Red Lion Broadcasting Co. v. FCC, 395 US at 390 (emphasis supplied). In a real sense, therefore, there is a "right of access" in broadcasting, that right being guaranteed the listening and viewing public. However, in order to secure this right to the people, and to avoid unwarranted governmental supervision, Congress has delegated the primary responsibility for the selection of particular spokesmen and specific program material to private licensees who are required to serve as trustees for the public. As the Supreme Court stated in its BEM decision:

> "This policy [of concentrating the allocation of journalistic priorities in the licensee] gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be 'robust and wide-open' does not mean that we should exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators." 412 US at 125.

82. We do not mean to suggest that broadcasters are in any way required to maintain "tight editorial control" over the spokesmen who appear on their stations. Much to the contrary, we wish to give every encouragement to broadcasters to experiment with new ways of providing for wide-open debate of public issues. Our point here is that while genuine partisan debate should be encouraged, we cannot, at this time, justify or support its particularized imposition by Commission fiat.

83. Although we have here reaffirmed the present system of licensee responsibility and discretion and rejected requests for the creation of a direct "right" of access, we wish to emphasize that this system is predicated entirely upon the assumption that licensees will in fact make a reasonable, good faith effort to meet their public obligations. Licensee discretion is but a means to a greater end, and not an end in and of itself, and only insofar as it is exercised in genuine conformity with the paramount right of the listening and viewing public to be informed of the competing viewpoints on public issues can such discretion be considered an adequate means of maintaining and enhancing First Amendment interests in the broadcast medium. For the present, we remain convinced that the general rubric of the fairness doctrine, with its emphasis on licensee responsibility and discretion, provides the most desirable and practical means to that end. However, should future experience indicate that the doctrine is inadequate, either in its expectations or in its results, the Commission will have the opportunity – and the responsibility – for such further reassessment and action as would be mandated by the public interest and the First Amendment.

V. Application of the Fairness Doctrine to Political Broadcasts – Ballot Propositions

84. The First Report on Part V of the Fairness Doctrine Inquiry, 36 FCC 2d 40 [24 RR 2d 1917] (1972), dealt almost exclusively with appearances by the President and other public officials and with questions of the application of the Zapple doctrine 30/ to such appearances. However, Part V of our Notice of Inquiry phrased the Zapple question in broader terms:

> "We request comment on such relevant questions as the following: whether the quasi-equal opportunities approach should be restricted, expanded, or left alone, with a specific description of the feasibility and effect of any proposed revision on the underlying policies of the statute (see Section 315(a))." 30 FCC 2d 26, 34 (1971).

We now address ourselves specifically to application of the fairness doctrine to ballot propositions such as referenda, initiative or recall propositions, bond proposals and constitutional amendments.

85. Some comments filed in this inquiry have urged that Zapple rather than the Cullman doctrine be applied to ballot propositions on the ground that such

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30/ See Nicholas Zapple, 23 FCC 2d 707 [19 RR 2d 421] (1970).

situations are analogous to those covered by the "equal opportunities" requirement of Section 315 and the "political supporters" policy in Zapple. One party has suggested that not only should Cullman apply but that when one side buys spots, the licensee should be required to present opposing announcements in the same format (i.e., spots), and also to afford proponents of all sides opportunity for extended discussion of the issues. In this regard, the Commission also has received informal complaints that application of the Cullman doctrine to ballot propositions is unfair on the ground that it enables proponents of one side to spend their money on newspaper, billboard and direct mail advertising - where there is no Cullman requirement - and then to rely on Cullman to obtain free broadcast exposure of their views because the other side has spent its money in that medium.

86. After considering all comments, we find no substantial reason to alter our previous application of the fairness doctrine to ballot propositions. The Zapple doctrine, which some urge that we apply to this area, was adopted solely because it was analogous to the situation for which Congress itself had provided for "equal opportunities." As we explained in our First Report, Zapple was simply a common-sense application of the statutory scheme relating to appearances by political candidates, and we made clear the fact that we did not intend to extend its application further. While ballot propositions are similar to political candidacies in the sense that both are subject to popular vote, they are more closely analogous to ordinary public issues such as a bill pending in Congress or a state legislature. We are unable to perceive why such issues should be treated differently merely because they are subject to popular vote. In a case involving political candidacies, the natural opposing spokesmen are readily identifiable (i.e., the candidates themselves or their chosen representatives). In the case of a ballot proposition, however, there is generally no specific individual or group which is entitled to equal or comparable time. Furthermore, Congress has shown no intent to alter the Commission's traditional application of the fairness doctrine, including the Cullman corollary, to ballot propositions.

87. It has been argued that in the closing days of an election campaign, licensees may be overwhelmed by orders for large quantities of spot announcements favoring or opposing a proposition, and could be hard put to comply with the requirements of the fairness doctrine if only one side buys time. No licensee, however, is required to sell all the time that an advocate of a proposition (or even a legally qualified candidate) may wish to buy. 31/ Indeed, some licensees in the past have discovered to their dismay that an employee has sold an

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31/ However, stations are required to either give or sell reasonable amounts of time to candidates for federal elective office. 47 USC §312(a)(7); See also Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510 [2 RR 2d 1901] (1972). While we do not dictate how much time should be devoted to the various issues being debated in a community, ballot propositions and other election matters will frequently receive considerable coverage on the basis of their importance to the community. In this regard, we recognize that

[Footnote continued on following page]

inordinate amount of time in the closing days of a campaign to one candidate – only to be confronted by a demand from the opposing candidate to buy an equal amount. It is the responsibility of the licensee in such situations to look ahead and commit himself to no more time for Candidate A than he is prepared to sell to Candidate B. Similarly, no licensee is required by statute or Commission rule or policy to yield his facilities to one side of a ballot proposition for a so-called "blitz." His clear obligation in fairness situations is again, to plan his programming in advance so that he is prepared to afford reasonable opportunity for presentation of contrasting views on the issue, whether or not presented in paid time. 32/

88. Finally, it is argued that some ballot issue advocates take advantage of the Cullman principle by spending their available money on non-broadcast media, then waiting for the other side to buy time on the air, and finally demanding that their own views on the proposition be given free broadcast exposure, thus obtaining a broadcast "subsidy" for their views. To the extent that this could occur, the same criticism can be voiced against any application of Cullman. We believe, however, it is more important in the democracy that the public have an opportunity to receive contrasting views on controversial issues of public importance – that "robust, wide-open debate" take place – than that the Cullman principle be abandoned because of the possible practices of a few parties. Moreover, the fairness doctrine does not require equality of exposure of contrasting views, and those who rely solely on Cullman have no assurance of obtaining equality by such means.

31/ [Footnote continued from preceding page]

> "The existence of an issue on which the community is asked to vote must be presumed to be a controversial issue of public importance, absent unusual circumstances. . . .It is precisely within the context of an election that the fairness doctrine can be best utilized to inform the public of the existence of and basis for contrasting viewpoints on an issue about which there must be a public resolution through the election process." King Broadcasting Co., 23 FCC 2d 41, 43 (1970) (staff ruling).

32/ In our Public Notice of March 16, 1972, 34 FCC 2d 510 [23 RR 2d 1901], setting forth our interpretation of the Federal Election Campaign Act of 1971, we stated that Congress, in amending Section 312(a) of the Communications Act to require licensees to allow reasonable access to or to permit purchase of reasonable amounts of time by candidates for federal elective office, "clearly did not intend, to take the extreme case, that during the closing days of a campaign stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts. . . ." (Question and Answer 3, Section VIII). The same principle would, of course, apply to ballot propositions.

89. Thus, we shall continue to deal with ballot proposition issues as we do with other controversial public issues. As in all fairness doctrine matters, the licensee is required to use his own discretion regarding issues to be presented, the amount of time to be devoted to each, parties to present contrasting views, and the formats to be employed. Upon receipt of a complaint, we shall as in the past review the licensee's actions only for reasonableness and good faith.

VI. Conclusion

90. It is hoped that this inquiry and report will provide a needed restatement and clarification of the essential principles and policies of the fairness doctrine – both in terms of its theoretical foundations and its practical application. While we have here reaffirmed the basic validity and soundness of these principles and policies in ensuring that the medium of broadcasting will continue to function consistently with the ends and purposes of the First Amendment and the public interest, the Commission fully recognizes that their specific application in particular cases can involve questions and determinations of considerable complexity and difficulty. For this reason, the administration of the doctrine must proceed, within the framework of general policies set forth herein, on a case-by-case basis according to the particular facts and circumstances presented. We do wish to emphasize that in the final analysis, the fairness doctrine can fulfill its purpose and function only to the extent that all the parties involved – the broadcasters, the Commission, and individual members of the public – participate with a sense of reasonableness and good faith.

91. Accordingly, the proceedings in Docket 19260 are terminated.

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS CONCURRING IN PART; DISSENTING IN PART

As I have indicated in many pronouncements outside of this proceeding, I am solidly committed to the Fairness Doctrine in principle and purpose. Moreover, in view of the statutory and Constitutional links with which the courts have bound the Doctrine to the American scheme of broadcasting, 1/ an uprooting of the primary Fairness concept would leave an unbridgeable chasm between two sides of a dialogue on controversial public issues.

Although I recognize the learned views of a number of distinguished jurists, legislators and others intimately familiar with broadcasting that the Fairness

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1/ The Supreme Court of the United States had held that the Fairness Doctrine is deeply embedded in the Communications Act of 1934 (specifically, 47 USC §315) and the First Amendment of the Constitution. See Red Lion Broadcasting, Inc., et al. v. FCC, 395 US 367 (1969).

[redacted]rine is, at once, burdensome and restrictive, I respectfully disagree with t[redacted]e judgments. Rather I believe that a significant portion of the consternation and frustration evinced by these erudite observers is engendered not by the fundamental precept underlying the Doctrine, viz. reasonably fair coverage of controversial issues, but by the Commission's progressively active interpretations which have unfortunately transfigured a simple tenet of conscientious service into an alleged super-straitjacket stricture. 2/ It is, therefore, my devout hope that the reformulation of the Fairness Doctrine enunciated in our instant Order will operate in a manner so as to more effectively enhance the necessary discussion of public issues and allay many of the criticisms recently directed against it. With that conviction, I concur in essence to the terms of the majority document with the important exception of the Doctrine's applicability to commercial advertisements, and it is to that aspect of our decision that I dissent.

My position with respect to handling of commercial announcements would be the abandonment of the applicati[redacted]n of the Fairness Doctrine thereto. In lieu thereof, I would urge the establishment of a requirement that broadcasters allocate two per cent (2%) of their customary commercial time as an open access period in which views in contrast to those embraced in commercial messages could be aired. 3/ The access time would be available on a non-discriminatory basis and would be subject to editing by broadcasters solely for the expurgation of libelous, indecent, profane or patently scurrilous material. The Commission would review a broadcaster's selections and administration [redacted]the access periods only upon a showing of intentionally arbitrary abuse by a [redacted]nsee. While this proposal may be subject to many attacks, my rationale [redacted]or its basis is explained below.

This country has opted for a broadcasting system that is wholly dependent on commercial advertising revenues for its existence rather than a tax-supported, government-administered system as in other nations. Consequently, only the most naive parties can fail to realize that the success of our broadcast system – both in quantity and quality — sits squarely on the continued patronage of commercial advertisers. Because I am an ardent advocate of our free

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2/ Whatever the efficacy of the assertions of the burdens imposed by the Fairness Doctrine, the Commission's statistics for fiscal year 1973 show that of 2,406 complaints in this area, letters of inquiry were sent to 94 stations with the Commission subsequently ruling against only 7 licensees. I am the first to concede that the Commission's workload is slowed by even these few complaints. But the time spent on Fairness Doctrine complaints when compared with the overwhelming burden alleged by some broadcasters appears inconsistent.

3/ My best information indicates that television stations program an average of approximately 190 commercial minutes per hour over a 19 hour day. Thus, under my proposal, a typical TV station would be required to devote to the access period something on the order of 4 minutes per day or nearly one-half (1/2) hour per week for such contrasting views.

broadcasting system, I seek improvement in the performance of licensees rather than a deterioration attributable to diminished revenues. The Fairness Doctrine works in two ways to sap advertising revenues: first, advertisers are reluctant to pay out large sums for broadcast advertising when there is the possibility that counter-spokesmen will demand and get free rebuttal time; second, broadcasters are chary of any advertisement which could possibly trigger the Doctrine because of the need to furnish valuable air-time for responses. Ultimately, these fears and burdens could drive a significant portion of advertising revenues to non-broadcast media. On the other hand, the broadcaster's need for advertising revenues should not by any means supersede the public's need to hear views in opposition to those presented by sponsors. A fair balancing of these needs is required. But the Fairness Doctrine is not the proper balancing force and, when applied to ads only serves to provide the Doctrine's critics with examples of increased government intrusion into broadcast content. This weakens support for the Doctrine's application to non-commercial programming of a controversial nature when response opportunity is most important.

What I believe to be the Commission's error resulting in the present state of chaotic circumstances was its unprecedented decision to apply the Fairness Doctrine to cigarette advertising. 4/ Instead of contorting and stretching the basic Doctrine so as to ensure that the public would be adequately apprised of the hazards of smoking, and then straining to delimit its applicability to that single genre of commercials, 5/ we should never have determined applicability to begin with. That is not to say that a broadcaster should have been at liberty to present a boundless barrage of cigarette advertisements while the remainder of its programming was mute with respect to the critical hazards of smoking. Indeed, under its primary and ongoing obligation to informatively serve the public interest, a broadcaster carrying cigarette ads which exhorted the positive features of smoking had an imperative and unrenounceable duty to warn

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4/ For those unfamiliar with this case, in 1967, the Commission held that the Fairness Doctrine required the presentation of views in contrast to those presented in common cigarette commercials. Although the Fairness Doctrine does not require "equal time", the Commission held that the presentation of cigarette ads raised one side of the issue of the health hazards inherent in cigarette smoking because the commercials themselves showed healthy, carefree people indulging this vice. Nonetheless, in its decision, the Commission held that cigarette ads were unique and the Doctrine would not be further extended to cover ordinary product commercials. See, Letter to Television Station WCBS-TV, 8 FCC 2d 381, petition for reconsideration denied, 9 FCC 2d 921 (1967), aff'd sub nom. Banzhaf v. FCC, 132 US App DC 14, 405 F2d 1082 (1968), cert. denied, 396 US 842 (1969).

5/ See the Commission's original determination in the Friends of the Earth gasoline matter (24 FCC 2d 743, 1970), and the court's reversal thereof. 146 US App DC 88, 449 F2d 1164 (1971).

the public of the potential threat to life, much as we would expect a broadcaster to alert its listeners to the immediate presence of some other imminent health menace, e.g., flood, famine, or plague. It is a broadcaster's principal duty – Fairness Doctrine aside – to notify its public as the nature of impending threats or potential harms, particularly in view of a broadcaster's possession of the most effective communications tool known. Failure to continually advise the public of the hazards of smoking would have been, in my view, a grave dereliction of public interest responsibilities had the Fairness Doctrine never been invented. This point was made quite clear by the court in Retail Stores v. FCC, 141 US App DC 94, 103, 436 F2d 248, 257 (1970) when it noted:

> ". . . the Supreme Court, this court and the Commission itself have all recognized that the Fairness Doctrine is not an island whole unto itself. It is merely one aspect of the Commission's implementation of the requirement that broadcast stations serve the public 'interest, convenience and necessity'." (Footnotes omitted)

The same reasoning would compel broadcasters to present contrasting views on all major issues of public importance irrespective of Fairness Doctrine requests for refutation opportunities. Hence, the novel and unwise extension of the Fairness Doctrine in Banzhaf created a quagmire with which the court in Friends of the Earth v. FCC, 146 US App DC 88, 94, 449 F2d 1164, 1170 (1971) deeply sympathized when it opined:

> "It is obvious that the Commission is faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the Fairness Doctrine. It has said as much in the closing paragraphs of the Chevron decision, where it announced its purpose to initiate in the near future a wide ranging inquiry which 'will permit a thorough re-examination and re-thinking of the broader issues suggested by this and other recent cases before us. . .' We do not, of course, anticipate what the result of that proceeding will prove to be, nor do we minimize either the seriousness or the thorny nature of the problems to be explored therein. Pending, however, a reformulation of its position, we are unable to see how the Commission can plausibly differentiate the case presently before us from Banzhaf insofar as the applicability of the Fairness Doctrine is concerned."

The "reformulation" of our posture referenced by the court, above, and manifested in the majority's Order herein does not, in my view, constitute a fully satisfactory solution to the problem.

The majority reformulation, seeking to narrow the applicability of the Fairness Doctrine to those ads which are "obvious and meaningful" (Majority Order, paragraph 70) is a good step in the right direction but does not go far enough in my judgment. Nor have we articulated a fully satisfactory distinction between controversial ads not falling into the majority's category of "obvious-and-meaningful" and the precedent established in the Banzhaf case and later expanded. 6/ If the Fairness Doctrine continues to apply to some

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6/ See, e.g., Friends of the Earth v. FCC, 146 US App DC 88, 449 F2d 1164 (1971).

advertisements, the public, the broadcasters, the Commission and the courts are still left with the difficult task of differentiating between those ads which do trigger the Doctrine and those which do not.

The best method by which to avert ceaseless disputes, many of which are legitimate, is to remove commercial advertisements from the ambit of the Fairness Doctrine entirely while providing a reasonable alternative for the presentation of views in contradistinction to those incorporated in certain ads. To this end, I would have adopted a requirement for a 2% access allocation of a station's commercial time in which parties wishing to take exception to arguable positions expressed in ads could promulgate their conflicting views, whatever their views. 7/ This would remove both the broadcaster and the Commission from the captious and costly business of debating the controversial or non-controversial nature of statements, images and nuances of particular ads while accommodating those who would like to proffer a dissimilar viewpoint.

Some broadcasters would undoubtedly reject this access proposal as being overly generous in terms of necessary rebuttal time in light of financial considerations and the bland, passive character of most commercials. Contrarily, some public interest spokesmen will consider the 2% access allocation unduly parsimonious. 8/ I believe that the figure proposed is fair; it will not seriously impair a broadcaster's advertising income and it will increase by 100% the amount of pure access time now available to counter-spokesmen. If experience demonstrates otherwise, the figure can, of course, be revised.

In any event, I believe the access concept with respect to commercial advertisements deserves experimentation and press its adoption.

STATEMENT OF COMMISSIONER JAMES H. QUELLO ON THE FAIRNESS DOCTRINE

I admit to some ambivalence regarding a doctrine which causes a government agency to interfere in any way with rights guaranteed by the First Amendment. The First Amendment was written, after all, to protect us from government intrusion into our inherent rights to freedom of speech and religion and those rights must be protected. Philosophically, I believe broadcast journalists are entitled to the same freedom as journalists in other media, and that they

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7/ Subject, of course, to the limitations on libelous and indecent, etc., material, discussed supra.

8/ However, the Citizens' Communications Center, a Washington, D.C. "public interest" group (in conjunction with San Francisco's Committee for Open Media) has suggested to the Federal Communications Bar Association, in connection with a re-regulation study, that counter-spot access periods should be on the order of 45 minutes per week for radio and 35 minutes per week for television.

have demonstrated over the years their ability to act independently and responsibly.

The Federal Communications Commission is charged, however, by statute, with the responsibility of maintaining a climate of fairness in the use of broadcast facilities and that responsibility must be met. The courts have held, of course, that this is affirmation of our First Amendment rights and the Commission seems to have been given considerable latitude in interpreting and enforcing the "fairness" concept. However, my position is that we should promote freedom of speech in the same affirmative sense the courts appear to have suggested rather than to erect a structure of rules and regulations so onerous to public and broadcaster alike that they have the effect of limiting, rather than promoting, this precious freedom.

I believe that the Fairness Report which has been under consideration by the Commission does accomplish the protection which Congress mandated in the Act (Section 315(a)) and, yet, does not impose a heavy regulatory burden on anyone concerned. Broadcasters who are concerned about First Amendment protection should have no trouble living with this new interpretation of the Doctrine even though they may share my philosophical view. . . and the public will continue to have assurance that a variety of viewpoints will be presented on each significant issue of public importance.

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OFFICE OF TELECOMMUNICATIONS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON, D.C. 20504

July 2, 1974

DIRECTOR

Honorable Warren G. Magnuson
Chairman
Committee on Commerce
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request of May 20, 1974, for the views of the Office of Telecommunications Policy on S. 3463, proposed legislation to repeal the "equal opportunities" requirement of section 315(a) of the Communications Act of 1934, as amended (47 U.S.C. §315(a)) with respect to candidates for President and Vice President. Presently section 315(a) provides that if a broadcast licensee permits any legally qualified candidate for public office to use his station, he must afford equal opportunities to all other candidates for the same office in the use of his station.

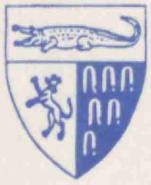
We are not in disagreement with the purposes of this proposed legislation -- to allow broadcasters to offer free time and coverage to major party candidates without being legally compelled to offer "equal opportunities" to minor party candidates. We take exception, however, to limitation of this bill to Presidential and Vice Presidential candidates. The adverse effects of section 315(a) may be much more pronounced with respect to candidates for other Federal offices. We see no reason why the reform prescribed by this bill should be so severely limited.

Accordingly, we recommend that your Committee report unfavorably on S. 3463.

Sincerely,

Clay T. Whitehead

Presidential TV



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BOOK REVIEW

Media Chic
Minow, Martin & Mitchell: Presidential Television

by

Clay T. Whitehead

83 YALE L.J. 1751

Media Chic

Presidential Television. By Newton N. Minow, John Bartlow Martin & Lee M. Mitchell. *New York: Basic Books, Inc.,* 1973. Pp. xv, 232. $8.95.

Reviewed by Clay T. Whitehead†

Within a relatively short time television has grown from insignificance to nearly total pervasiveness. Since the early 1950's we have become accustomed to this new medium, using it more hours each day[1] and increasingly relying upon it for advertising, entertainment, news, and political debate. Not surprisingly, the new medium and Presidents have found over the years a mutual attraction. Presidents need television to reach the electorate, and the TV medium finds presidential words and actions great "copy" (to stretch only slightly the newspaper term).

Presidential Television[2] documents the steadily expanding use of television by incumbent American Presidents. Following an analysis of the political implications and potential dangers of this phenomenon, the authors reach what seems to be the main point of the book: a series of proposals aimed at mandating an approximate equality of simultaneous television network time among the President, the Congress, and the party in opposition to the President.

The authors point out that the concern of the Framers of the Constitution was not that the President would become too powerful, but that he would not be noticed at all among the numerous members of Congress, whose personal constituencies would make them more powerful as a group.[3] Today, the authors maintain, the President has confounded the Framers' predictions by becoming the most visible, and therefore most powerful, politician in the country. They set out

† Director, Office of Telecommunications Policy, The Executive Office of the President, Washington, D.C. The author wishes to acknowledge the assistance of William Adams.

1. Total television viewing per home has been estimated to have reached 6 hours, 20 minutes per day in the over 60 million homes in the United States having television receivers. BROADCASTING MAG., BROADCASTING YEARBOOK 12 (1974).

2. N. MINOW, J. MARTIN & L. MITCHELL, PRESIDENTIAL TELEVISION (1973) [hereinafter cited to page number only].

3. Pp. 102-03, *citing* THE FEDERALIST No. 73 (Hamilton sees a natural tendency of legislative authority to "intrude upon the rights and absorb the powers of the other departments").

to show that it is largely because of the visibility resulting from his frequent use and masterful manipulation of television that he outshines the Congress and the courts and leaves his opposition far behind.

The proposals advanced by the authors aim at correcting this situation, as they perceive it, by "balancing" presidential use of television in four ways: (1) simultaneously broadcasting live on all television networks during prime time at least four evening congressional sessions each year; (2) granting to the national committee of the largest political party opposing the President an automatic legal right of reply to presidential addresses during an election year and near the time of off-year congressional elections, under the same conditions of coverage that the President enjoyed; (3) televising voluntary debates between spokesmen of the two major parties two to four times annually; and (4) providing free time simultaneously on the three networks to all presidential candidates according to a formula giving equal time to the major party candidates and lesser amounts of time to minor candidates.[4] The authors recommend that the equal time provision[5] and the Fairness Doctrine not be applied to these broadcasts, in order to avoid legal challenges and to prevent the President from demanding more time to reply to them.[6]

I

Unfortunately, the authors confuse the causes and the effects of the phenomenon they call "presidential television." Because they deal almost exclusively with effects, their recommendations, and especially their proposed changes in communications law, smack of tinkering and manipulation rather than the redress of constitutional imbalances. The authors blame the President's frequent television appearances for what they consider his undue power over public opinion in comparison with that of Congress and the opposition party. This conclusion is inaccurate in two respects. First, the present authority and prominence of the presidency result not from television but from the historical growth of the involvement of the federal government, and thus of the

4. This last proposal was earlier developed in THE TWENTIETH CENTURY FUND COMM'N ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, VOTERS' TIME (1969). This review will not discuss the proposals developed originally in that study. The authors also recommend that to preserve its judicial integrity, the Supreme Court should continue to avoid television coverage, while taking some steps to improve general press coverage of its functioning. Pp. 92-102.

5. 47 U.S.C. § 315 (1970).

6. For a summary of the authors' proposals, see pp. 161-63.

Executive, in national and international affairs.[7] Second, the President does not have control over the total amount and nature of his coverage on television, and there is no assurance that he will benefit from the exposure he does receive.

As the nation and the federal government both grew, so also did the power of the presidency. For the first 160 years of our constitutional history, this growth was unaided by television. By the dawn of the era of presidential television in 1947, when President Truman made an address from the White House to launch the Food Conservation Program,[8] the fears of the Framers that the President would be an obscure and unnoticed figure had long been put to rest.

Because of the inherent nature of the office, a Chief Executive is able to supervise or control detailed administrative matters and to act quickly and decisively in circumstances where the pace of national and international events is too rapid for the more contemplative Congress. In both situations, the pragmatic approach of Congress has been to delegate increasing authority to the President in order to allow effective action. Congress has also deliberately accepted certain methods of conducting business which allow the President to set much of its agenda; a large portion of the congressional year is devoted to consideration of the President's budget and legislative proposals. Congress has an even lesser role in international relations, where the President has a constitutional primacy.[9] Not surprisingly, much of the coverage of the President on national television has focused on foreign affairs.[10]

The coverage of the President in all the mass media, including television, reflects his importance, prestige, and newsworthiness in national and foreign affairs. The President's central role is evidenced by the fact that he regularly gets headline coverage in the more than 60 million newspaper copies printed daily in the United States,[11] as

7. The authors almost entirely ignore these factors in their concern with television. There are only occasional, brief admissions that other factors even exist. "Because he can act while his adversaries can only talk, because he can make news and draw attention to himself, and because he is the only leader elected by all the people, an incumbent president always has had an edge over his opposition in persuading public opinion. Presidential television, however, has enormously increased that edge." Pp. 10-11. "Presidential power has expanded because of the growth in national involvement in foreign affairs, because of the increasing role of the federal government in national life, especially in social services, and because television has given the president more access than Congress to the public." P. 103. Even in these statements, however, television is still portrayed as the most significant factor.

8. P. 33.

9. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

10. For one illustration that coverage is predominantly on foreign affairs, *see* note 14 *infra*. In addition, there has been extensive coverage of presidential actions in areas where Congress has delegated authority to the President, for example, wage and price regulation during the Nixon Administration.

11. U.S. DEP'T OF COMMERCE, POCKET DATA BOOK 296 (1973).

well as extensive coverage in the national news and opinion magazines. The authors recognize the fact that "[a]lmost anything the President does is news."[12] If "the modern trend in American government is towards an increasingly powerful president and an increasingly weak Congress,"[13] then television, like the other mass media, has only reflected that trend.

Furthermore, there is no evidence that the President's use of television confers any kind of political omnipotence. The political and social forces in this country are sufficiently diffuse to prevent presidential control of public opinion, and therefore, despite his use of television, the President may be defeated on unpopular policies and programs. For example, most of President Nixon's first term television addresses dealt with his Vietnam policies, which nevertheless remained less popular than most of his other domestic and foreign policies.[14] More powerful countervailing forces were acting concurrently to diminish any television advantage that the President might have enjoyed.

Despite the significant amount of attention he gets, the President does not control television coverage. He is covered by the networks and local stations at the discretion of their own independent news departments, and has no right to demand television time.[15] Furthermore, congressmen and other public figures frequently appear on television, and the views and activities of the President's opponents are regularly reported. In fact, if all programming is considered, senators and representatives appear on television much more frequently than the President.[16]

12. By virtue of his office, the President of the United States—its constitutional leader, supreme military commander, chief diplomat and administrator, and preeminent social host—obviously ranks higher in the scale of newsworthiness than anyone else—defeated opposition candidate, national party chairman, governor, congressman, senator.

. . . .

A presidential press conference is clearly news. So is his television address; a report of it will be on page 1 in tomorrow's newspapers. A presidential speech broadcast only on radio will be reported in the television news.

P. 21.

13. P. 103.

14. As of April 30, 1972, President Nixon had preempted network programming a total of 19 times to make addresses to the nation. Ten of these addresses, more than half, dealt with Vietnam or Southeast Asia policy. This subject, to which he devoted by far the most attention, never received as much public support as the authors' notion of the power of presidential television might predict.

15. At times, the President has had to bargain with the networks for a desired television time spot. The authors relate that an Eisenhower speech on the Quemoy-Matsu crisis was delayed until after prime time, while President Kennedy had to postpone a speech designed to prevent racial violence at the University of Mississippi from 8:00 p.m. to 10:00 p.m. (by which time rioting had already started). P. 35.

16. In 1973 alone:

[W]ell over 150 different Congressional spokesmen appeared on the NBC Television Network in more than 1,000 separate appearances of varying lengths. By contrast,

Even if the television news departments of the three national networks failed to provide such extensive coverage of Congress, and the local TV stations on their own news shows did not cover their local senators and representatives, the Federal Communications Commission's (FCC's) Fairness Doctrine would provide a regulatory check on presidential television.[17] In 1970, the FCC recognized that the large number of presidential addresses presented an unusual situation triggering television fairness obligations even when all other programming was nearly balanced.[18]

The impression left by the authors overstates the President's television advantage over Congress and the opposition party. If television under proper circumstances can be an electronic throne for the President, it can also be an electronic booby trap awaiting a chance slip or slur in an offhand remark, thereby causing an explosion of indignation or outrage and a consequent drop in the public opinion polls.

No President has been uniformly effective in his television appearances.[19] It is perhaps the unique intimacy conveyed by television that is responsible for its capacity to betray both the serious and the super-

the President appeared approximately 148 times (of which about 20% were ceremonial occasions).

J. Goodman, President of NBC, Statement Before the Jt. Comm. on Cong. Operations, Mar. 7, 1974, at 4 (hearings to be published).

The *CBS Evening News* broadcast six nights a week to 18 million people a night included 222 interviews with or appearances by members of Congress from June 1, 1973, to last week [the week prior to Feb. 21, 1974] . . . . In addition there were hundreds of other reports of Congressional activity on the *CBS Evening News* during that period.

. . . .

In 1973, for example, there were 31 appearances by members of Congress on *Face the Nation* alone.

A. Taylor, President of CBS, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974, at 2 (hearings to be published). Since June 1973, CBS has also implemented a more expansive reply policy for leading opposition figures to reply to presidential messages. *Id.* at 5.

17. The statutory basis for the Fairness Doctrine is the Communications Act, 47 U.S.C. § 315 (1970), but in reality the doctrine is an administrative concept grounded in the "public interest" standard governing broadcast regulation. 47 U.S.C. § 309 (1970). The doctrine requires that if a broadcaster gives time to present one side of a "controversial issue of public importance," he must provide a reasonable opportunity for the presentation of conflicting viewpoints. He must provide free time if paid sponsors are not available. There is no "equal time" requirement, and the broadcaster determines what time will be provided for the reply, the format to be used, and who the spokesmen for the other side will be. No individual or group has a right to time under the Fairness Doctrine, which is concerned only with the presentation of issues. *See, e.g.*, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (Fairness Doctrine held constitutional).

It should be noted that this reviewer recommends abolition of the Fairness Doctrine because of the opportunities it creates for bureaucratic and political second-guessing of editorial judgments.

18. Committee for the Fair Broadcasting of Controversial Issues, 19 P & F Radio Reg. 2d 1103 (1970).

19. *See, e.g.*, pp. 37, 40, 47, 48, 50-54, 58.

ficial weaknesses of a politician. The authors attribute the fall of Senator Joseph McCarthy in the mid-1950's to this effect.[20] On a more subtle level the authors suggest that President Johnson's continued inability to use television to bridge what became known as his credibility gap marked his failure to win support for his Vietnam policies and caused his political power to wane.[21] Perhaps this was also due to extensive television coverage of the application and effects of those policies.

Finally, having more to lose than to gain, an incumbent President nearing election time may choose to avoid the risks of television appearances in the hope that his opponent will be discredited and undermined by using television.[22] Such a practice is wholly inconsistent with the authors' notion of television's invariably favorable influence on public opinion and political forces.

II

The authors' first proposal for ending the imbalance in television exposure is that Congress should permit television "on the floor of the House and Senate for the broadcast of specially scheduled prime-time evening sessions . . . ."[23] At least four times per year, these are to be carried live by the three major networks simultaneously. "These broadcasts should be exempt from the 'equal time' law and the fairness and political party doctrines."[24] Staging special evening sessions for television coverage appears well within the power of Congress and, at least at the outset, sufficiently interesting to warrant the three-network, simultaneous, prime-time coverage the authors seek to achieve.[25] But the wisdom and propriety of such a congressional maneuver simply to counteract the President's use of television is doubtful.

20. P. 107.
21. *See* p. 47.
22. *See, e.g.*, p. 58.
23. Pp. 122, 161.
24. Pp. 124, 161. The Fairness Doctrine is discussed in note 17 *supra*. The "equal opportunities" provision, 47 U.S.C. § 315 (1970), applies only to actual candidates during an election campaign. The political party doctrine, a creation of FCC case law, provides that if one major party is given or sold time to discuss candidates or election issues, the other party must be given, or allowed to buy, time (but not necessarily equal time). Pp. 87-89.
25. Prime time is defined as the peak television viewing hours for evening entertainment, generally 7:00-11:00 p.m. It is interesting to note that the only hour which is prime time for the entire nation is 10:00-11:00 p.m., eastern time. The suggested live sessions would have to begin late in the evening in Washington, D.C., to reach west coast viewers during prime time.

While discussing ways to give Congress access to the media, the authors never really address the question of *how* congressional television will counteract presidential television, and their conclusion that "Congress needs television"[26] is therefore without force. Since Congress is by nature pluralistic, many of the recent attempts of its members to present unified fronts have necessarily expressed only the least common denominator of their views and thus those efforts have lacked the impact of a singly-spoken presidential statement.[27] It is hard to see how the prime-time congressional specials could be much better, unless carefully staged by the majority party leaders; yet if the specials were actually staged, both viewers and news commentators might see them as contrived performances. These special congressional sessions are therefore unlikely to improve significantly the image of Congress or provide an effective means of expressing opposition to the President.

In practice, it is doubtful that this proposal would result in the long-run balance to presidential television the authors seek. More often than not, Congress and the White House have been held by the same party, a situation that could give even greater exposure to the President's position and put the opposition party at a more serious television disadvantage when it is perhaps most dangerous to do so.

The authors also suggest that the congressional coverage under their proposal be exempt from the Fairness Doctrine. If the President and the congressional majority were of the same party, the President's opponents would not be represented by the televised congressional sessions, and they would lose the opportunity under the Fairness Doctrine to have these programs balanced by presentation of conflicting views.[28] Moreover, if a broadcaster in this situation voluntarily attemped to balance the exempt congressional coverage by giving time to opponents of the President, there would be a danger that supporters of the President's policies might try to apply the Fairness Doctrine to this nonexempt coverage, forcing the broadcaster to give still more time to the presidential position.

Furthermore, this proposal seems to require the networks to broad-

26. P. 121.

27. Pp. 125, 130. In describing the attempts of Democratic party leaders to present opposition to President Nixon's Vietnam policy, the authors observe that the "quest for a consensus resulted in a watered-down response that George Reedy, President Johnson's former press secretary, said 'sounds like yapping' to most television viewers." P. 130. The authors also observe that the diversity within Congress creates severe limitations on its ability to rebut presidential television. P. 121.

28. *See* p. 1755 *supra*.

cast these congressional sessions. This raises the specter of government compelling its own coverage, a dangerous precedent. Currently, one of the checks on the political use of television is that the President and Congress can only request time, and the networks can therefore negotiate over the time of day and amount of time given.[29] This protection would be removed if either the President or Congress were permitted to demand television time.

The authors have not given sufficient weight to First Amendment interests in their proposal to broadcast congressional sessions. A better solution, if Congress wishes to be more accessible to all of the media,[30] would be to permit journalists to cover whatever congressional activities they consider newsworthy by means of print, radio, or television. Adequate television coverage of Congress could best be encouraged through improvement of congressional procedures. One proposal is to institute several reforms, including restructuring committees to remove overlapping jurisdictions, developing a more efficient method for reviewing the President's budget proposals, and coordinating the actions of the House and Senate, in the hope that such reforms would increase the visibility of Congress and make it easier for the press to cover congressional activities.[31] Constructive proposals of this nature might profitably be undertaken before Congress schedules its debut on live, prime-time television.

When Congress does something newsworthy, it invariably receives broad coverage. All that Congress needs to do is open its doors, if it decides that the public needs "congressional television." Journalists should be left to take care of the rest. Congress has no need to demand or legislatively require television coverage.

29. *See, e.g.*, note 15 *supra*.

30. C. Edward Little, President of the Mutual Broadcasting System, points out that in 1972 congressional committees conducted 40 percent of hearings and other meetings behind closed doors. He notes encouragingly, however, that the trend towards closed meetings is being partially reversed in recent months. C. Little, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974 (hearings to be published), *citing* 28 CONG. Q. ALMANAC 93 (1972).

31. Rep. J. Cleveland, Statement Before the Jt. Comm. on Cong. Operations, Feb. 20, 1974, at 5 (hearings to be published).

> But the final passage of a bill or a successful investigation are only parts of the legislative drama. The rest of the performance must also be comprehensible—both to achieve quality and to communicate effectively.
>
> . . . .
>
> Reform can achieve this objective. The restructuring of committees, for example, can reduce overlapping jurisdictions, clarify responsibility, improve oversight, and encourage more rational planning—all of which would heighten the visibility of committee work and make it more accessible to the media, as well as produce a higher quality legislative product.

III

The next major proposal the authors develop is that:

> [T]he national committee of the opposition party should be given by law an automatic right of response to any presidential radio or television address made during the ten months preceding a presidential election or within 90 days preceding a Congressional election in nonpresidential years.[32]

Suggesting amendment of § 315 of the Communications Act of 1934,[33] the authors propose that every broadcaster or cablecaster who carries a presidential appearance within the expanded response period provide "equal opportunities to the national committee of the political party whose nominee for President received the second highest number of . . . votes"[34] in the most recent presidential election. The equal opportunities and fairness provisions are to be suspended for this reply by the opposition.[35] The purpose of this proposal is "to insure equality in the electoral use of television."[36]

If such a proposal were implemented, the result would be the replacement of editorial judgment in campaign coverage by a mechanical rule. It is no doubt true that fairness and objectivity are often lacking in network coverage of political parties and candidates. It seems more likely, however, that even with the limited diversity of only three networks, day-to-day news selection based on a reasoned, professional judgment is superior to the mechanical application of a law which forces broadcasters automatically to present spokesmen selected by the opposition party.

One need not peer far into the past to find examples of the potential mischievousness of such a law. When President Johnson was pursuing his Vietnam policies, most of the effective opposition was in his own party, while Republicans were generally less critical of the war. Since the proposed law would not limit the other party to the issues discussed by the President, the Republicans could have eschewed any discussion of the war and instead attacked the President on some unrelated and perhaps less important issue. Ultimately, the war would have been opposed less effectively by the President's real opposition in the time remaining to the networks for coverage of other news topics.

32. P. 161.
33. 47 U.S.C. § 315 (1970).
34. P. 161.
35. P. 162.
36. P. 153.

On the whole, granting the party out of power a right of free reply will make political debate in America more partisan and institutional rather than philosophical and issue-oriented.[37] Such a provision may lock the current political scene into law by narrowing the range of expression to established partisans. Similarly, this proposal could hurt insurgent candidates running independently of the backing of party regulars by giving each national committee the power to select party spokesmen. Television debate of political issues is not likely to be strengthened by giving so much television control to the party regulars on the national committees.

The "opposition" to the President's policies can come from many sources. Whether that opposition is the other party, a local official, or the heir apparent within the President's own party, the wiser choice is to seek conditions under which each such group can receive news coverage to the extent that it is newsworthy and can also have a right to buy television time for itself. This latter issue of access rights, which would in many ways help achieve the authors' objectives, is explored in more detail below.

IV

The authors propose also that "National Debates" among spokesmen of the national political parties be established on a voluntary basis for all concerned, with the stipulation that they be shown live during prime time with simultaneous major network coverage.[38] Designed to facilitate the development of party positions, a dubious goal in itself, the debates would more than likely lead to many of the same results as the proposals for "opposition television" that were criticized above.

Political debates have always been voluntary for both participants and broadcasters. There has seldom been any hesitancy on the part of broadcasters to stage debates. The problem is that the incumbent, usually much better known, is often understandably reluctant to help provide an equal forum for his opponents. The National Debates would frequently meet the same obstacle. It is likely that they would never take place except when the strategies of all candidates coincide. Such debates therefore could never play a major role in balancing presidential television appearances.

37. The present Fairness Doctrine, in contrast, requires a balance of issues, not personalities or parties.

38. Pp. 155, 162.

The authors would vest in the national committees of each party the power to choose the spokesmen who will participate in these debates. They suppose that the "most arresting personalities and best debaters will be chosen."[39] More likely, the division within the national committees will often lead to compromise spokesmen noted only for their lack of further political ambition.[40] Without the charismatic figures that television seems to require, the debates would probably languish very low in viewer popularity—except for those few occasions when they would have been interesting enough to command coverage anyway.

V

In developing their recommendations for giving television reply time to Congress and the opposition party, the authors almost completely ignore the question of allowing a private right of access.[41] Giving access to groups other than Congress and the opposition party would make it possible to provide exposure for a wider range of political opinions. Had the authors considered the access issue in light of theories of broadcasting regulation and the requirements of the First Amendment, their recommendations might have been far different.

Despite the demand for some form of access by private groups, the Supreme Court ruled in *Columbia Broadcasting System v. Democratic National Committee*[42] that broadcaster refusal to allow paid access to the airwaves in the form of "editorial advertisements" did not violate the First Amendment or the broadcasters' statutory duty[43] to act "in the public interest." The Court, in considering the possibility of creating such a private right of access, said that it was necessary to weigh the interests in free expression of the public, the broadcaster, and the individual seeking access. It then held that the Congress was not unjustified in concluding that the interests of the public would be best served by giving full journalistic discretion to broadcasters, with the only check on the exercise of that discretion being

39. P. 155.
40. Conversely, if each party chose several spokesmen to represent various wings of the party, the debates could become little more than intraparty quarrels.
41. "Private right of access" refers to the practice of allowing individuals and groups to purchase television time to broadcast their views on politics or other subjects.
42. 412 U.S. 94 (1973). The Court overturned a ruling by the court of appeals that a flat ban on paid editorial announcements violates the First Amendment, at least when other sorts of paid announcements are accepted. Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).
43. 47 U.S.C. § 309 (1970).

the FCC's public interest regulation of broadcasters. The majority opinion pointed out that choosing a method of providing access to individuals and private groups that relied on detailed oversight by a regulatory agency would simply increase government interference in program content, in view of the need to create regulations governing which persons or groups would have a limited right of access.[44] The Court stated, however, that the access question might be resolved differently in the future: "Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."[45]

The appearance of *Presidential Television* revives the concerns that took *Democratic National Committee* to the Supreme Court. The growing role of broadcasting in American politics, together with the increasing clamor for some form of access, may justify legislative reexamination of whether the broadcaster should be required in selling his commercial time[46] to accept all paid announcements without discrimination as to the speaker or the subject matter.[47] In this way, paid editorial announcements would stand on an equal footing with paid commercials and paid campaign advertisements. The broadcaster would sell advertising time exclusively on the basis of availability, the same way that newspapers and magazines sell advertising space. All

44. 412 U.S. at 126-27. The Supreme Court distinguished this type of "right of access" from enforcement of the Fairness Doctrine, which the Court described as involving only a review of the broadcaster's overall performance and "sustained good faith effort" to inform the public fully and fairly. However, the Court apparently was unaware of the gradual shift away from general enforcement of the Fairness Doctrine towards specific, case-by-case and issue-by-issue implementation. *See* Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75 (1969); Goldberg, *A Proposal to Deregulate Broadcast Programming*, 42 GEO. WASH. L. REV. 73, 88 (1973); Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Scalia, *Don't Go Near the Water*, 25 FED. COM. B.J. 111, 113 (1972), *quoting* Paul Porter from *Hearings on the Fairness Doctrine Before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., at 153 (1968). In effect, this shift in the method of enforcement has made the Fairness Doctrine similar to the type of "right of access" mechanism that the Court in *Democratic National Committee* said would regiment broadcasters to the detriment of the First Amendment. 412 U.S. at 127.

45. 412 U.S. at 131.

46. This proposal is limited to time reserved for paid commercials, not program time. A broadcaster would not be compelled to preempt regular programming. Commercial time on television falls generally in the range of 9 to 16 minutes per hour. The voluntary code of the National Association of Broadcasters allows nine minutes per hour during prime time, BROADCASTING MAG., *supra* note 1; the amount of commercial time is greater during other times of the day.

47. Under present government regulation, the broadcaster is legally responsible for his commercial time as well as his program material. In a system of paid access, it may be sufficient that individuals and groups are civilly liable for slander, obscenity, false or deceptive advertising, incitement to riot, or other offenses, and therefore the broadcaster should perhaps be relieved of liability for any infractions of law by users of the station's facilities.

persons able and willing to pay would have an equal opportunity to present their views on television.[48]

This kind of access right would be compatible with the policy concerns of the Supreme Court in *Democratic National Committee*.[49] This proposal would require no additional government administration or interference. Exempting access announcements from the Fairness Doctrine would cause a minimum of dislocation to the broadcaster's regular programming.[50] Moreover, broadcasters would not give up any significant control over substantive programming if the right of access were limited to commercial time. Both the journalistic freedom of the broadcaster and the interest of members of the public in obtaining television time are therefore protected by the creation of this limited right of access.[51]

By meeting some of the public demand for an electronic forum, developments in communications technology such as cable television will in the future almost surely reduce the hazards, real or imagined, from

48. This should not cause an unfair discrimination against groups which lack funds. Considering the amount of contributions which television appeals can attract, it is likely that any group with something important to say could raise money for the announcements by an on-the-air appeal. *See, e.g.*, p. 118 (an antiwar group paid $60,000 for time, but received $400,000 in contributions). Small, unpopular, or extremist groups might have trouble raising funds, but regrettably some of these groups probably would also be denied time under the present Fairness Doctrine. Poor groups whose views were not represented on programming time would be able to compel at least some coverage of their views through enforcement of the broadcaster's statutory responsibilities.

49. In fact, this would conflict less with *Democratic National Committee* than would the authors' proposals, which show little regard for the public interest or the journalistic freedom of the broadcaster. The authors would take from the broadcaster control over large blocks of time now devoted to program material, and give it to groups which the FCC could not hold accountable under the public interest standard. This was one reason the Court accepted the FCC's refusal to require public access in *Democratic National Committee*. 412 U.S. at 125.

50. If the Fairness Doctrine were applied to paid political advertisements, the broadcaster might be forced to provide free time for replies during regular programming time. 412 U.S. at 123-24 (the Court apparently did not decide whether the FCC would be permitted or required to extend the Fairness Doctrine to paid political advertisements). This possibility would be avoided by explicitly exempting these announcements from the Fairness Doctrine as part of the proposal. Such an exemption, of course, need not affect application of the Fairness Doctrine to product advertisements. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). In addition, this proposal would leave the license renewal process available as a recourse in cases of extreme program imbalance.

The Fairness Doctrine, moreover, is not the source of this right of access. To use the Fairness Doctrine to justify a private right of access is to give it a function for which it was never intended.

51. In contrast, giving an unlimited right of access during regular programming time could remove a large amount of time from the control of the broadcaster and give it to individuals or groups. Since even proponents of access agree that this would be undesirable, they recommend more "limited" rights of individual access. But then it would be necessary to have detailed FCC-enforced regulations and standards to determine who would be entitled to time and which time slots would be made available. A right of access so constrained would result in the same type of governmental control over program content that was condemned in *Democratic National Committee*, 412 U.S. at 126.

presidential television.[52] In the meantime, the more limited medium of broadcast television must be made more responsive to individuals and groups seeking to express their points of view. The method by which this is done is crucial. Access can either be given on an ad hoc basis to those groups powerful enough to command it legally (such as Congress and the opposition party), as the authors suggest, or it can be sold on a nondiscriminatory basis. Only the latter proposal would be an improvement over the present system.

VI

The thrust of all of the authors' proposals is toward dictating to television viewers what they are to see, with paternalistic disregard for their actual desires. In doing so, the authors have lost sight of the substantial journalistic function that broadcasters share with publishers. Newspapers devote their space to those issues and events that the editors feel the readers will find most important. The more important the event, the more prominent is its position in more newspapers. No one tells a newspaper how many column-inches to devote to a certain topic, and certainly there is no law requiring the periodic coverage of specified events regardless of their newsworthiness.

To be sure, the "broadcasters' First Amendment" has come to be viewed[53] as an abridged version of the original one.[54] It is crucial, however, that intrusions on journalistic expression be severely limited. Most of the authors' proposals would impinge on free journalistic expression at a time when ways should be found to help preserve that expression. Indeed, the inevitable arbitrariness and complexity of such proposals provide the best arguments against legal controls over the use of television. The proposals go well beyond what is necessary to achieve many of the authors' goals and, unfortunately, fail to concentrate on the development of a general system of access that would be better designed to achieve those goals.

The major criticism of the authors' proposals, though, is that they

52. While the authors include cable systems in their suggestions, it is doubtful that anyone, including the President, should appear simultaneously on all of the potentially numerous networks in a medium of channel abundance like cable. It is also doubtful that all cable network organizations should be required to give free time to Congress or opposition parties, since there should be sufficient time for sale to accommodate everyone. Cable television, therefore, should be exempt from the programming requirements proposed by the authors.

53. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (the right of the viewers and listeners is paramount to that of the broadcaster).

54. The First Amendment commands that "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

would impair rather than expand the ability of television to evolve into a medium reflecting a wide range of perspectives on the American social and political scene. With the extreme economic concentration of control over television programming by the three national networks[55] and the growing scope of FCC programming regulations,[56] we are already moving toward control of national television programming by a familiar coalition of big business and big government. Proposals such as those in this book serve only to entrench such a system and to constrain the diversity and free choice that should characterize American television.

Presidential Television provides an interesting and valuable addition to the literature on national politics by documenting the successes and failures of the evolving strategies that Presidents have devised in their efforts to adapt to the new television medium. But in the end, the authors fail to demonstrate the validity of their assertion that television has significantly and permanently altered the ebb and flow of America's political forces. We are left with presidential television as a still-evolving form, mastered neither by news departments nor Presidents, clearly something different from presidential radio and presidential headlines, very much a part of our political process, but hardly a fundamental threat to our constitutional system. The authors have discovered the dangers inherent in excessive concentration of presidential power. But, in seeking to check this power, they have chosen a course at variance with our most fundamental First Amendment principles, undermining the ultimate check on political power—an electorate that informs itself through a press unrestrained by government prescription.

55. The three networks originate about 64 percent of all programming for affiliated stations. BROADCASTING MAG., *supra* note 1, at 70. The percentage is higher during evening prime-time hours. Of the 700 commercial stations operating as of April 30, 1974, BROADCASTING MAG., June 3, 1974, at 40, only about 80 are not affiliated with the networks. Station ownership is also highly concentrated:

> Each of the networks owns the legal maximum of 5 VHF stations. Since these are in the largest cities, networks reach 25 to 35 percent of all TV homes with their own stations.

R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 16 (1973).

56. *See, e.g.*, Notice of Inquiry in Docket No. 19154, 27 FCC 2d 580 (1971) (recommended percentages of certain types of programming); Further Notice of Inquiry in Docket No. 19154, 31 FCC 2d 443 (1971) (same); Report and Order Docket No. 19622, 29 P & F RADIO REG. 2D 643 (1974) (prime-time access restrictions on network programming).

J

ng their weight around in this admin-
on."

Ru[redacted] in both oral and written
unic[redacted] with all workers in the ex-
e b[redacted] is saying quite clearly:
one must fully understand and abide
e President's message: there shall not
e no wrongdoing in this administra-
there shall not be even the appear-
of wrongdoing."

t's the President's standard. And Mr.
feld is seeing to it that everyone in this
istration lives up to it.

FEDERAL RESERVE'S CURRENT TIGHT-MONEY POLICIES

. TUNNEY. Mr. President, I would
o bring to the attention of my col-
es a two-part editorial by television
on KGTV in San Diego, Calif. Mr.
on McKinley, senior vice president
cGraw-Hill Inc. and the company's
economist spoke for the station on
Federal Reserve's current tight-
y policies.

sk unanimous consent that the edi-
ls be printed in the RECORD.

ere being no objection, the edi-
ls were ordered to be printed in the
RD, as follows:

OUR GOVERNMENT'S REMEDY FOR INFLATION IS DEAD WRONG

OTE.—Why does the government's awe-
fiscal power seem unable to cope with
nflation that's eating us all alive? Be-
e the Federal Reserve Board is fighting
wrong kind of inflation. The following
part editorial commentary was broad-
this [redacted] for the McGraw-Hill Broad-
ng [redacted] by Gordon W. McKinley,
or V[redacted]sident-Economics and Fi-
ial Planning, McGraw-Hill, Inc.)

PART I. THE BASIC CAUSE OF TODAY'S INFLATION

ch and every one of you has felt the
ct of inflation in one way or another.
the most serious economic problem we
today. Yet—tragically—our Govern-
t has no effective program to solve the
lem. The Federal Reserve Board's solu-
is to restrict the supply of money and
e interest rates to the highest levels in
century. McGraw-Hill Broadcasting
pany believes that this tight-money,
-interest rate policy is mistaken. The
cy has failed miserably thus far, and will
make inflation worse if it is continued.
call for a prompt move to easier money
lower interest rates.

e do not doubt the sincerity of the Fed-
Reserve Board. We are convinced, how-
, that the Board has badly misjudged
true nature of the inflation virus that
grips the American economy. The Board
arently believes that we are in a classic
l of "demand-pull" inflation. They pic-
the economy as fully employed, with
sumer demand very strong and with
es rising simply because we are unable
turn out goods fast enough. Under
se conditions, the solution is clear: re-
ct the money supply so that we do not
e too much money chasing too few goods.
nfortunately, a close look at the real
nomy of our country does not look at all
the classic case envisioned by the Fed-
l Reserve Board. For one thing, the econ-
y today is not fully employed in any
aning[redacted]se of that term. For another,
vern[redacted]tistics show that our man-
acturi[redacted]stries taken as a group are
erating [redacted]us. 80 per cent of capacity, a
e of utilization which in the past twenty-
years has occurred only during periods
recession. And, in the first quarter of
s year, our real gross national product
l by a larger amount than in any other quarter in the past sixteen years. Unemployment is rising, and business failures are multiplying. Industrial production today is actually below that of a year ago. These are not the signs of a fully employed economy.

The fact of the matter is that today's inflation is not at all the demand-pull situation I mentioned earlier. Instead, it is a new cost-push inflation, stemming from a worldwide shortage of basic commodities. Look at the record. The first symptom showed up in a sharp rise in the price of grains and other foods, followed by a staggering jump in petroleum prices. Then, in dramatic succession, price increases developed in other raw materials and foods, from bauxite to bananas. Steel, paper, cement, chemicals and many others joined the list—all booming at the same time that broad areas of the economy are declining. The distinguishing characteristic of today's inflation is that prices are being forced up by rising costs despite a complete absence of vigorous consumer demand.

Now the question: what happens when a Federal Reserve policy of tight money and high interest rates is used in an attempt to halt this new type of cost-push inflation? The answer is all too clear: the whole economy is dragged d[redacted]n in a futile effort to reduce the prices of raw materials and basic commodities. The home construction industry is crippled and vital plant and equipment expenditures are discouraged. The loss of 600,000 homes and apartments this year will unquestionably mean higher home prices in the future. And curbing plant expenditures now will directly affect our ability to raise productivity and lower costs in the future. To the extent that tight money is curbing the output of housing and new plant and equipment in 1974, it is depriving us of our most effective means of combating inflation in the future.

The net effect of the current high interest rate, tight money policy has been to reduce output, not prices. And, even if tight money is pushed to the point of a severe recession, it will not be successful in curing today's inflation. Deliberately provoked recessions are not the cure for inflation. Following the 1970 recession, inflation accelerated so rapidly that an Administration committed to the free market was forced to accept direct wage and price controls.

PART II. A WORKABLE PROGRAM TO COMBAT INFLATION

What, then, can be done about inflation? We suggest the following six-point, anti-inflation program.

The first step, and one which should be put into effect immediately, is easier money and lower interest rates. Tight money has reduced output and raised costs. An easing in monetary policy will increase output, restore order to the financial markets, halt the rising tide of business failures, and put people to work again. Higher production is the best way to beat inflation.

The second step is a cut in government spending. There is fat and waste in the Federal budget and this unnecessary spending can and must be eliminated. Federal officials smugly advise the American public to pull in their belts and suffer patiently while the economy stagnates. I suggest that it is the bureaucrats who should pull in their belts so that the private sector can have the resources necessary to expand production and jobs.

The third step is to increase incentives to the business community to encourage expansion of factories and modernization of machinery. This can be done with a more liberal investment tax credit; depreciation allowances adjusted to reflect inflation; and other forms of tax relief necessary to spur plant and equipment expenditures. Modern plants mean larger, more efficient output which is the way to bring down prices.

The fourth step is the establishment of a National Commodity Reserve. Substantial stocks of raw materials and basic commodities would be accumulated in this Reservoir through government purchase when supply is ample and prices weak. These reserves would be released on the market only when prices rose more than, for example, 10 per cent. This would effectively stabilize prices, and equally important, would make this country less dependent on foreign sources.

Fifth, Congress establish, immediately, an Agricultural Production Bonus Program. Government bonuses would be paid for production above the base period. The increased farm production would bring food prices down, and the bonus payments would keep farm income high. No greater blow could be leveled against inflation than a drop in food prices.

Finally, Congress should establish a National Commission on Free Market Prices. The Commission would be charged with carefully reviewing the many existing laws and regulations which inhibit price competition. The Commission would then recommend to Congress solutions designed to repeal these laws.

All the steps in this program follow one central theme—what this country needs to bring down prices is more production, more employment, more plant capacity. Inflation can be beaten if we discard restrictive monetary policies and concentrate our efforts on increasing output.

President Ford right now is searching for new solutions. Let him know how you feel.

The President's summit conference on economic affairs starts today. If you agree with our solution, or if you disagree with it, or if you have a solution, of your own, by all means communicate it to him. Write to us. We'll forward your comments to President Ford.

If you would like reprints of this editorial commentary, write to: KGTV-10. McGraw-Hill Broadcasting Company, Inc., P.O. Box 81047. San Diego, California 92138.

MR. JUSTICE STEWART INTERPRETS A FREE PRESS

Mr. PROXMIRE. Mr. President, the title, "Or of the Press," hints at the force of the address by Mr. Justice Potter Stewart to the Yale Law School Sesquicentennial Convocation on Nov. 2. Just as the words of the first amendment to the Constitution granting a free press in the United States are simple and forthright, so were the words of the Supreme Court Justice.

Mr. Justice Stewart makes it clear that a free press goes beyond free speech. The free press guarantee, he says, is a "structural provision of the Constitution." Most of the other provisions in the Bill of Rights, he says, are to protect "specific liberties or specific rights of individuals."

Mr. Justice Stewart goes on to say that:

> The Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

His point becomes clear when he notes that the founders of our system "deliberately created an internally competitive system," meaning a distribution of powers between the legislative, executive, and judicial branches.

So what does that have to do with the free press?

Stewart first quotes Mr. Justice Brandeis in a 1926 dissenting opinion:

The [Founders'] purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches. Consider the opening words of the Free Press Clause of the Massachusetts Constitution, drafted by John Adams:

"The liberty of the press is essential to the security of the state."

Stewart is saying that a free press is the citizen's guarantee against Government domination.

An old radio program, "Steve Wilson of the Illustrated Press"—remember?—had a standard introduction that included these words: freedom of the press is a flaming sword—hold it high, use it well.

Stewart is saying about the same thing. Think not?

Early in his address to the Yale convocation, he said that polls have shown that some Americans believe that the former Vice President and former President were "hounded out of office by an arrogant and irresponsible press," and that many more Americans consider the press to have "illegitimate power" in our political structure. Not true, says Stewart. He says:

On the contrary, the established American press in the past ten years, and particularly in the past two years, has performed precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution.

In his distinction between free speech and a free press, Stewart points to the Supreme Court's decisions on libel and slander. He notes that for all practical purposes officials of all three branches of Government are immune from libel and slander suits, for otherwise we as citizens could not be assured of "bold and vigorous prosecution of the public's business."

And, he says—

By contrast, the Court has never suggested that the constitutional right of free *speech* gives an *individual* any immunity from liability for either libel or slander. (The emphases are his.)

In this context, he explains the close vote of the Court in a decision that has led to a debate over whether reporters should be able to shield the identity of their sources. As an individual, the reporter obviously cannot use free speech as an argument to frustrate a grand jury. Stewart says:

Only if a reporter is a representative of a protected *institution* does the question become a different one. The members of the Court disagreed in answering the question, but the question did not answer itself.

The implication in his speech on this point is that a free press must be about the public's business, and it can do that business only if it cannot be intimidated by the officials who are supposed to run it correctly. And that, of course, is why we use the phrase free press rather than just the word press.

Stewart covers CBS versus the Democratic National Committee, which raised the question of "whether political groups have a first amendment or statutory right of access to the federally regulated broadcast channels of radio and television. The Court held there was no such right of access."

Also in his list is the Miami Herald versus Tornillo, in which the Court unanimously held unconstitutional the Florida statute requiring newspapers to grant a right of reply to political candidates who had been criticized in print.

In getting back to the principle on those cases, he says:

The cases involving the so-called "right of access" to the press raised the issue whether the first amendment allows government, or indeed requires government, to regulate the press so as to make it a genuinely fair and open "market place for ideas." The Court's answer was "no" to both questions. If a newspaper wants to serve as a neutral market place for debate, that is an objective which it is free to choose. And, within limits, that choice is probably necessary to commercially successful journalism. But it is a choice that government cannot constitutionally impose.

But for the Government to force newspapers to be fair is impossible under our system, not only because that force is unconstitutional, but because there is no assurance whatsoever that the Government could establish standards for fairness.

My thesis is that the Federal Communications Commission's fairness doctrine is unconstitutional. Stewart did not say that to his Yale audience.

Can that be read into his speech?

Probably not, because a Justice of the Supreme Court of the United States will not speak in particular about cases that might come before the Court. Also, only a majority of the Court can speak with authority, and it will do that only when a specific question is before the Court.

Yet, I believe it is important that Stewart in his Yale address did not exclude the electronic media from his definition of the press. Indeed, in two instances he specifically listed them along with the print press. In another instance, he alluded to the electronic media.

Here are those three instances:

Specifically, I shall discuss the role of the organized press—of the daily newspapers and other established news media—in the system of government created by our Constitution.

* * * * *

Newspapers, television networks, and magazines have sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press in the way to eliminate abusiveness, untruth, arrogance, or hypocrisy from government itself.

* * * * *

The press could be relegated to the status of a public utility. The guarantee of free speech would presumably put some limitation on the regulation to which the press could be subjected. But if there were no guarantee of a free press, government could convert the communications media into a neutral 'market place of ideas.' Newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice.

Mr. President, there is no doubt in my mind that radio and television broadcasters could be, and should be, the same watchdogs of government that publishers are structurally under our Constitution. It is significant that Stewart in his specific mention of the electronic media warned of government abuse.

Let me repeat my last quotation from his speech:

Newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice.

Stewart sees the danger in government control of the news media that the authors of the Bill of Rights were seeking to avoid.

We have an adversary system in this country. We have it because it was designed that way. The press is part of that system, and it is part of it constitutionally. It may not be an official or integral part; but it is distinct part of the system outside the Government.

And the beneficiaries of that system are not the legislative, executive, and judicial branches nor the watchdog press. No; the beneficiaries are the citizens of our country.

The citizens, the people of the United States, delegate powers to the Government. Someone has to watch that Government to make sure abuses are exposed. The press—electronic and print—has that duty. It can carry out that duty because it is not official.

Other countries have official publications. That is, they have authorized organs or tools of information. We should not under our Constitution.

But how then can the FCC—an integral part of government—be explained away in its function of controlling that part of the press which happens to use the airwaves to deliver its information?

It cannot be explained away. It cannot be fitted into our constitutional system.

The FCC is a chain on the watchdog.

Some argue that it is not a chain. Others argue that the chain is necessary because the airwaves are public property.

But it is legal fantasy to say that the airwaves are public property. Suppose for a moment that the airwaves are publicly owned; the chain still cannot be rationalized.

The Constitution is an instrument of the People of the United States.

It is the Constitution that establishes the government.

The Constitution vests powers to the legislative branch, to the executive branch and to the judicial branch. It vests only the powers enumerated.

The first amendment to the Constitution specifically prohibits the legislative branch from passing a law abridging, that is, diminishing, the freedom of the press.

The President is sworn to uphold the Constitution.

The FCC was established by the legislative branch and is part of the executive branch. It is a part of the Government.

The Government may not interfere with the press. Therefore the FCC may not interfere with the press, which includes radio and television broadcasters.

It makes no difference who owns the airwaves.

The law that established the FCC says that the Government controls the channels of radio communication and may provide for their use but not their owner-

over

[illegible]t does not say who owns the chan[illegible] airwaves.

That law also says that the FCC shall not interfere with the right of free speech by means of radio communication.

If the FCC may not interfere with free speech, which according to Justice Stewart can be limited because it is not a structural provision of the Constitution, it follows that the FCC in no way can interfere with a free press.

Radio and television are part of the free press, so the Government through the FCC may not interfere with the free press aspects of broadcasters.

But it does interfere.

So it is time to right the situation. It is time to start following the Constitution again.

I believe that job should be done by the legislative branch. It is too much to hope that the executive will change its ways. The judicial, correctly, is reluctant to make law.

That is why after the next Congress convenes I shall introduce legislation making clear that the people of this country should have the protection of a completely free press.

Why is it too much to hope that the executive branch will help accomplish this?

In the Pentagon Papers case, Mr. Justice Stewart said that the line was drawn between secrecy and openness in the af[illegible] of Government. But was the line [illegible]n in the Constitution?

[illegible]e said:

The Justice Department asked the Court to find in the Constitution a basis for prohibiting the publication of allegedly stolen government documents. The Court could find no such prohibition. So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

Then comes the heart of the matter. The Justice goes on:

But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution.

Mr. President, it seems clear to me from that position that the real push for a free press—a complete free press including television—should come from the people of this country. They are the ones with the real stake in knowing.

The Congress, being closest to the people, is the place to start.

And what if the free press, including [illegible]dio and television, gets out of hand. [illegible]ustice Stewart, as I have already [illegible]quoted, has the answer. The press must be responsive to the needs of the people.

He put it this way:

If a newspaper (and from his context, I believe he includes radio and television) wants to serve as a neutral market place for debate, that is an objective which it is free to choose. And, within limits, that choice is probably necessary to commercially successful journalism. But it is a choice that government cannot constitutionally impose.

Mr. President, I ask unanimous consent that Mr. Justice Stewart's address be printed in the RECORD. It is, I think, an eloquent argument for a fully free press.

There being no objection, the address was ordered to be printed in the RECORD, as follows:

OR OF THE PRESS

(Address of Potter Stewart, Associate Justice, Supreme Court of the United States)

Mr. Justice White, President Brewster, Dean Goldstein, Mr. Ruebhausen, Ladies and Gentlemen:

It is a pleasure to be here today with my colleague Byron White, and I am very grateful to him for his generous words of introduction. And it is, of course, a pleasure to participate with him and with all of you in this convocation marking the commencement of the sesquicentennial year of the Yale Law School.

Just how it is that this *is* the Law School's 150th Anniversary is a subject that I am happy to leave for others to explain. All I know is that it is supposed to have something to do with a couple of young men who, in the year 1824, persuaded a friendly printer to give their proprietary law school a little free advertising space in the Yale College catalogue.

But many great institutions have had humble beginnings. Even the Roman Empire, you will remember, traced its history back to no more than two hungry little boys and a friendly wolf.

Yet, however obscure the origins of this law school may have been, all of us know that by the early years of this century it was emerging as an important center for legal study. And by the time my classmates and I showed up here as first year students in 1938, the Yale Law School had long since been universally recognized as one of a very few great national law schools in the western world.

Just to speak the names of those, now gone, in whose classrooms I sat during my three years as a student here is to call the roll of some of the most notable legal scholars and law teachers in our country's history: Charles Clark, Arthur Corbin, Edwin Borchard, George Dession, Ashbel Gulliver, Walton Hamilton, Underhill Moore, Harry Shulman, Roscoe Steffens, Wesley Sturges.

And, although we hardly realized it then, the law school's student body during those three years was quite a remarkable collection of people as well. The membership of a single student eating club during that three year period included, as it turned out, the two members of the Supreme Court who are here today, a United States Senator, three members of the House of Representatives, two Governors of Pennsylvania, two Secretaries of the Army, an Undersecretary of Defense, a nominee for the Vice Presidency of the United States, and the incumbent President of the United States.

The Yale Law School of that era had already acquired a distinctive reputation for its leadership in the so-called "realist movement." Yet it was a place then, as it is a place now, where, in the words of Dean Goldstein, "widely divergent theories of law and society were taught and debated, a school which cannot be described as representing an orthodoxy of left, center, or right." It was then, as it is now, an exciting place and a challenging place, where a teacher's reach sometimes exceeded a student's grasp and where, as a result, every student was invited to stretch himself, in intellect and understanding, to heights and breadths well beyond his previous experience. There was a tradition here then, as there is now, of free inquiry, of independent thought, and of skeptical examination of the very foundations of existing law.

It is in that tradition that I turn this morning to an inquiry into an aspect of constitutional law that has only recently begun to engage the attention of the Supreme Court. Specifically, I shall discuss the role of the organized press—of the daily newspapers and other established news media—in the system of government created by our Constitution.

It was less than a decade ago—during the Vietnam years—that the people of our country began to become aware of the twin phenomena on a national scale of so-called investigative reporting and an adversary press—that is, a press adversary to the Executive Branch of the Federal Government. And only in the two short years that culminated last summer in the resignation of a President did we fully realize the enormous power that an investigative and adversary press can exert.

The public opinion polls that I have seen indicate that some Americans firmly believe that the former Vice President and former President of the United States were hounded out of office by an arrogant and irresponsible press that had outrageously usurped dictatorial power. And it seems clear that many more Americans, while appreciating and even applauding the service performed by the press in exposing official wrongdoing at the highest levels of our national government, are nonetheless deeply disturbed by what they consider to be the illegitimate power of the organized press in the political structure of our society. It is my thesis this morning that, on the contrary, the established American press in the past ten years, and particularly in the past two years, has performed precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution. I further submit that this thesis is supported by the relevant decisions of the Supreme Court.

Surprisingly, despite the importance of newspapers in the political and social life of our country, the Supreme Court has not until very recently been called upon to delineate their constitutional role in our structure of government.

Our history is filled with struggles over the rights and prerogatives of the press, but these disputes rarely found their way to the Supreme Court. The early years of the Republic witnessed controversy over the constitutional validity of the short-lived Alien and Sedition Act, but the controversy never reached the Court. In the next half century there was nationwide turmoil over the right of the organized press to advocate the then subversive view that slavery should be abolished. In Illinois a publisher was killed for publishing abolitionist views. But none of this history made First Amendment law because the Court had earlier held that the Bill of Rights applied only against the Federal Government, not against the individual states.

With the passage of the Fourteenth Amendment, the constitutional framework was modified, and by the 1920's the Court had established that the protections of the First Amendment extend against all government—federal, state, and local.

The next fifty years witnessed a great outpouring of First Amendment litigation, all of which inspired books and articles beyond number. But, with few exceptions, neither these First Amendment cases nor their commentators squarely considered the Constitution's guarantee of a Free Press. Instead, the focus was on its guarantee of free speech. The Court's decisions dealt with the rights of isolated individuals, or of unpopular minority groups, to stand up against governmental power representing an angry or frightened majority. The cases that came to the Court during those years involved the rights of the soapbox orator, the nonconformist pamph-

leteer, the religious evangelist.' The Court was seldom asked to define the right and privileges, or the responsibilities, of the organized press.

In very recent years cases involving the [redacted]ed press finally have begun to reach [redacted]preme Court, and they have presented a [redacted]y of problems, sometimes arising in complicated factual settings.

In a series of cases, the Court has been called upon to consider the limits imposed by the free press guarantee upon a state's common or statutory law of libel. As a result of those cases, a public figure cannot successfully sue a publisher for libel unless he can show that the publisher maliciously printed a damaging untruth.[1]

The Court has also been called upon to decide whether a newspaper reporter has a First Amendment privilige to refuse to disclose his confidential sources to a grand jury. By a divided vote, the Court found no such privilege to exist in the circumstances of the cases before it.[2]

In another noteworthy case, the Court was asked by the Justice Department to restrain publication by the *New York Times* and other newspapers of the so-called Pentagon Papers. The Court declined to do so.[3]

In yet another case, the question to be decided was whether political groups have a First Amendment or statutory right of access to the federally regulated broadcast channels of radio and television. The Court held there was no such right of access.[4]

Last term the Court confronted a Florida statute that required newspapers to grant a "right of reply" to political candidates they had criticized. The Court unanimously held this statute to be inconsistent with the guarantees of a free press.[5]

It seems to me that the Court's approach to all these cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the [redacted]stitution. Most of the other provisions in [redacted]t of Rights protect specific liberties or [redacted]s rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. Between 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of the press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, a "market place for ideas," a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, attach [redacted]ain[redacted] insufficient weight to the institutional autonomy of the press that it was the [redacted]urpose of the Constitution to guarantee.

[redacted] setting up the three branches of the [redacted]ral Government, the Founders deliberately created an internally competitive system. As Mr. Justice Brandeis once wrote: [6]

"The [Founders'] purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches. Consider the opening words of the Free Press Clause of the Massachusetts Constitution, drafted by John Adams:

"The liberty of the press is essential to the security of the state."

The relevant metaphor, I think, is the metaphor of the Fourth Estate. What Thomas Carlyle wrote about the British Government a century ago has a curiously contemporary ring:

"Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous to us in these times."

For centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.

It is this constitutional understanding, I think, that provides the unifying principle underlying the Supreme Court's recent decisions dealing with the organized press.

Consider first the libel cases. Officials within the three governmental branches are, for all practical purposes, immune from libel and slander suits for statements that they make in the line of duty.[7] This immunity, which has both constitutional and common law origins, aims to insure bold and vigorous prosecution of the public's business. The same basic reasoning applies to the press. By contrast, the Court has never suggested that the constitutional right of free *speech* gives an *individual* any immunity from liability for either libel or slander.

In the cases involving the newspaper reporters' claims that they had a constitutional privilege not to disclose their confidential news sources to a ground jury, the Court rejected the claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half. But if freedom of the press means simply freedom of speech for reporters, this question of a reporter's asserted right to withhold information would have answered itself. None of us—as individuals—has a "free speech" right to refuse to tell a grand jury the identity of someone who has given us information relevant to the grand jury's legitimate inquiry. Only if a reporter is a representative of a protected *institution* does the question become a different one. The members of the Court disagreed in answering the question, but the question did not answer itself.

The cases involving the so-called "right of access" to the press raised the issue whether the First Amendment allows government, or indeed *requires* government, to regulate the press so as to make it a genuinely fair and open "market place for ideas." The Court's answer was "no" to both questions. If a newspaper wants to serve as a neutral market place for debate, that is an objective which it is free to choose. And, within limits, that choice is probably necessary to commercially successful journalism. But it is a choice that government cannot constitutionally impose.

Finally the Pentagon Papers case involved the line between secrecy and openness in the affairs of Government. The question, or at least one question, was whether that line is drawn by the Constitution itself. The Justice Department asked the Court to find in the Constitution a basis for prohibiting the publication of allegedly stolen government documents. The Court could find no such prohibition. So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.[8] The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.

Newspapers, television networks, and magazines have sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance, or hypocrisy from government itself.

It is quite possible to conceive of the survival of our Republic without an autonomous press. For openness and honesty in government, for an adequate flow of information between the people and their representatives, for a sufficient check on autocracy and despotism, the traditional competition between the three branches of government, supplemented by vigorous political activity, might be enough.

The press could be relegated to the status of a public utility. The guarantee of free speech would presumably put some limitation on the regulation to which the press could be subjected. But if there were no guarantee of a free press, government could convert the communications media into a neutral "market place of ideas." Newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice.[9]

Such a constitution is possible; it might work reasonably well. But it is not the Constitution the Founders wrote. It is not the Constitution that has carried us through nearly two centuries of national life. Perhaps our liberties might survive without an independent established press. But the Founders doubted it, and, in the year 1974, I think we can all be thankful for their doubts.

Let me emphasize again what I tried to indicate at the beginning of this discussion. The First Amendment views that I have expressed are my own. I have not spoken for the Court, and particularly I have not spoken for Mr. Justice White. While he and I are in agreement about many things, we have also sometimes disagreed—from as long ago as 1939 to as recently as last Tuesday. And, whatever else we may have learned at this Law School, I think each of us learned somewhere along the way that the person who disagrees with you is not necessarily wrong.

In my opening remarks I spoke of the Law School that I knew as a student. But I am not here today in the role of an aging alumnus with wistful memories of the way things used to be. All of us are here not so much

Footnotes at end of article.

to commemorate a golden past as to celebrate the present, and to express our faith in a bright and solid future.

I spoke earlier of the distinguished members of the faculty who are gone. The fact is that many of the finest teachers of my day are still here, or only recently retired: Fleming James, Myres McDougal, J. W. Moore, Fred Rodell, Eugene Rostow. And the more important fact is that the Law School through the years has been remarkably successful in its continuing program of faculty self-renewal—drawing here teachers and scholars of proven achievement or extraordinary promise. Of them all, I mention only the name of Alexander Bickel, not just because of his nationally recognized distinction, but because I am so sorry he cannot be with us today.

Among the students now here there are undoubtedly future judges and justices, perhaps future senators and congressmen and governors and cabinet officers, and maybe even a future President. But that is not what was really important about the Yale Law School of a generation ago, nor what is important now, nor what will be important in future years. The number of our graduates who have gone into government service is exceedingly high. But public service is surely not limited to government service. The real impact of the Yale Law School will always be most broadly felt through the leadership of its sons and daughters in countless other areas of professional and business activity.

Whatever place any of us may now occupy, all of us share one priceless experience in common. All of us have spent three of the most formative years of our lives in *this* place—challenged by the ideal of excellence, and prepared by that challenge to go forth from here with the will and the confidence to do our best with any task that life may bring.

The opportunity for that priceless experience at this great Law School, for generations of young men and women yet to come, is surely worth preserving for *at least* another 150 years.

FOOTNOTES

[1] See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971).

[2] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

[3] *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

[4] *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

[5] *Miami Herald Publishing Co.* v. *Tornillo*, 94 S. Ct. 2831 (1974).

[6] *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (dissenting opinion).

[7] See *Barr* v. *Matteo*, 360 U.S. 564 (1959).

[8] Cf. *Pell* v. *Procunier*, 94 S. Ct. 2800 (1974); *Saxbe* v. *Washington Post Co.*, 94 S. Ct. 2811 (1974).

[9] Cf. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

BUSINESS EXECUTIVES VIEW CONSUMERISM AS POSITIVE MARKET FORCE

Mr. PERCY. Mr. President, one of the most encouraging signs during these times of two-digit inflation and an unstable economy is the widely held view by businessmen that consumerism is a positive force in the marketplace. A recent article by Stephen A. Greyser and Steven L. Diamond in the Harvard Business Review dramatically reports that 84 percent of the more than 3,400 businessmen surveyed believe that consumerism is "here to stay." Consumer concern over rising prices is seen to be the most important factor in the growth of consumer interest.

Advertising is cited as a major cause of consumer dissatifaction, and the businessmen strongly support more truthfulness; 87 percent agree that "advertising should include adequate information for 'logical' buying decisions, whether or not consumers choose to use it." Hopefully, the views of these executives will be reflected in the mainstream of marketing practices. Consumers need such improvements in advertising both to assist them in their purchases and to restore confidence in American business.

The blame and responsibility for consumer problems was also addressed in this excellent study. The executives assigned to business "the dominant share of responsibility" for both causing, 48 percent, and remedying, 52 percent, consumer problems. In contrast, Government was considered more of a cause, 27 percent of, than a force for remedying, consumer problems. Most significantly, the majority of businessmen, 53 percent thought "consumers should have a lot more protection than they are getting."

These attitudes are encouraging. The Washington-based trade associations that bitterly fought the creation of an Agency for Consumer Advocacy would do better to listen to the enlightened views of these business executives who make up their membership. Fifty-eight percent believe that it is the responsibility of Government to protect consumers from abuse.

The article reports further that 70 percent of the executives agree that "consumerism's pressures overall have had a positive effect on business," and that 74 percent agree that "consumerism's pressures overall have had a positive result for the consumer." This is, as the article indicates, "an interesting twin faceted overall endorsement of consumerism."

Because of the importance of these current research findings for businessmen, consumers, and Members of Congress, I ask unanimous consent that the full text of this article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From Harvard Business Review, September–October 1974]

BUSINESS IS ADAPTING TO CONSUMERISM

(By Stephen A. Greyser and Steven L. Diamond)

(AUTHORS' NOTE: We gratefully acknowledge the support of the Marketing Science Institute and especially thank Jane Ross for her assistance in data tabulation and analysis.)

Broad recognition and growing acceptance characterize management's attitude toward consumerism, the "buyers' rights" movement that has sometimes frustrated, sometimes dismayed, the business community. Generally considered as here to stay, consumerism is now seen by a surprisingly large number of executives as an opportunity rather than a threat. This comprehensive report interprets the opinions of HBR subscribers on the causes and growth of consumerism, its impact on marketing and other business practices, present and prospective business reactions to it, and its regulatory ramifications.

Mr. Greyser is professor of business administration at the Harvard Business School, where he teaches advertising, and executive director of the Marketing Science Institute (a nonprofit research center associated with HBS). Among other books, he has authored Cases in Advertising and Communications Management (Prentice-Hall, 1972) and co-authored with Raymond A. Bauer Advertising in America: The Consumer View (Division of Research, Harvard Business, School, 1968). A frequent contributor to this and other journals on issues of businessmen's attitudes, marketing, advertising, and public policy, he also serves as secretary of HBR's Editorial Board. Mr. Diamond is a doctoral candidate at HBS and a research assistant at MSI. Also research director of The Child, Inc., Mr. Diamond has published a number of articles in the areas of consumer behavior and market research.

Threat . . . or opportunity? Legitimate rights . . . or radical take-over? Substantive . . . or strictly political? Redressing imbalances in the marketplace . . . or creating them?

Consumerism—a movement generally defined as seeking to increase the rights and powers of buyers in relation to sellers—is a phenomenon that has been characterized as each of the above by some observers. As the principal targets of consumerists' activities and demands, businessmen, especially marketers, are often perplexed and distressed by consumerism. Yet whatever their attitude—accepting, cautious, or rejecting—most businessmen regard consumerism with growing interest and concern.

This survey of HBR subscribers is the first wide-scale study of the attitudes and reactions of the executive community regarding consumerism. The respondents come from a variety of industries, company sizes, functional areas, and levels of management, as shown in *Exhibit I* (see page 40). Not unexpectedly, a healthy proportion—about half—are in industries and companies where markting is considered particularly important. The respondents include many who have direct experience with consumerism as well as many who have been relatively unaffected by it. (For details on the study methodology, see the accompanying ruled insert.)

From the responses to the comprehensive HBR questionnaire, we see a picture of broad recognition and acceptance of consumerism by managers as a permanent part of the business landscape. Although some of this acceptance is grudging, a strong majority of executives consider consumerism a positive force in the marketplace. Moreover, by far the most dominant management view of consumerism is that it represents an opportunity for marketers rather than a threat to them.

SURVEY HIGHLIGHTS

Here are the major findings of the study, which are given more extensive treatment in the indicated sections that follow:

Consumerism is here to stay is the overwhelming executive consensus. The combination of consumer concern over rising prices and over the problems of product performance and quality are viewed as the chief reasons for consumerism's growth. (See the section entitled *Here to stay.*)

The traditional "buyer beware" philosophy of the marketplace is seen as fast eroding. Executives think the balance between buyer beware and seller beware is still tilted toward the former, but the pendulum is swinging swiftly toward seller beware. (See *Caveat emptor eroding.*)

Despite their problems, consumers are seen

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file - fairness Doctrine

hour arrangements, I was pleased to see the increasing acceptance and availability of this work alternative to full-time members of the work force. I believe that an increased number of work opportunities of this type, as well as part-time and shared time arrangements for those who desire them, will lead to an overall increase in employee satisfaction and productivity.

It was for this reason that I joined as a cosponsor of S. 2022, the Flexible Hours Employment Act. This legislation, which is now pending on the Senate calendar, will require Federal civilian agencies to increased the number of permanent part-time positions within each grade level, except for grades 16, 17, and 18. The increased availability of part-time jobs will be of benefit to thousands of people who because of either preference or need desire less than full-time employment.

Carolyn Shaw Bell, Katharine Coman professor of economics at Wellesley College, has been a strong advocate of flexible work hours arrangements. In a recent paper she argues for the specific inclusion of flexitime and part-time hours employment in the public service job program. She raises persuasive arguments in support of the economic and social viability of alternative work arrangements within the public employment program, and I commend her paper to [illegible] colleagues.

Mr. President, I ask unanimous consent that Bell's paper be printed in the RECORD.

There being no objection, the paper was ordered to be printed in the RECORD, as follows:

FLEXITIME IN PUBLIC SERVICE EMPLOYMENT

(By Carolyn Shaw Bell)

Public service employment should be specifically designed to provide opportunities for part-time workers at all levels and in every field. It should also allow for those working flexible hours rather than the conventional schedules in effect. Furthermore, if public service legislation is envisaged as hardship relief designed to alleviate some anti-inflation measures, the welfare implications of these provisions are substantial.

In terms of welfare let me make the following observations. Inflation has led to an increase in the number of those seeking jobs, as people seek more work to keep up the level of real income. More than half the married couples in the country derive income from earnings of both husband and wife. A significant number of families receive income from two or three earners aside from the married couples. One answer to managing the increasing cost of living on an individual basis is to acquire more income to meet the higher cost. For a family, this means additional earners as well as additional jobs. For a single individual, this means taking on an extra job. Many of those additional workers, particularly young people and women, seek employment that will fit their other commitments to education or to their obligations at home. Making jobs available on a part-time or flexible hour[illegible] would enable their contribution[illegible] income to stave off hardship [illegible] prices.

Part-time workers have also long played an important part in our economy. They number about 20% of the labor force and are particularly useful in certain areas of work. Unemployment rates among these workers are twice as high as the average unemployment. It is a mistake to think that the income of such part-time workers is marginal or peripheral to family income and that the unemployment rates among this group are therefore of less importance. Exactly the reverse may be true, depending upon the family's perceived need for extra income. It can be argued that public service employment should be designed to fit the needs of the unemployed, rather than the need of public agencies for employees. This reasoning would allot more jobs to specified groups with higher rates of unemployment. Paramount among these would be, of course, part-time workers.

As to the anti-inflationary arguments for this proposal they fall under two broad categories. To the extent that inflationary pressures will grow in the future because of the demand for higher wages, public services employment providing part-time or flexible hours work can help dampen down this demand. If more families can increase their incomes and keep up with the rising cost of living as a result there will be less pressure for higher wages for the individual worker who has to support a family by his or her sole efforts. The need for maintaining real, that is, deflated consumer demand during the stringencies of anti-inflation measures cannot fully be met by extending unemployment insurance. In a growing economy there will be additional job-seekers added to the labor force each year. Not only will young workers leave school and college but older workers may re-enter the labor force after service elsewhere or after significant re-training. These new workers, or a substantial part of them, will of course not be covered by unemployment insurance. It is significant that the number of insured unemployed amounts to only about half the total number of unemployed people in almost a dozen states. In many other states unemployed people who are not eligible for benefits make up from one-quarter to one-third of all those lacking jobs. Consequently, the need for public service employment will exist even though unemployment insurance benefits are increased.

Finally it can be generally agreed that an increase in productivity has strong anti-inflation effects. In a particular work setting productivity can be enhanced by finding the most able person for the task at hand. In general, the greater the pool of applicants, the better qualified the worker selected will be. By making tasks accessible to those working unconventional time periods the pool of available workers is enlarged. It is quite clear that this direct impact on productivity can lessen the pressure on prices. There is also some scattered evidence that two part-time workers filling one job are more productive than a single employee. Such evidence might be pursued for support of this proposal.

TWO VIEWPOINTS ON THE FAIRNESS DOCTRINE

Mr. PROXMIRE. Mr. President, Richard W. Jencks, vice president of CBS/Washington, said last week in a talk in Nevada that the Federal Communications Commission's so-called fairness doctrine violates the first amendment to the Constitution.

And in Washington the previous week, Chief Judge David L. Bazelon, of the U.S. Court of Appeals for the District of Columbia Circuit, said in a speech that—

Courts and the FCC moved away from traditional First Amendment concepts to accommodate government attempts to control the power of television.

Now Judge Bazelon, it seems, is not willing to go as far as Mr. Jencks and predict that the Supreme Court will decide that the fairness doctrine violates the first amendment "when an appropriate case comes before it." But Judge Bazelon is clearly bothered by regulation of broadcasters, although he is also worried by electronic media abuses.

Mr. President, the important point about these recent public appearances of a broadcaster and a jurist is that there does exist a real, constitutional question about regulation by the Government of broadcasting.

Unfortunately, for a politician to discuss this question is equated, all too often, with toadying or groveling to the information media. The fact is this: A free press—and that includes radio and television news, and whether we like it or not, the entertainment side of television, too—is necessary to protect the citizens of this country from the potential and real abuses of their Government. To do that, the press must be free, free from direct and indirect governmental control.

The people of this country cannot keep their freedom without a free press. And that, of course, is the very reason why a free press is guaranteed in the first amendment.

What we sometimes forget is that freedom of speech and of the press carries with it the liberty to say and publish and broadcast the unpopular as well as the popular. Just because some abhorrent idea is written or spoken does not mean that everyone reading or hearing that abhorrent idea will adopt it. No. We are free to object, and we do.

I understand that my advocacy of an end to the "unfairness" doctrine will meet with objection. Thus, since July 15 I have been speaking about it here on the floor of the Senate. It is an important subject that needs to be debated, to be thought about.

Mr. President, for that reason I ask unanimous consent that the addresses of Mr. Jencks and of Judge Bazelon be printed in the RECORD.

There being no objection, the speeches were ordered to be printed in the RECORD, as follows:

NATIONAL ASSOCIATION OF EDUCATIONAL BROADCASTERS 50TH ANNIVERSARY CONVENTION, LAS VEGAS, NEV.—DEBATE: DOES THE FCC FAIRNESS DOCTRINE VIOLATE THE FIRST AMENDMENT OF THE CONSTITUTION?

(By Richard W. Jencks)

Does the FCC Fairness Doctrine violate the First Amendment of the Constitution?

Of course it does, and the Supreme Court will so decide when an appropriate case comes before it.

The argument made by the proponents of the Fairness Doctrine is simple and, on the face of it, disarmingly appealing. It is that the Fairness Doctrine "enhances" the First Amendment by assuring the public's "right to know".

If this argument is correct a Fairness Doctrine applied to the nation's print media should be constitutional. The argument was forcefully made before the United States Supreme Court in the *Miami Herald* case, in which a Florida statute providing a "right of reply" was at issue. The statute was analagous to the FCC's personal attack rules which form a part of the Fairness Doctrine.

But the Court, just last June, rejected the "enhancement" argument and unanimously held the Florida statute to be unconstitutional.

Speaking for a unanimous court, Chief Justice Burger declared:

"The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the newspaper, and content [illegible] *treatment of public issues and public* [illegible] *—whether fair or unfair*—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." [Emphasis added.]

If government compelled fairness would not "enhance" the First Amendment as to the print media, how then can it enhance the First Amendment when applied to the broadcast media?

The fact of the matter is that the case for a government guarantee of fairness is even poorer with respect to the broadcast press than with respect to the print media.

Item: The consequence of violating the right of reply statute held unconstitutional in the *Miami Herald* case was only to be convicted of a misdemeanor; it embodied no government power to shut the newspaper down. By contrast, a broadcaster who flouted the FCC's fairness doctrine could and would, as in the case of station WXUR, lose its license, be utterly shut down.

Item: The opportunity of the *Miami Herald* to impede the free flow of information to the public through unfairness was far greater than that of broadcasters. As Chief Justice Burger observed: "One newspaper towns have become the rule, with effective competition working in only four percent of our large cities." By contrast, in 92 of the top hundred markets there are three or more television stations; TV and radio stations were, as of June 1974, *five* times as numerous as daily newspapers.

Item: The *Miami Herald* could comply with government compelled fairness far more [illegible] than could any broadcaster; the cost [illegible] paring and inserting printed material [illegible] newspaper is low and a newspaper format is expandible. By contrast, the cost of producing visual material is high, and a broadcast schedule cannot be expanded; nothing can be added without something else being dropped.

In short, the burden on broadcasters of compelled fairness, and therefore its "chilling effect" on First Amendment rights, is not less, but is far greater than the burden of enforcing fairness upon newspapers. Yet television and radio are at present the American public's primary source of news and information.

It is not merely *losing* a fairness doctrine case which domonstrates the crippling impact of the Fairness Doctrine. For a broadcaster to undertake the burden of contesting an FCC Fairness Ruling, even though he ultimately prevails, just as clearly chills First Amendment rights.

In June of 1970, following several presidential prime time broadcasts, CBS initiated what it contemplated was to be a periodic series entitled "The Loyal Opposition", featuring leaders of the party out of power presenting views contrasting with those of the President. After the first broadcast, featuring Democratic National Committee Chairman Larry O'Brien, the Republican National Committee filed a fairness complaint. The FCC upheld the complaint and ordered us to provide free time to the Republicans. CBS appealed. Fourteen months and tens of thousands of dollars in legal expenses later the Court of Appeals reversed the FCC and vindicated CBS. But the FCC and Court decisions so clouded the area in which our licensee discretion might be upheld, that the project was abandoned.

Another landmark fairness case concerned NBC's pension documentary of September 12, 1972, "Pensions: The Broken Promise." This Peabody Award winning documentary was challenged in a fairness complaint filed by an organization known as Accuracy In Media, Inc. on the ground that it had insufficiently presented the positive merits of good pension plans. The FCC held that the broadcast violated the Fairness Doctrine and ordered the presentation of balancing material. NBC appealed and two years later, on September of this year, the court reversed the Commission and held that NBC had acted within the boundary of licensee discretion. One may well ask what is likely to be the effect on the men and women who produce NBC's documentaries of so prolonged and costly of victory.

The second class citizenship of broadcasters also creates opportunities for burdensome harassment by the Congress, as well as by the FCC and the courts. Because of their FCC oversight responsibility, the Senate and House Commerce Committees often have conducted investigations and hearings on fairness charges, such as was done with the CBS News documentaries *The Selling of the Pentagon*, and *Hunger in America*, among others. Newspaper executives do not troop resignedly up to Capitol Hill to explain and justify their stories and features. Can anyone think that it is healthy for broadcasters to have to do so?

If the impact of Fairness Doctrine on powerful and affluent organizations like CBS cannot be calculated, its impact on the small broadcaster cannot help but be shattering. Lawyers' fees for handling the merest fairness complaint—and there were 2,800 fairness complaints in 1972—are rarely less than three hundred to five hundred dollars. Henry Geller, former General Counsel of the Commission, in his recent study, *The Fairness Doctrine in Broadcasting*, reports that a fairness complaint over an Expo 1974 Bond issue editorial carried by a Spokane, Washington station resulted in legal expenses alone of about $20,000 plus travel expenses and some 480 man hours of executive and supervisory time. This was a case the station *won;* after twenty-one months of proceedings the FCC staff found that the station *had* offered reasonable opportunity for response. But, as Mr. Geller writes:

"Because of editorials such as that on Expo 1974, the renewal of the station's license can be put in question and for a substantial period. What effect—perhaps even unconscious—does this have on the manager or news director the next time he is considering an editorial campaign on some contested local issue? What effect does it have on other stations?"

The short answer to Mr. Geller's rhetorical question is that the effect of such proceedings, on the station involved, and on other stations, is to unconstitutionally inhibit freedom of expression and the dissemination of ideas.

Although Henry Geller is himself probably the most knowledgeable advocate of the Fairness Doctrine, his scholarly study indicates that he obvioulsy reads the *CBS vs. The Democratic National Committee* case as casting grave doubt on the constitutionality of the Fairness Doctrine as it has been administered since 1962.

Mr. Geller points out that the court in that case rejected the idea of a constitutional right of access because that would involve the FCC far too much in the "day to day editorial decisions of broadcast licensees . . ."

"Clearly," writes Mr. Geller, "if that is true as to a right of access by persons to broadcast facilities for editorial advertisements, *it is also true as to the application of the Fairness Doctrine.*" [Emphasis added.]

To save the Fairness Doctrine, Mr. Geller recommends that the FCC return to its pre-1962 fairness practice, but with the major difference that the Commission would make no attempt to rule on individual complaints, but rather would determine at renewal time only whether there had been such a pattern of conduct throughout the license period as to indicate malice or reckless disregard of Fairness obligations.

Presumably, this debate concerns the Fairness Doctrine as the FCC now administers it. Even Henry Geller would not, if I read him correctly, support the argument that the Doctrine as presently administered is constitutional. There are others, however, who do not believe that even the refinements suggested by Mr. Geller would save the Doctrine from being struck down as unconstitutional.

Senator Proxmire was once so devoted to the Fairness Doctrine that at his suggestion in 1959 it was elevated from mere FCC policy and made part of the Communications Act. The Senator recently announced that he now plans the introduction of a bill to eliminate the Fairness Doctrine from the statute books. "The heart of my position," Senator Proxmire says, "is that the fairness doctrine is an appalling adman's name for justifying depriving radio and television of their First Amendment rights."

Senator Ervin, often called the leading constitutionalist of the Senate, has written of the Fairness Doctrine:

"At its best, it stifiles controversy; at its worst, it silences it. In its present condition, it represents a flickle affront to the First Amendment."

Senators Ervin and Proxmire are not alone in having second thoughts about the appropriateness and constitutionality of the FCC's Fairness Doctrine.

Chief Judge David Bazelon, of the U.S. Court of Appeals of the District of Columbia, a judge with a record of consistent support over the years for aggressive FCC regulation of the broadcast media, is also in that number. Characterizing the FCC's revocation of WXUR's license as "a prima facie violation of the First Amendment," Judge Bazelon said:

"It is proper that this court urge the Commission to draw back and consider whether time and technology have so eroded the necessity of governmental imposition of fairness obligations that the Doctrine has come to defeat its purpose; that we ask whether an alternative does not suggest itself—whether as with the printed press more freedom for the individual broadcaster would enhance, rather than retard, the press's right to a marketplace of ideas."

Chief Judge Bazelon's language recalls a prescient statement of the Supreme Court in its 1969 decision in the *Red Lion* case. That is the case, with its sweeping dicta about the public's right to know, on which the proponents of the Fairness Doctrine must chiefly rely. Although the Court in *Red Lion* upheld FCC personal attack rules analogous to those it struck down in the *Miami Herald* case, the Court in the latter case failed even to mention the *Red Lion* decision, making no attempt to distinguish or justify it. But it is worth remembering that *Red Lion* had an escape clause. For the Court said in *Red*

"If experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."

That time has surely come. The nation's tragic experience with Watergate, if nothing else, must have the effect of forcing thoughtful people to reexamine the idea that we should entrust government with "enhancing" the flow of information under the First Amendment.

Joining those who have such second thoughts have been such liberal journals as the *New Republic* and, at the same time, such conservative critics of network news as President Nixon's Director of Telecommunications

Policy, Clay T. Whitehead, who said last month that he feared "that federal regulation of broadcasting could lead to some form of governmental control over newspapers."

What do the defenders of day-to-day government interference with the broadcast press have to say about all of this? All they are left with, it seems to me, is the iteration and reiteration of hackneyed slogans and outworn ideas.

The defenders of the Fairness Doctrine assert that the airwaves belong to the people. That may be true enough as far as it goes; but the whole lesson of American democracy is that we do not secure the rights of the people by vesting those rights in their government. American newspapers and magazines belong to the people in a truer and more significant sense than the press of any country where it is subjected to government control. Rather, it is a government owned or controlled press which does not belong to the people. In brief, as Chief Judge Bazelon has said, the government cannot "place restraints upon the First Amendment rights of those who use this property simply by declaring 'I own it.'"

The defenders of the Fairness Doctrine assert that there is a technical scarcity of broadcast frequencies such as to vest in the government a power to regulate broadcast speech that it does not have over the print press. That there is such a scarcity, albeit in a highly technical sense, is true enough; but this does not demand that we choose between applicants for such frequencies on the basis of their conformance with the government's ideas about how news and information should be reported. In any event, the real scarcity is of print media, caused by economic barriers to entry. As of October thirty-first of this year, there were 7,737 commercial broadcasting stations, as compared to somewhat less than 1,800 daily newspapers.

What the Fairness Doctrine defenders seem not to comprehend, however, is that their scarcity of frequencies argument is irrelevant.

Even if the government, because of a scarcity of frequencies, were deemed to have the power to intervene in the day-to-day journalistic judgments of broadcasters, government is not, after all, compelled to exercise that power. Even if the First Amedment does not *forbid* a Fairness Doctrine, it clearly does not *compel* a Fairness Doctrine. One of the attributes of power is the freedom not to exercise it.

If then we conclude, as I believe we must, that the Fairness Doctrine does *not* enhance the free flow of information, we do not have to apply it, whether or not we have the power to do so.

In closing, I would remind you that those who call most persistently and most eloquently for an ending of the Fairness Doctrine experiment are not, in the main, broadcasters themselves. The exercise of untrammelled First Amendment right is not necessarily profitable. The unhappy fact of the matter is that most broadcasters have been content to be tame tabbycats on this issue, reasonably happy with their regulated status and relatively undisturbed by a regulatory regimen which encourages blandness and inhibits robust debate.

When the FCC three years ago sent a questionnaire to broadcasters soliciting suggestions as to the deregulation of radio, it obtained from 7,000 radio broadcasters only 424 replies, and these mainly relating to the trivia of license renewal. Indeed, the passivity of most broadcasters on this issue is itself a damning indictment of the long term effect of governmental regulation on the broadcast press.

So I would close by reminding you of the words of Justice Douglas, no apologist for broadcasting, in his concurring opinion in *CBS vs. The Democratic National Committee:*

"My conclusion," Justice Douglas said, "is that the TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications."

He went on to say:

"The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."

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"What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of 'press' as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions."

I trust and believe that when the issue framed by this debate squarely reaches the Supreme Court Mr. Justice Douglas' brethren will agree with him.

On the 40th Anniversary of the Federal Communications Commission

(By David L. Bazelon)

Mr. Porter, Chairman Wiley, Senator Pastore, Ladies and Gentlemen of the Communciations Bar: It is a distinct honor to attend this dinner as a representative of the Judicial Branch, although I doubt very much whether my views on telecommunications law are representative of my circuit, the Federal judiciary as a whole or even of the prevailing sentiment in this room. I do bring you the greetings of my colleagues on the United States Court of Appeals for the District of Columbia Circuit and their congratulations to the FCC and the Communications bar for your 40 years of service to the nation. As you know our court at present is the sole forum for appeals from FCC licensing decisions and this has brought us into contact with many of you here tonight. This has always been a friendly relationship but not always one of perfect agreement. It is like the Arkansas moonshiner, who had been convicted numerous times and was once again before the Court. The judge told the culprit sternly, "Before passing sentence, I want to tell you that you and your sons have given this Court more trouble than anyone else in the whole State of Arkansas. Have you anything to say?" The old fellow thought a moment and said, "Well, Judge, I just want to say that we haven't given you any more trouble than you've given us."

Much of the criticism of the FCC over the past 40 years is not really directed at the Commission so much as it is directed toward the next to impossible task the Commission was required to execute. Given no standards for decision and only the broadest outline of a regulatory mandate, the Commission was ordered to license and regulate the infant telecommunications industry "in the public interest, convenience and necessity." Not the most simple task ever devised by the mind of man! So it is a tribute to the Commission and the Communications bar that the problems we face today are problems of affluence, the problems of having survived the basic test of whether a workable order can be attained and of now being confronted with *the much tougher,* intractible choice of where to go from here. Upon the resolution of these problems depends not the existence of a high quality telecommunications system but rather its increasing perfection. We deal with such problems out of our sense of higher challenge, not out of our sense of basic order.

In short, we are now confronted in telecommunications law with the problems of the second generation. The first generation has erected a telecommunications system unparalleled in the world, a system whose technological achievements and entertainment and educational capacity boggles the mind. The second generation must stand in recognition of the accomplishments of the first generation. But we would do well to temper our respect with a healthy critical response. Our posture reminds me of the overdone but instructive story of the pilot who comes over the intercom to inform the passengers that he has some good news and some bad news. The good news is that they have just broken all speed records for passenger aircraft and they are presently travelling at a phenomenal rate of speed. Now for the bad news: "We don't know where we are!" We have made gigantic technological advances in the telecommunications but we either don't know where we are or, if we do, some of us don't want to go there.

My main concern with "where we are" at present relates to the First Amendment and the current FCC regulatory structure. Our traditional First Amendment faith has been that by encouraging the widest possible unrestricted expression of views, we would produce more diversity of ideas than if the government chose who should speak and on what subjects. However, as the first generation erected a workable system of telecommunications law—bringing order out of the chaos of the twenties—this traditional faith was displaced by a feeling that the power of certain speakers was such that they should be *required* to present more than their own view of public events and human achievement. In short, the immense power represented by television communication placed our traditional view of the First Amendment under severe pressure. Under this pressure courts and the FCC moved away from traditional First Amendment concepts to accommodate government attempts to control the power of television. In the very few minutes I have here this evening, I cannot fully explore the various aspects of this power, except to say that much has been written about it. All the resulting rhetoric, however, does not convince me that we even now fully comprehend the impact of television on our lives.

The power of television is commensurate and I do not think I exaggerate in the least with the power to produce atomic energy and the power to modify human conduct by use of bio-behavioral controls. I recently had occasion to address my old friends, the American Psychiatric Association, concerning the perils of bio-behavioral controls. I did not speak to them about the blessings that will emerge from the use of bio-behavioral controls. And I do *not* speak tonight about the blessings that will emerge from the use of television as a human communications tool. The blessings are, I think, self-evident to those engaged in broadcasting and in bio-behavioral research. It is the perils of the new forms of wizardry which, I fear, will be overlooked in the excitement to exploit new discoveries. Thus it is that the potential evils of the power of television require great sensitivity on the part of the programming executives and their clients, the advertisers. And from a diligent inquiry into the potential evils of television can come the conception of media responsibility which will ultimately save the First Amendment from the pressures which threaten it today.

As lawyers, we know that there are alw

some understandable, if not legitimate, pressures on the traditional view of the First Amendment. In the field of broadcasting, these pressures have been, as I have indicated, partially successful in altering the traditional view of the First Amendment. Such pressures in the broadcast field are not [redacted]. They represent serious concerns to v[redacted] most circumstances the government should feel duty-bound to respond. I think that many of us as members of the bench and bar would be willing to walk more than an extra mile to resist those pressures and to uphold the traditional view of the First Amendment. But one may question whether your clients, the broadcasters, are not making such resistance more difficult. And one may also ask whether the communications bar is aware of this fact and is getting the message through to the broadcast media.

I am aware of and do not relish the "raised eyebrow" or "chilling effect" form of media regulation. I do not mean by my statement tonight to contribute to that kind of regulation. The broadcast media surely must strenuously resist all government attempts to interfere with their wide legitimate discretion. But on the other hand, they must also have the strength to admit their shortcomings, their abuse of the immense power of television for the private profit of a few, to the serious detriment of the nation at large. The broadcast media know—or should know—when their programming is simply and only mass appeal pabulum designed to titillate a sufficiently large majority to enable the broadcasters to sell the most advertising. They know when they are presenting only one side of a major public issue, when they are shading the facts to present their own point of view, and when they are ignoring the concerns of the community. They know the impact of their programs on children, they know about the marketing of human emotions and of the prurient interest in violence and sex. They know when they [redacted] the professionalism of their own news [redacted] order to reach the demographic au[redacted] which will attract advertisers. They know that wide exposure of subjects ranging from the names of rape victims to the private grief of a mother on the death of her son constitute unconscionable invasions of privacy. And, they know when they are over-commercializing their programming to amortize the inflated cost of the broadcast license. In sum, I think they know the times they may have prostituted the tremendous potential of television as a human communication tool. They know this and they know what should be done about it. The programming executives and their advertiser clients must stop their single-minded purpose to achieve higher ratings, more advertising and greater profits, and stop to consider what greater purposes television should serve. And they must do it soon if we are to preserve our First Amendment values for telecommunications.

These subjects I have mentioned are not without controversy. And there is more than one possible good faith response to the problems they represent. Those of us who are willing to walk more than that extra mile—and maybe even another mile beyond—to resist the pressures on traditional First Amendment values realize that these many problems are complex and difficult beyond neat solutions. The First Amendment protects the broadcast media when they seek to formulate a response to these problems—but this protection is seriously jeopardized when the power of the media is abused.

The pressures I have discussed have produced a regulatory scheme for telecommunications which is inconsistent with traditional First Amendment doctrine in some [redacted]cts. The task for the bench and bar, [redacted] indeed the Congress, is to begin the [redacted] overdue process of reconciling First [redacted]endment doctrine and telecommunications regulation in a manner which preserves both the traditions of free speech and the purposes of the Federal Communications Act. I have recently made an heroic, but I suspect insignificant, attempt in my concurring opinion in *Citizens Committee to Save WEFM* to begin this process of reconciliation. Future attempts at reconciliation will proceed in the "gray areas" of the First Amendment, those areas which are *not* clearly *within* First Amendment protection or *not* clearly *without* that protection. Of course, the broadcast media should resist encroachments on First Amendment freedoms in these gray areas. But I would be less than honest if I did not state that their success in this fight will depend in no small part on their ability to demonstrate their sensitivity to the public interest. I have the greatest hopes for their success. I approach the task of reconciliation with much cause for optimism.

In the limited time I have tonight, I was only able to broadly sketch the outline of my ideas on the First Amendment and telecommunications. My discussion is therefore necessarily incomplete and more unqualified than I would like. I have, for example, not mentioned several subjects of particular interest to me, including the much analyzed assertion that the scarcity of broadcast frequencies justifies a different First Amendment regime. Neither have I mentioned perhaps a more interesting issue: how can we expect a commercial enterprise to forego profits in service of the public good? But the sponsors of this affair have sternly warned me about my time limitation. They are concerned with this audience's attention span, and the limitations thereof. At first this concern puzzled me. How could such high-priced legal talent have a short attention span? But I then learned that there would be more than one cocktail party before and during this dinner. If I don't miss my guess, methinks there will be more than this dinner. So I shall release you without delay.

I would not, however, want to leave you without noting that the Commission and the industry it regulates give us much reason for pride as we count our blessings instead of our problems. The critical mind which is so essential to all our professions sometimes blinds us to the progress we have made. Occasions like this are an appropriate time to recall *that* progress and, indeed, to congratulate the Commission and the telecommunications industry for the success that *that* progress represents.

Thank you for inviting me to speak tonight and I wish you another 40 years as exciting and eventful—and even as profitable—as the last 40.

MARKED INCREASES IN THE PRICE OF SUGAR

Mr. BAKER. Mr. President, on November 25, 1974, our distinguished colleague from New Mexico (Mr. DOMENICI) addressed a meeting of the Council on Wage and Price Stability. Senator DOMENICI's comments were directed to the problem of the recent, marked increases in the price of sugar.

Mr. President, with respect both to the particular problem of sugar prices, as well as the larger question of the impact of the wage-price squeeze upon the American consumer, I find Senator DOMENICI's statement extremely relevant, informative, and eye-opening. Consequently, I recommend it to my colleagues and ask unanimous consent that it be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT BY U.S. SENATOR PETE V. DOMENICI

Mr. Chairman and distinguished members of the Council. Thank you for this opportunity to address this meeting of the Council on Wage and Price Stability. I hope that the facts you receive not only illuminate the shadowy world of sugar pricing, but provoke some considerations in your minds about both the free enterprise system's future and your council's responsibility.

My interest in the specific question of sugar prices came directly from a meeting I called on October 6 of this year in my home state of New Mexico. As a member of the American delegation to the World Food Conference in Rome, I decided to call together agricultural economists, nutritionists, extension service employees, farm and livestock organizations, consumer groups, representatives of the retail food industry and interested individual citizens.

During his formal statement to my New Mexico Food Conference, the executive director of the New Mexico Restaurant Association raised the following questions:

1. Why has the price of sugar risen from $9 for a hundred pounds to $43 for a hundred pounds in the past 12 months?

2. Why is the delivered-to-Albuquerque price the same $43 whether sugar is brought from processing plants in Utah, Texas, Arizona, or Los Angeles, and regardless of sugar processor involved?

3. Why are beet and cane sugar selling for the same price?

I instructed my staff to prepare a study for me. Our investigation revealed facts which supported the testimony given at the food seminar. I then wrote Attorney General William Saxbe; Lewis Engman, chairman of the Federal Trade Commission; Senator Philip A. Hart, chairman of the Senate Subcommittee on Antitrust and Monopoly; and to Senator Roman L. Hruska, Ranking Republican on the Senate Subcommittee on Antitrust and Monopoly. In these letters I requested an investigation into the sugar industry and explained that the evidence we had gathered created a strong presumption of administrative price fixing and conspiracy

I have been promised a complete report on the situation by Mr. Engman. I have talked to Mr. Saxbe about possible actions in this area by the Justice Department and I have received a letter from Senator Hart explaining that, due to my request, sugar will be added to an investigation into food commodities currently being undertaken by his subcommittee staff.

Since my original inquiries into this matter, the situation has progressively worsened. The price of sugar has increased 300 per cent in the last year, 30 per cent in the last month and has risen by 7¢ in the last week.

Many startling facts have recently come to the forefront. The USDA Sugar Report, September issue, shows that the average quoted wholesale price in August for refined cane sugar was exactly the same in the Northeast, Southeast and Gulf States areas of the U.S.—$36.83. The following are the price quotations on September 20, 1974, for refined sugar sold at wholesale in 100-pound bags, by regions:

[*Region, hundredweight bags*]

Northeast	$40.85
Mid-Central	40.84
Western Ohio-Lower Michigan	40.85
Southeast	40.85
Gulf	40.85
Chicago-West	34.95/40.85
Intermountain Northwest	33.75
Pacific Coast	35.00

Now let's look at similar figures from the October issue of the same publication. The average quoted wholesale price in September for refined cane sugar was exactly the same in the Northeast, Southeast, Gulf states and Chicago-west areas of the United States—$40.74.

Jack

Is it clear that cutting off aid to Turkey persuade the Turks to make the concessions they should make in Cyprus. Here reasonable arguments results. Archbishop Makarios had every right to return to Cyprus, but his return has undoubtedly complicated, if it has not defeated, the hopes of the secret compromises that were being worked out when he returned.

In his last press conference, Secretary of State Henry Kissinger said that a series of prolonged and divisive debates in the Congress (over such things as the trade and Turkish amendments) could hamper the main objectives of his policy.

In the aftermath of Vietnam and Watergate, the Congress is reassuring itself in many positive ways, but it still has not found the line between effective and destructive intervention. It can and should influence the objectives and instruments of foreign policy, but when it intervenes in negotiations, it invariably gets into trouble.

A FAIRNESS DOCTRINE DEBATE

Mr. PROXMIRE. Mr. President, on November 26 I inserted in the RECORD part of a debate on the Federal Communications Commission's fairness doctrine. I will ask that the entire debate be printed in the RECORD.

The debate was before the 50th anniversary convention of the National Association of Educational Broadcasters in Las Vegas on November 20.

The principals in the debate were Richard Jencks, vice president of CBS/Washington; and Robert Lewis Shayon, author, critic and professor at the Annenberg School of Communications, University of Pennsylvania.

Henry Geller, formerly of the FCC staff and now with the Rand Corp., commented afterward on the debate.

In a spirit of fairness, Mr. President, I ask unanimous consent that the debate and Mr. Geller's "afterword" be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

A FAIRNESS DOCTRINE DEBATE

Mr. JENCKS. Thank you very much. Does the Fairness Doctrine violate the first amendment? Of course it does. And the Supreme Court will so decide when an appropriate case comes before it. The argument made by the defenders of the doctrine is simple, and on the face of it disarmingly appealing.

It is that the Fairness Doctrine enhances the First Amendment by assuring the public's right to know. If this argument is correct, a First Amendment applied to the nation's print media should be constitutional. Indeed that very argument was forcefully made before the U.S. Supreme Court in the Miami Herald case in which a Florida statute providing a right of reply was at issue. The statute was analogous to the FCC's personal attack rules which form a part of the Fairness Doctrine. But the Court last June rejected the enhancement argument and unanimously held the Florida statute to be unconstitutional. Speaking for a unanimous court, Chief Justice Burger declared, "The choice of material to go into a newspaper and the decisions made as to limitations on the size of the newspaper and content and treatment of public issues and public officials, whether fair or unfair, constitutes the exercise of editorial control and judgment.

It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with first amendment guarantees of a free press as they have evolved to this time. If then, government compelled fairness would not enhance the first amendment as to the print media, how then can it enhance the first amendment as applied to the broadcast media?

The fact of the matter is that the case for a government guarantee of fairness is even poorer with respect to the broadcast press than with respect to the print press. Item: the consequence of violating the right of reply statute held unconstitutional in the Miami Herald case was only to be convicted of a misdemeanor. It involves no government power to shut the newspaper down.

In contrast, a broadcaster who flouted the FCC's doctrine could, and would, as in the case of station WXUR, lose its license and be utterly shut down. Item: the opportunity of the Miami Herald to impede the free flow of information to the public through unfairness is far greater than that of any broadcaster. As Chief Justice Burger observed, "One newspaper towns have become the rule, with effective competition working in only 4% of our large cities. By contrast, in 92 of the top 100 television markets, there are 3 or more television stations. Television and radio stations are nearly 5 times as numerous as daily newspapers." Item: Miami Herald can comply with government-compelled fairness far more easily than could any broadcaster. The cost of preparing and inserting printed material into a newspaper is low, and a newspaper format is expandable.

By contrast, the cost of producing visual material, as this audience well knows, is high, and a broadcast schedule cannot be expanded. Nothing can be added without something else being dropped.

In short, the burden on broadcasters of compelled fairness and therefore its chilling effect on first amendment rights, is not less, but is far greater than the burden of enforcing fairness upon newspapers. Yet, television and radio are at present the American public's primary source of news and information. It is not merely losing a fairness doctrine case which demonstrates the crippling impact of the fairness doctrine.

For a broadcaster to undertake the burden of defending against an FCC fairness complaint, even though he ultimately prevails, just as clearly kills first amendment rights. Two examples may suffice. In June of 1970, following several presidential primetime broadcasts, CBS initiated what it contemplated was to be a periodic series entitled "The Loyal Opposition," featuring leaders of the party out of power.

After the first broadcast, featuring Democratic national committee chairman Larry O'Brien, the Republican national committee filed a fairness complaint. The FCC upheld the complaint, and ordered us to provide free time to the Republicans. CBS appealed.

Fourteen months and thousands of dollars of legal expenses later, the court of appeals reversed the FCC and vindicated CBS. But the FCC in court decisions so clouded the area in which our license discretion might be upheld, the project was abandoned. Indeed, it might be asked what gain the Republican party would have achieved from the victory after 14 months had elapsed.

The court, as editor in chief of a journalistic organization, is simply ineffectual. Another landmark case, of course, this time with a two year delay between complaint and final judgment involved the NBC 1972 pensions documentary, "Pensions, the Broken Promise." The second class citizenship of broadcasters also creates opportunities for burdensome harassment by the Congress, as well as by the FCC and the courts.

Because of their FCC oversight responsibility, the Senate and House commerce committees often have conducted investigations and hearings on fairness charges such as was done with the CBS News documentaries "The Selling of the Pentagon" and "Hunger in America" among others.

Newspaper executives do not troop resignedly up to Capitol Hill to explain and justify their stories and features. Can anyone think that it promotes fearless journalism for broadcasters to have to do so?

If the impact of the fd on powerful and affluent organizations, like CBS, cannot be calculated, its impact on the small broadcaster cannot help but be shattering. Lawyers' fees for handling the smallest fairness complaint—and there were 2800 fairness complaints in 1972—are rarely less than 300 to 500 dollars.

Henry Geller, former general counsel for the commission, in his recent study of the fairness doctrine and broadcasting, reports that a fairness complaint over an editorial carried by a Spokane, Wash., station, a relatively innocuous editorial urging support of a bond issue to finance Expo 74 resulted in legal expenses alone of about $20,000, plus travel expenses and some 480-man hours of executive and supervisory time. This, mind you, was a complaint that didn't even reach the commission itself, let alone the courts.

After twenty-one months of proceedings, the FCC staff found that the station had offered a reasonable opportunity for reply to the editorial. But as Mr. Geller writes, because of editorials such as that on Expo 74, the renewal of a station's license can be put in question, and for a substantial period.

What effect, perhaps even unconscious, does this have on the manager or news director, next time he is considering editorial campaign on some contested local issue. What effect does it have on other stations?

A short answer to Mr. Geller's rhetorical question is that the effect of such proceedings on the station involved and on other stations is to unconstitutionally inhibit freedom of expression and the dissemination of ideas.

Although Henry Geller is himself probably the most knowledgeable advocate of the fd, his scholarly study indicates that he obviously reads CBS vs. Democratic National Committee case as casting grave doubts on the constitutionality of the fd as it has been administered since 1962.

Mr. Geller points out that the court in that case rejected the idea of a constitutional right of access because that would have involved the FCC far too much in what the court referred to as the day-to-day editorial decisions of broadcast licensees." Clearly, writes Mr. Geller, if that is true as to a right of access by persons to broadcast facilities for editorial advertisements, it is also true as to the application of the fairness doctrine.

So, to save the fd, Mr. G. recommends that the FCC return to its pre-1962 fairness practice, but with the major difference that the commission would make no attempt whatsoever to rule on individual complaints, but rather would determine at renewal time whether there had been such a pattern of conduct throughout the license period as to indicate malice or recklessness with regard to fairness obligations.

Now presumably this debate this noon concerns the fairness doctrine as the FCC now administers it. And even Henry Geller, would not, if I read him correctly, support the argument that the doctrine as presently administered is constitutional.

There are others, however, who do not believe that even the refinements suggested by Mr. Geller would save the doctrine from being struck down by the courts. Senator Proxmire was once so devoted to the fd that it was at his suggestion in 1959 that it was elevated from mere FCC policy and made a part of the communications act.

The Senator recently announced that he now plans the introduction of a bill to eliminate the doctrine from the statute

books. "The heart of my position," Sen. Proximire says, "is that the fd is an appalling adman's name for justifying depriving radio and television of their first amendment rights." Senator Ervin, often called the leading constitutionalist of the Senate, has written of the fairness doctrine, "at its best it stifles controversy; at its worst, it silences it; in its present condition, it represents a fickle affront to the first amendment."

They are not alone. Chief Judge David Basilan of the U.S. Court of Appeals of the District of Columbia, a judge with a record of consistent support over the years for aggressive regulation of the broadcast media is also in the number. Characterizing the FCC's revocation of WXUR's license as a prima facie violation of the First Amendment, the judge said, "It is proper that this court urge the commission to draw back and consider whether time and technology have so eroded the necessity of governmental imposition of fairness obligations that the doctrine has come to defeat its purpose." His language recalls a pressing statement by the Supreme Court in its 1969 decision in the red line case.

That is the case with its sweeping dicta about the public's right to know on which the defenders of the doctrine must rely. The court said in red line, "If experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the quality of coverage, there will be time enough to reconsider the constitutional considerations. That time has surely come.

The nation's tragic experience with Watergate, if nothing else, must have the effect of forcing thoughtful people to reexamine the idea that we should entrust government with enforcing the flow of information under the 1st amendment.

What do the defenders of day-to-day government interference with the broadcast press have to say about all this? All they are left with is the iteration and reiteration of hackneyed slogans and outworn ideas. One of those is that the airwaves belong to the people. That may be true enough as far as it goes.

But the whole lesson of American democracy is that we do not secure the rights of the people by vesting those rights in their government. Isn't it clear that Am. newspapers and magazines belong to the people in a truer and more significant sense than the press of any country where it is subject to government contract? They argue that there is a technical scarcity of broadcast frequencies, and in a highly technical sense, that's true enough.

But that does not demand that we choose between applicants for such frequencies on the basis of their conformance with the govt's ideas about how news and information should be reported. In closing, I would remind you that those who call most persistently and eloquently for an ending of the fairness doctrine experiment are not in the main broadcasters themselves. The exercise of unchanneled first amendment rights is not necessarily profitable.

The unhappy fact of the matter is that most broadcasters have been content to be tame tabby cats on this issue, reasonably happy with their regulated status, relatively undisturbed by a regulatory regimen which encourages blandness and inhibits robust debate. When the FCC 3 years ago sent a questionnaire to broadcasters soliciting suggestions as to the deregulation of radio it obtained from 7000 radio broadcasters only 424 replies, and these mainly relating to trivia.

Indeed, the passivity of most broadcasters on this issue is itself a damning indictment of the long-term effect of governmental regulation of the broadcast press.

I would close by reminding you of the words of Justice Douglas, no apologist for broadcasting, in his concurring opinion in CBS vs. Democraitc National Committee. Said the Justice, "The Fairness Doctrine has no place in our first amendment regime. It puts the head of the camel inside the tent, and enables administration after administration to toy with tv or radio in order to serve its sordid or benevolent ends. What kind of first amendment," he went on, "would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned first amendment that we have is the court's only guideline, and one hard and fast principle which it announces is that government shall keep its hands off the press.

That means, as I view it, that TV and radio, as well as the more conventional methods of disseminating news are all included in the concept of the press as used in the first amendment. Ladies and gentlemen, I trust and believe that when the issue framed by this debate squarely reaches the Supreme Court, Mr. Justice Douglas' brethren will agree with him. Thank you. (applause)

Mr. SHAYON. I was going to congratulate NAEB on its 50th anniversary, but I see that Jim Fellows is holding a tight clock, so I'll make it a very quick congratulation.

Dick Jencks as a good broadcaster got off right on the nose, and that places a burden on me. I want to make it right clear at the start that I am not an unqualified defender of the fairness doctrine as it is.

It has its faults, in fact much of public discussion about it has to do with suggestions for improving it, even for trading it for other measures that will protect fairness for the public. I'm prepared to talk about them if we get into them, but just now I'm saying no to the clear proposal that the fairness doctrine violates the constitution. That's the area we're constrained to discuss and I'm sticking to it.

In a debate, when the pros and the cons don't know what each other is going to say, there's a lot of overlapping, and of course, Dick anticipated some of my comments, and I anticipated some of his. But at the risk of redundancy, I'm going to formulate a line of reasoning which gives you a picture of the fairness doctrine as the negative sees it rather than the affirmative. Then we'll get into a trading of arguments later on.

The answer to the question is of course no because the Supreme Court has said no. It said no, as Dick suggested, in Red Lion, the case which challenged the constitutional and statutory bases of the doctrine and its component rules. It even said no in CBS v. DNC. Indeed, it's curious to know that in that very case, CBS relied on the fairness doctrine to reject a right of paid access. Again the U.S. Court of Appeals said no in the pensions case which Dick mentioned.

It said that the licensee did not make an unreasonable judgment in implementing the fairness doctrine, but had a wide degree of discretion in the handling of news documentaries. But the court in no way suggested abandoning the fairness doctrine. Whenever it's been at issue, the courts have by a majority sustained the fairness doctrine in broadcasting as a necessary control for the public interest. The broadcaster can not assert a right to freedom of the press that transcends the public's right to know.

To be sure there are dissenters. A good friend the liberal Justice Douglas is a first amendemnt hard-liner. Justice Stewart joined him in his dissent in CBS vs. DNC. And chief justice Bazelon of the court of appeals has had doubts about the fairness doctrine. But Justice Saterday, if you read your New York Times, you'd see that the good judge is wavering.

He made a speech at the FCC Bar Association in which he expressed his doubts about the industry's performance in the public interest. In an outspoken attack on television not equaled since Newton Minow's wasteland speech he said that the industry was making it difficult for judges and lawyers to ensure that traditional guarantees of freedom of the press continue to be applied to television. So you've got Bazelon wavering between the two extremes.

Nevertheless, as Chief Justice Hughes once said, we live under a constitution, but the constitution is what the judges say it is. As of now, the Supreme Court has said eight to nothing in Red Lion that the fairness doctrine is constitutional, and they said it again in CBS vs. DNC, 7 to 2. Of course, the Supreme Court has reversed tself in the past. Classic majority dissents have lived to see the day when they became majority opinions.

Dick Jencks may be the John Marshall Harland, the great dissenter of the 19th century. He may be doing us a great public service by hammering away at the minority view. I could stand on what the lawyers call *stare decisis* of the court and say "It is settled," but that wouldn't be any fun. So let's go into the thicket of the constitutionality of the fairness doctrine and have another round.

I take it Jencks, representing many broadcaster licensees, wants to join the heavenly company of the print publishers, who are exempt from the regulatory powers of government, although of course, they are beneficiaries of salutary government intervention in their business, by virtue of enjoying favorable postal rates.

Publishers don't mind the camel's nose in the tent when it helps them to make a profit. The broadcasters want the same rights that the print media enjoy. Should they have it? Justice Holmes once said, "The life of the law has not been logic: it has been experience." Nevertheless, let's try logic. Let's not have a debate; let's pursue truth.

And again quoting Justice Holmes, "All I mean by truth is what I can't help thinking." The purpose of the first amendment, as our moderator said, was to keep government from prior censorship of the press so that ideas could flourish freely in the marketplace, robust, vigorous, clashing, antagonistic. Out of this would emerge the wisest decisions for a democracy. That was the faith. Only if the fairness doctrine in broadcasting under it, only political candidates and persons specifically attacked on the air have clear, unqualified rights to speak.

As for the rest of us, in determining whose rights are paramount under the first amendment the courts have said that it is the right of the people to be informed that is paramount, not the broadcasters' rights, not the viewers' nor the listeners' nor even the one who wants to speak his mind in public forums. It's the right of all of us to have spread before us a diversity of opinion. On that, as Judge Learned Hand said, "We have staked our all." OK, diversity of opinion and an informed electorate, on that the broadcaster and the regulator agree.

The position of the regulators is that it's not unconstitutional for the government to use the first amendment affirmatively to ensure diversity of opinion. You know the arguments, scarcity of frequencies, the public trustee concept, the recipient must give the people something in return when he gets a franchise. At the very least, an obligation to conduct informed public discussion on matters of concern, and when conducting them, to be fair to all shades of opinion. The broadcaster is given the widest possible latitude in exercising this public trustee function.

This is the constitutionally approved scheme for broadcasting. It's different from the print media where the publisher has an unabridgeable right to be unregulated. The broadcaster may even refrain from raising any controversial issues and still escape sanctions. This happens, as you know, many years when stations fail to broadcast even the barest of news and public affairs and get their licenses renewed.

The fairness doctrine, is hardly perfect in its applications and implementations. It has many arrogators on right and left, but it is the bedrock of the public interest standard of the communications act. Take it away, and you have no act. The position of the broadcasters who urge the abadonment of the doctrine is that it invades the first amendment rights of the broadcasters.

Mr. Vincent Vasilefski, president of the NAB in a fairness doctrine hearing in 1968 before a House Subcommittee argued that even if the government grants the broadcaster a franchise with exclusive use of a frequency the government may demand nothing in return without violating that broadcaster's first amendment rights. The argument further runs that most broadcasters will, by necessity and just plain natural virtue, be fair without regulation. Go peddle your ideas to another station, to a newspaper, make a speech, write a book. You ought not to have a direct legal remedy.

There should be no way in which a broadcaster can be chastised for failure to give someone else the right of reply to anything the broadcasters says on the air. This doesn't mean, say the broadcasters, that the listener is left with no remedy at all. There is an—remedy. What is it? Listen to Mr. John J. Koporra, Vice President for news for Metromedia at the House Hearings in 1968: quote "There's a very orderly procedure for taking care of the bad broadcaster in the capitalistic system. That is, he will go broke, and be forced to sell.

A bad broadcaster will not survive," end quote. In short, the broadcaster should get his franchise and have no obligation to be fair other than his own sense of decency. That's how we get diversity of opinion, and serve the needs of a democratic society for informed discussion. To do otherwise, to insist that the broadcaster be legally required to be fair would be to harass, to inhibit him, to cow him, rather than risk legal sanctions, he will engage in no controversy, and all his broadcasts will be bland, and there would be no diversity of public opinion.

What should one reply to this position? At the worst, it seems to me that it is unconscionable that one man should say to the people of the United States, "Give me a piece of everybody's electromagnetic spectrum and I will operate it for my own partisan purposes and profit and keep everyone I don't agree with off the air." But let's suspend judgment and try it out. Let's see how it would actually happen.

Many of you are familiar with the famous WLBT–TC case in Jackson, Mississippi. The licensee was LaMAr Life Insurance Co. and all through the late 50's and 60's it was asserted by citizens of Jackson, Miss. that the station was guilty of racial and religious discrimination. It cut off network civil rights broadcasts with signs reading "Sorry, cable trouble."

Eventually with no help from the FCC, the Office of Communication of the United Church of Christ persuaded the U.S. Court of Appeals to grant a hearing, and when the evidence was all in some five or six years later, the court itself vacated the license of LAmAR LIfe. It said that the FCC's record in the case was irreparable, and it took the license revocation sanction into its own hands. Now suppose we eliminate the fairness doctrine.

A licensee operates one of two vees in Jackson. It decides to put on racist editorials. You don't think that can still happen? Go down to Jackson. What's to stop him? Does a black citizen rush to the competitive station and beg time for a reply and possibly get refused? To the newspapers and get snickered down? Perhaps they wouldn't turn him down, but they could, couldn't they? And he'd have no legal remedy, none at all.

I ask Dick Jencks, do you really believe that such a system would serve our need for an informed public opinion, for fairness in the clash of ideas, presumably the lifeblood of our democracy? If you ever got the Congress to abandon the fairness doctrine, and broadcaster mavericks act up the way WLBT did, there would be such a public cry of outrage that the next fairness doctrine written into law would have the kind of teeth the present one lacks, and I don't think the broadcasters would care for that bite at all.

They want the same first amendment rights as the print media. What that means is that they want a monopoly based on scarcity of frequencies, and they want it free and clear of any legal obligation to be fair in public discussion. I'm not prepared to let them have it on those terms. You wish to be free of obligations? Then I'll free you also of your monopoly position.

No obligations, no monopoly. Turn pay cable lose. Let's have a real competitive market based on open entry, and we'll discuss it. But they're trying to stop pay cable. They don't want an open entry. They want a protected market and on top of that they want no legal obligations for fairness. Trust us, they say, we'll be fair because we love fairness. And if there are a few bad apples, the system will take care of them. Now, come on. Ok, the. are other solutions.

Let's rewrite the act. Let's auction off the frequencies to the highest bidders. Give it to the winners, free and clear of any fairness doctrine restraints, but on condition that they set aside 10% of prime time for public access and that they give—you're gonna love this—10% of their gross revenues to public broadcasting.

Then you can have your unharassed, uninhibited first amendment. You want that Dick? If you have no fairness obligations, why should you be allowed as CBS to own 5 VH stations in the top market? Why not just one? The so-called chilling effect of the fairness doctrine is legendary, despite the protestations of professional journalists, our scholarly expert Henry Geller says that they've never even been documented.

Everyone knows the fairness doctrine is really a mild regulation. Broadcasters have lived with it and maintained their profits. What the broadcasters are really worried about is access. That's what they're concerned about. People are not content to let Cronkite and Reasoner, Chancellor speak for them and say every night that's the way the world is. Is it? People want counter-rags. There will be more court challenges. Dick, in 1969, at a panel of the American Bar Association, you accepted Red Lion as the farthest permissible reach of government.

The figures show that the networks in only one case, the famous NBC-Chet Huntley case, where he broadcast an editorial favoring cattle raisers when he had an interest, a conflict of interest, was the only time the networks ever got hooked. In the NBC case, the courts overturned the FCC. Figures. In 1971, there were 2000 fairness doctrine complaints. In only 168 cases did the FCC send inquiries to the stations, an 8% ratio of inquiries to complaints.

There were only 69 FCC rulings, and only 5 out of 2000 were adverse to licensees. Even in 1972, Dick, in Aspen, Colorado, you still found that the fairness doctrine has worked fairly well. You relied on it in CBS vs. DNC. Judge Tamm of the U.S. Court of Appeals dissenting in the NBC pensions case said, "The fairness doctrine as it has been utilized here is the yeast of fairness in the dough of the telecaster's right to exercise his journalistic freedom."

Nobody asked the broadcaster to be a public trustee. He volunteered for the license. He volunteered for it, and he did it with his eyes wide open to what the terms of the game were: a right to make a mint of money in return for fairness to the public in controversial issues, a balancing of his rights against the people's rights under the first amendment.

If CBS or any other licensee doesn't like the way the game is played, let them turn in their license and resign. There are plenty of others waiting on the sidelines with very eager appetities to get into the game under the exceptionally mild and generous conditions of the constitutional fairness doctrine.

Mr. JENCKS. Well, I'll try to deal with some of the matters that Bob Shayon raised. He says that the Supreme Court has firmly decided that the Fairness doctrine is constitutional, which I don't think is the case, and the real test will be the S. C. gets a case in which a license hangs in balance, such as the Brandywine case which did not go to the Supreme Court.

Judge Boyelan was among others who do not think that Red Lion is dispositive as to the legality of the fairness doctrine. And it's very curious indeed that last June in the Miami Herald case, although striking down the right of reply statute directly analogous to the right of reply regulation which it had upheld five years before, the Supreme Court of the United States did not even mention Red Lion, did not attempt to distinguish it, did not attempt to justify it.

Now, Bob says that I'm asking you to rely upon the decency of broadcasters. I'm not, anymore than I ask you in the print field to rely on the decency of publishers. Rather, I'm asking you to rely upon their contentiousness and their desire to reach their readers, if they are running media general circulation. He says the bedrock of the communications act is the fairness doctrine, take it away and you have no act.

Well, you had no fairness doctrine from the inception of the act in 1934 until 1949, and you had no fairness doctrine embodied in the statute until 1959. So, clearly you can have a communications act and proper regulation of broadcasters and no fairness doctrine. He talks about commercial broadcasters desiring to strangle pay television, and if that's the case, there are laws suitable to cope with that. The anti-trust laws for one.

Justice Douglas made clear in his opinion from which I previously quoted, and I quote again, "The commission has a duty to encourage a multitude of voices but only in a limited way, viz. by preventing monopolistic practices and by promoting technological developments that will open up new channels. He got quite a laugh from you in talking about the possibility that he would be willing to auction off our first amendment rights if we would be willing to give 10% of our profits to public broadcasting.

If he would really be willing to abandon his precepts for a price, then I think we have gauged his depth of feeling about the first amendment. He asks me the rhetorical question can I really believe, he says, can I really believe the system of untrammeled freedom would serve our needs? And I ask you back, can you really believe that the press of this country, the print press, serves our needs?

And if it doesn't, why not? Look about you, when you read your morning newspaper, whether it be the Las Vegas Sun or the New York Times, or the Los Angeles Times, or the Washington Star-News, or the Washington Post, when you read your news magazine whether it be U.S. News and World Report or Time or Newsweek, do you yearn, do you yearn to have the power to make a federal commission make that publication do its will? Do you yearn to have the licenses of those publications terminated? Do you yearn to have a federal court in Washington decide when their articles and features had been fair and unfair?

And more to the point, do you yearn to have those editor-in-chief's decisions come one year, two years, three years after the controversy which precipitated them? Does that strike you as improving the press upon which you depend every day of your life?

If it does not, then the humorous solutions and the decency of broadcasters are really beside the point. Broadcasters are no more decent, nor any less, than newspaper publishers. (Side 2 of tape.) Stations as superb as any of the best of the print media in this country. The question is what is the risk of allowing that freedom to happen? I don't have any more time, So I * * *

Mr. SHAYON. Well, as to the constitutionality of the fairness doctrine, I would welcome a test confronting the issue head on. Dick is right. The courts have hedged very often in confronting the issue squarely, even in the WXUR decision, Brandywine, the argument was that the decision was based—the revocation of the license—on what the majority opinion called "a very narrow ledge."

The judges are very sensitive to getting into a confrontation of the issue, and I for one would like to see a case come before the court where it met it head on, but as of the present moment, the best indications we have is that whenever faced by the Supreme Court in a tangential situation, they seem on the whole to have upheld the necessity for the fairness doctrine.

Now, Dick says that there was no fairness doctrine until 1959—49. Now I disagree with that. If you read the history of the Federal Radio Commission, you will see that in its initial rulings, they specifically and explicitly set forth the principle of fairness to all shades of opinion. Very quickly the politicians got into the act and got section 315 written for them in fairness.

It took a little while longer for everybody else to get their bit into the act, but the concept of fairness was inherent in the regulatory scheme this country's broadcasting licensing system from the very beginning on, and if Dick would like we could go to the records and we can check it out. He talks about the press serving the needs. Well, I for one happen to believe that the press in many respects did not serve the need of the people.

I happen to agree with Jerome Barren that I'd like to see an experiment made in the right of access for reply to newspaper space—it's much easier for the newspaper to add pages than it is for a broadcaster to add time, that's true. But I don't think that the present system adequately meets the demands of the 20th century for all the people to get into the act of diversity of opinion. Barren is right.

The romantic conception of the first amendment that was in view when the founders of our republic framed the Constitution is no longer adequate to the needs of the 20th century. We have different means of communication, massive means of communication, which take a lot of money, as our moderator says, and the ordinary citizen just can't get into that game, so we have a real realistic notion of the marketplace of ideas, and it presents new problems.

I don't say that the fairness doctrine as is is the answer, but I say, it's the final bastion we have under the present system for the legal protection of the citizens' rights, and I'm not prepared to forego it and take the risk of trusting either the wisdom, or the decency or the fairness of broadcasters to implement the first amendment rights. Let's talk for a minute about this chilling of the press. It's argued that it arises as a result of the economic and procedural and time burden imposed upon broadcasters.

I have a different theory about the chilling effect. It comes from the economic structure of the industry. The industry is foremost committed to entertainment, so it says to its people in news and public affairs, "Here's a little corner of the total spectrum. You operate that little corner, and don't you dare get out of it." So the Cronkites and the Reasoners, naturally they're human like all of us, they say, "That's my little corner. That's my territory. I'm in charge of it, so I'm going to be the judge of what goes in and what goes out, and I'm going to be the public voice, and I'm going to be the trustee."

But they resist attempts of anybody else to take a little piece of their precious corner and play with it, and I say that's not adequate to represent the rights of all citizens today. There's a clamoring, a hunger for public discussion by spokesmen who want to initiate controversies that the public media do not even recognize as controversy. How are we to deal with that problem?

There are suggestions for improving the fairness doctrine, for trading perhaps for free speech messages. I would be in favor of an experimental situation to see whether or not it would really provide a solution to fairness doctrine's defects, but I'm not prepared to scrap the fairness doctrine until I see whether or not this system proves out.

What I'm arguing is that broadcasting is still not the print media, the public still needs protection in the area of limited frequencies, and that the fairness doctrine line should be held until something better can be demonstrated.

Question from floor.

Dick, isn't it true, apropos right from the beginning, that when Secretary of Commerce Hoover, later the President of the United States, as the Secretary of Commerce, he considered broadcasting a public property and from the inception proposed that those be a reservation of time, something between 20 and 25% of all the broadcast time, morning, afternoon, and evening, shall be reserved, not for sale, but for public use—(interrupted by moderator for second question—second question summarized in Shayon's opening remarks.)

Mr. SHAYON. Let me tal the smaller question first. The philosophical basis for a discussion of the fairness doctrine and man's place in the universe—that's easy. Well, a serious question deserves a serious answer, and I conceive of man to be what I call a dialectical creature. He's capable of using his mind, he's capable of growing, he's being exercised. It's the opposite of what has come to be known as the banking concept of information and education, where you conceive of individuals as banks into which you deposit wisdom, and when necessary you submit a deposit slip and you call it back. Unfortunately, most of our public education is banking education.

But I think public broadcasting has a tremendous opportunity to be a dialectical system of education in which we won't tell people what the answers are but we engage with them in a discussion and we listen to them and we learn from them and together we engage in a growing dialectical experience. This is my view of man, as a philosophically creative creature rather than a passive one. Ok, that takes care of the easy one.

Now let's take the hard one. The hard one is: what are we going to do with this fairness doctrine? It has its defects, some people say it doesn't work for me, others say it works too much, everybody's complaining about it. Well, I think there is no mechanical solution to the problem. X amount of broadcast time reserved for the public or for free speech messages, well, I'm willing to try that, but again, man is not a mechanical creature. You don't get a mechanical solution to a creative problem.

The only real problem—the only real solution to this problem—is a real, spiritually dedicated, affirmative commitment of all broadcasters, commercial and public, to a reasoned discussion of controversial issues in the interest of an informed public opinion.

And I say, that means that they've got to go out and not only provide public forums under duress but to help the people think their way through to a clarification of the complex issues of our complex world. It isn't enough for a broadcaster to say "Here's an access program—20% of my time. Anybody that wants to come on can have a point of view and say it and that takes care of the problem of discussion in a democracy." It doesn't. The broadcasters are professionals; in that respect, Dick Jencks is right.

As professionals they should serve the people, and they should serve the people by engaging in some kind of a dialectical situation with them. They should come to us and say, "What are you trying to say? Let us help you say it. Let us use our resources to help you organize your views, and let us see that everybody has this opportunity."

A mechanical attribution of you get 2% and you get 3% and balancing it—that's never gonna solve it. The judges and the lawyers want mechanical statistical solutions—that's how they work, that's how their universe structures. They have to have unqualified laws to which they can appeal in all their wisdom. But life isn't like that.

There are no mechanical solutions to our problems. And if only the commercial broadcasters would really say "Look we're all in this human boat together. Profit is not the end of it.

The survival of our planet, of our race, of our values is involved—which has a higher priority—speech in the interest of discussion of ideas to have our democratic institutions, or speech for the peddling of commercial products, however important they are to our economy?

If only they would say that, and commit themselves to an affirmative use of their resources for public controversy, we wouldn't have any fairness doctrine complaints or problems. I've been in the broadcasting business. I organized the first CBS documentary unit, which was the first network to deal with controversial issues.

I dedicated my life to the handling of public issues over the media, and I tell you, it can be done. It can be done without fuss, without feathers, it takes a risk, it takes guts, and there is no security from problems. But if you really want to do it, you can persuade the people of this country that the broadcasters are fair in their handling of public controversy.

We're not asking for legal remedies, we're asking for remedies that come from the heart. And I think ultimately, this is what fairness is all about. Not fairness that is sanctioned and constrained by the law, but fairness that comes from the heart. That's the fairness that for 30 years I've been begging the commercial broadcasters to exhibit, and now may I add, I beg the public broadcasters to exhibit. Thank you.

Mr. JENCKS. Well. to devote myself to the question, isn't it true that President Hoover said that broadcast frequencies are public property and that broadcasters should be required to give 20–25% of their time for public uses. Yes, it is true that President Hoover said that.

There were occasions, on which you recall, President Hoover was wrong. He was partly right in that remark. He was not right—Hoover was one of our Presidents who was not a lawyer—and he was certainly not right in meaning to suggest that because the air waves are public property that restraints can be placed on the first amendment rights of those who use the property.

I think there that Judge Bazelon was correct when he said that government cannot place restraints upon the first amendment rights of the users of this property simply by declaring "I own it." Now as to the philosophical basis of our democracy, and of communications generally, I take it that it finds its reflection in the Constitution, in the proposition that this is a government of re-

powers. Powers that are not granted government are reserved for the states people. And I think that means that we trust people.

The American experiment was intended to take government off the backs of people. The framers of our Constitution could, of course, have decided upon a system under which the press would be licensed. That was the precedent they knew. That was what George III and his predecessors had done. They decided, and they didn't much like the press, which then as now is quarrelsome and difficult and arrogant, they decided they'd take their chances with it.

They thought that government control of the press would prove to be stupid, irrational, and suppressive of free speech, and they were right. 315, the equal time provision, is a good example of a stupid, irrational provision, almost everybody so recognizes now, and only the politicians don't have the courage to admit that mistake. Stupid also, is the idea of a federal commission, or a federal judge sitting in judgment on a network documentary two years after the documentary was broadcast.

There comes throughout much of this discussion the idea that if we don't like commercial broadcasters, then withholding their freedoms from them is some sort of punitive act. We say, "We're going to treat you this way until you show that you deserve better treatment." And I say that is at odds with the philosophical basis of this nation and the genius of its people. It's very much at odds with it. We've seen in the past two years the free press operate in a way which is really one of the glories of our history.

There has never been a time in the whole rly 200 years of this country, in which ress has performed so valuable a role. r as broadcasters are concerned, and in particular, that, I'm afraid has been, not because of, but in spite of the government power over the broadcast media. CBS, as you know, was No. 1 on President Nixon's list of enemies. And there were a number of efforts made to deal with CBS, and some as you know with Katherine Graham of the Washington Post. Those didn't succeed. We don't want to see any efforts like that succeed in the near future.

So I would say to you that the experiment that we want to make is to return to the experiment that we've all been embarked upon for 200 years, which is the experiment in the First Amendment, the most extraordinary experiment that has been utilized with respect to communications in any nation in the world, and it's worked, despite some of our dissatisfaction with the print media, we know it has worked there, and I think it would work with the broadcast media, and I hope that as broadcasters, you will join the task of seeing to it that you insist upon First Amendment rights and that broadcasters as a whole have them and have them without having to bargain for them, have them without let and hindrance, have them just as the rest of the press has them. Thank you.

AFTERWORD: LOOKING BACK AT THE DEBATE

(By Henry Geller)

My first comment is to commend the excellence of the debate on both sides. Exception could be taken to a few supporting points, but the essential contentions were, I believe, well and forcefully presented. The debate covered two main issues: (1) Is the fairness doctrine constitutional under existing law; and (2) should it be constitutional; does it serve the public interest, including the crucial First Amendment goal of promoting robust, wide-open debate?

1. *Constitutionality.* Dick Jencks stresses the recent Miami Herald holding of the Supreme Court:

"The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the newspaper, and content, and *treatment of public issues and public officials—whether fair or unfair*—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." [Emphasis added]

The Florida "right of reply" statute there struck down is, he correctly points out, analogous to the FCC's personal attack/political editorializing rules. Indeed, if anything, it is harder to make the fairness case in the broadcast field because although "a newspaper format is expandable . . . a broadcast schedule cannot be expanded; nothing can be added without something else being dropped" (Jencks, pp. 3-4) .

On the other side, Bob Shayon also marshalls a powerful case: The Supreme Court found the fairness doctrine constitutional in the 1969 *Red Lion* case, and again relied heavily upon the doctrine in the 1973 *CBS* v. *DNC* case (with only two dissenters to its constitutionality—Justices Stewart and Douglas). There is no indication that the 1974 *Miami Herald* case overturned the *CBS* case, decided just one year before. Significantly, Shayon points out, the most recent Court treatment, by Judge Leventhal in the NBC *Pensions* case, distinguishes the *Miami Herald* decision, and adheres to the fairness doctrine in the broadcasting field.

How can one square these persuasive arguments on both sides? And particularly how can one square the strong holding quoted by Dick Jencks from the *Miami Herald* case with the statement in *Red Lion* that "there is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves" (395 U.S. at p. 394).

There is no *logical* way to do so. Bob Shayon gave the practical answer in his Holmes quotation that the life of the law has not been logic; it has been experience. And in the broadcasting field the experience, "almost from the beginning" (*Pensions*, p. 13), has been different from the print medium. From the 1943 *NBC* case to the 1973 *CBS* case, regulation of broadcasting under a short-term, public interest licensing scheme has been sustained—and that is why the fairness doctrine decisions have gone in the FCC's favor.

Dick Jencks believes that when the right case is presented to the Supreme Court—one like *Brandywine* (*WXUR*) where the station lost its license because of fairness doctrine violations, among other things—the Supreme Court will strike down the doctrine. I think Boy Shayon is more apt to prove correct on this issue. The Supreme Court had the opportunity to review *Brandywine*, with Judge Bazelon's powerful dissent on the fairness doctrine—yet it declined to do so.

More important, it seems to me most unlikely that the Burger-led Court will flip-flop on this issue. Remember that Chief Justice Burger wrote both the 1973 *CBS* v. *DNC* and the 1974 *Miami Herald* opinions, so it is unlikely that the latter overrules the former. And Chief Justice Burger is the author of the *WLBT* opinion, where he states that ". . . adherence to the Fairness Doctrine is the *sine qua non* of every licensee" (359 F.2d at p. 1009). The odds, therefore, are strong for continued affirmance of the constitutionality of the fairness doctrine itself (as compared with the different issue of the legality of its general *implementation* or some particular application of the doctrine).

2. On the second issue, both debaters again cogently set forth strong arguments. Dick Jencks stressed that it is *Government* trying to insure fairness; that no one would or should desire that the Government review the editorial decisions of the Washington *Post* or the New York *Times* for fairness—why then should Governmental review for fairness of the editorial processes of NBC, CBS, or ABC be welcomed or desirable? In my opinion, Jencks does not make out a strong case that Governmental review has had a "chilling" effect on the networks' treatment of controversial issues.

The networks are "big boys" who can and do stand up to the Commission (e.g., *Pensions*). Jencks' main example, "The Loyal Opposition" program, was not dropped by CBS because of the FCC ruling (which did not really inhibit the presentation of any future programs—CBS could merely specify 10 or more issues to be addressed by the spokesman or spokesmen); the program simply did not meet CBS' expectations and indeed, CBS appeared embarrassed over it in its Congressional testimony (25 FCC 2d at p. 300, n. 25). But Jencks does score with his contention that FCC fairness activities can be "chilling" as to the smaller broadcast station. While I am admittedly biased on this score, I believe that fairness cases like KREM-TV (the Spokane, Washington ruling cited by Jencks) cannot be answered by facile recitation of fairness statistics (i.e., Shayon's observation that in over 2000 fairness complaints, the Commission referred only 168 to stations and ruled against the licensee in only five instances).

The KREM-TV ruling was favorable to the licensee, but the three-year hassle clearly might well inhibit future station coverage of contested local issues. Further, Jencks raises the disturbing point: Is such an intensive intervention in the broadcast editorial process worth the possible "plus"—that an entirely different audience hear some further presentation on an issue two or three years later?

On the other hand, Shayon correctly stresses the fundamental relationship of the fairness obligation to the notion of the public trustee. The Congressional scheme is one of sort-term licensees who obtain the right to use scarce, valuable radio spectrum free because they have volunteered to serve the public interest. Shayon then points to the WLBT (Jackson, Mississippi) case where a licensee would not present the integration viewpoint, largely ignored the extensive black population in its service area, and espoused the segregational cause.

How can a licensee, who uses the frequency only to reflect his *private* views on issues of great important to the area, be said to be a public trustee? Just as the antitrust laws provide an overlay or national mood fostering competition, the fairness doctrine affords protection that generally licensees will act responsibly "as proxies for the entire community, obligated to suitable time and attention to matters of great public concern" (*Red Lion*, 395 U.S. at 394).

Here again the debate presents an oddity—each side has advanced powerful First Amendment arguments *for* his position and faces serious First Amendments *against* his position. Again—just to state the commentator's views—it seems to me that Shayon's overall position will reflect governing policy in the next decade. For, one could ask Dick Jencks: Would elimination of the fairness doctrine really free broadcast journalism?

Remember that the present Congressional scheme for broadcasting involves the Government significantly in the licensee's overall programming operation. It *is* a licensing scheme in the public interest, and because programming is the heart of service to the public, the incumbent's overall programming operation is the crucial element examined at renewal, whether in a petition-to-deny situation or in a comparative hearing. This means that CBS' renewal of WCAU-TV in Philadelphia or the Washington Post's re-

newals in Florida will be judged on whether the incumbent licensee has rendered substantial service to meet the problems, needs, and interests of the area.

Further, the agency can affect the economic health of the licensee or network in many other non-licensing areas—for example, by changing the multiple ownership rules applicable to networks or large VHF stations, or changing the network programming process through prime-time access and syndication rules.

My point is obvious: Unlike print, the Government is integrally involved in the broadcasting field. So long as one maintains the public interest licensing and pervasive regulatory scheme, elimination of the fairness doctrine does not free the broadcast licensee from the danger of undue Governmental pressure or intrusion, but it does eliminate the check on licensees who would act like WLBT.

In my judgment, therefore, it better serves both the public interest and the First Amendment to retain the fairness doctrine, so long as the public trustee interest licensing scheme is kept.

Both Jencks and Shayon correctly observe that there is no *Constitutional* need to maintain that system—that while the Government must license to prevent engineering choas, there are other alternatives that would serve the public interest and yet free the licensee from Governmental intrusion (e.g., auction or rental of the frequency, with the proceeds going to non-commercial broadcasting or access programming, and with certain rights to paid or free access for limited periods). However, such alternatives are not likely to be adopted in the near future, if ever. If this analysis is correct, the fairness doctrine will continue to be applicable in the next decade, and its problems must therefore be dealt with.

The *Pensions* case is indicative of one trend to deal with these problems. It creates a *mood* that looks with disfavor on governmental intrusion in broadcast journalism, except perhaps in egregious circumstances. Such a mood may be difficult to define and may change over time. But it is nonetheless of great importance for the administration of the fairness doctrine in the coming years.

As Dick Jencks notes, I believe that a further revision is needed to "save the fairness doctrine"—that the Commission should generally examine fairness matters only at renewal time, and then to determine "whether there had been such a pattern of conduct throughout the license period as to indicate malice or reckless disregard of Fairness obligations." (p. 7, Jencks), I can appreciate why Jencks, like Oliver Twist, wants more, but it seems to me that he is not fully taking into account the pubic trustee nature of the present pervasive regulatory scheme.

Judge J. Skelly Wright has pointed out that unlike ". . . some areas of the law [where] it is easy to tell the good guys from the bad guys . . . in the current debate over the broadcast media and the First Amendment . . . each debater claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication." The answers, he pointed out, "are not easy," but he hoped that "with careful study . . . we will find some." Dick Jencks and Bob Shayon admiraby illustrate Judge Wright's point. Both are "good guys" strongly committed to promoting First Amendment goals. Both deplore broadcaster indifference to these goals. And both have made an excellent contribution to the study of the fairness doctrine and to possible courses of action.

INSURING DUE PROCESS IN TRADE PROCEEDINGS

Mr. MATHIAS. Mr. President, last Friday the Senate passed the Trade Reform Act. This week the House-Senate conference committee on this bill will meet to work out differences in the two Houses' versions of this bill. Because certain changes made on the Senate floor, and certain understandings reached during the days leading up to the Senate action are important to insuring fair proceedings and due process in the implementation of this bill and related laws, I would like to make some remarks relevant to the work of the conferees and the conference report on this bill.

The trade reform bill is landmark legislation. It will guide the trade relations among the major nations of the world for years to come. It will affect the economies of all nations, the jobs and livelihoods of millions of citizens throughout the world.

I commend the Senate Finance Committee, and its chairman, Senator RUSSELL LONG, for its detailed and deliberate consideration of this bill. It would be impossible to produce a bill of the complexity and importance which would be acceptable in every part to every Senator. But this is a sound measure, and should be enacted.

In general, the bill gives the President limited authority to negotiate reductions in tariffs and other trade barriers. Conversely, the bill provides that the President should take limited measures to retaliate against unfair trade practices initiated by foreign nations—thereby protecting American industry and American jobs.

The bill provides several methods by which the President can respond to unfair trade practices by foreign governments and industries. Among these are: First, raising tariffs, second, suspending benefits of trade agreements, third, import quotas, and fourth, orderely marketing agreements.

Moreover, the bill strengthens existing statutes requiring the President through the Secretary of the Treasury to impose duties to counteract dumping or countervailing duties imposed by foreign governments.

When this bill was first reported from the Finance Committee, I was pleased to note that the committee provided a process by which American firms and other interested domestic parties could obtain judicial review of certain critical decisions made by Government officials concerning what steps, if any, should be taken to offset dumping or countervailing duties. In the past this right to judicial review has not been extensive, with the unhappy result that the parties with the most direct interest in the decisions of the Secretary of the Treasury or of the U.S. International Trade Committee were not insured of a forum to review the appropriateness of those decisions.

The committee bill, as reported, expanded this right of judicial review. It did not, however, go as far in that direction as I believe is consistent with basic concepts of due process or with the gravity of the issues involved. Consequently, I prepared an amendment which I intended to offer to expand this right further. I am pleased, however, that the committee itself, and most particularly its distinguished chairman, during its own review of the bill, decided that the language reported did not embody the true intentions of the members of the committee and accordingly, the chairman introduced an amendment on his own behalf to expand and clarify this essential right of judicial review.

Since the chairman's amendment was accepted by the Senate, I did not pursue my own activity in this regard. It is my understanding that the judicial review provisions in title III are designed to insure fair and effective enforcement of the unfair trade statutes dealing with antidumping and countervailing duties. Under the antidumping procedures of the bill, the Secretary of the Treasury has the right to dismiss a complaint without initiating any investigation if he should decide that the complaint, in the language of the courts, fails to state a cause of action.

The judicial review provisions of the trade bill were designed to provide for an American manufacturer to have court review of a decision by the Secretary not to undertake an antidumping investigation as well as a review of a determination by the Secretary on the merits that there have not been sales at less than fair value. I would hope that the report of the conference committee would make this intent as to the proper scope of judicial review quite clear.

It is also my understanding of the judicial review provisions allowing an American manufacturer the right of review by the customs court of decisions in the antidumping and countervailing duty area that it is intended that a domestic manufacturer will have at least rights of judicial review equal those afforded to the importers under existing law as contained in section 514 of the Tariff Act of 1930 (19 U.S.C. 1514). I note that there are a number of customs court decisions dealing with importers' appeals from Tariff Commission determinations of inqury in antidumping cases. The customs court has in these cases set forth the areas and scope of judicial review of such Commission decisions dealing with injury—for example, *Orlowitz* v. *United States*, 200 F. Supp. 302, aff'd 457 F. 2d 991, 1972.

Under the protest provisions dealing with the American manufacturer's right of judicial review as contained in this trade bill, the domestic manfacturer would, therefore, have the equivalent right of appeal to the customs court of adverse decisions by the Tariff Commission dealing with the question of injury in both the antidumping proceedings and the countervailing duty cases involving duty free items.

These are some of the results which I sought to insure with the amendment which I prepared for introduction. It is my understanding that they are clearly comprehended by the bill and clearly intended by the managers.

I accordingly commend again the committee, its staff, and its chairman for their work on this legislation and look forward to the results of the conference.

THE FOSTER GRANDPARENT PROGRAM

Mr. THURMOND. Mr. President, recently I received a very thoughtful and delightful poetic description of the Foster Grandparent program in Charleston, S.C. The message in this acrostic is particularly appropriate here in the Christmas season, because it exemplifies the gift of selfless love, joy and peace by a group of concerned senior citizens to needy children. I ask unanimous consent that this beautiful composition be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. THURMOND. Mr. President, the Foster Grandparent program is a very special kind of program which is greatly beneficial both to those older Americans who give themselves to it and to the children who receive the warmth of close personal relationships. This program is authorized under title IV of the Older Americans Act of 1965 and administered and funded by ACTION, the President's Domestic Volunteer Agency. In Charleston, S.C., the county economic opportunity commission receives the funds and operates the program as part of its Community Action efforts. The Charleston program presently involves 64 foster grandparents who give of their time through the department of mental retardation, nursery and day care centers, and other institutions which need volunteer services to help care for children.

The Foster Grandparent program provides a useful way for older adults to contribute to their community in their retirement years and to enjoy the self-respect and satisfaction that come from being needed and serving others. In a very clear manner, it demonstrates that retired persons are willing and able to participate reliably in community service roles on a part-time basis. It also creates opportunities for low-income retirees to supplement their income.

What makes Foster Grandparent such a successful and worthwhile program is the fact that everyone involved benefits—the foster grandparents, children, institutional staff, parents and friends. Foster grandparents demonstrates so well the abilities of older people to provide a reliable and effective community service—helping children to develop to their fullest potential.

I would like to congratulate and thank all of the foster grandparents across the country who have given their time and talents to this most worthwhile endeavor, and I hope other older Americans will see fit to follow their example. I believe if our retired citizens would only look around their communities, they would find numerous ways in which they can bring a greater joy and happiness to themselves and others during this holiday season.

Additionally, all of us need to be more aware and appreciative of the actual and potential contributions of our senior citizens. They are a part of our Nation's wealth and strength, and we should make every effort to use their valuable resources in worthwhile efforts such as the Foster Grandparent program.

EXHIBIT 1

FOSTER GRANDPARENT PROGRAM,
Charleston, S. C., December 1974.

F aith is to believe on the word of God.
O ur strength is often the weakness we're damned if we're going to show.
S eek today to make your tomorrow a time of peace.
T ain't worthwhile to wear a day all out before it comes.
E very day count your blessings over again.
R esources of the spirit are like savings; they must be accumulated before they are needed.

G od touches your life in many ways and speaks to you in many voices.
R each out and capture the joy of today.
A language which the deaf can hear and the blind can read—Kindness.
N ot enough to do our best, sometimes we have to do what's required.
D ecent provisions for the poor is the true test of civilization.
P lease be as kind to me tomorrow O God, as I was kind to my neighbor today.
A long life may not be good enough, but a good life is long enough.
R ather. than looking back with self-congratulations—Shape the future!
E verything ripens at its time and becomes fruit at its hour.
N o one grows old by living—only by losing interest in living.
T he natural flights of the human mind is from hope to hope.

P overty has stimulated one talent for each hundred it has blighted.
R eal happiness comes from completing what God gives us to do.
O Lord, reform the world—beginning with me.
G et rid of those prejudices and thoughts that are hopelessly out of date!
R ecreate peace in yourself to reestablish it in others.
A ll the goodness and order in the world are an echo of God.
M ay you win God's blessings and share our joy in the good we are able to do through you.

Our special wish is that the Peace and Joy of this Holy Season be with you all through the year.

FOSTER GRANDPARENTS AND STAFF.

PUBLIC JOBS

Mr. HANSEN. Mr. President, in the Sunday, December 15, edition of the Washington Post, Mr. Robert J. Samuelson has written an editorial entitled, "Public Jobs: Commonsense or Nonsense." Mr. Samuelson notes that unemployment in November reached 6.5 percent, which is the highest rate since 1961. He also states, in light of this figure, the irresistible appeal of public service job proposals is understandable. However, Mr. Samuelson asks a question which I would venture to guess many have not asked. That is, How much good will these proposals if enacted, do?

In light of the passage of S. 4079, and H.R. 16596, the Special Employment Assistance Acts of 1974, which I opposed, I feel the points in Mr. Samuelson's article deserve consideration and ask unanimous consent that the article be printed at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HANSEN. Mr. President, Mr. Samuelson treats many of the inherent dilemmas associated with the economy and public service jobs in his editorial. There is a split of authority between economists as to whether public service jobs will solve our economic plight. Some believe economic stimulus is needed to prevent deep recession and public service jobs will provide this stimulus. Others believe some unemployment may be necessary to cool inflationary fires since public service jobs are only financed by the creation of more Federal money. Regardless of this dilemma, both schools of economic thought have agreed this Special Employment Assistance Act has not solved the problem.

Mr. Samuelson observes:

Finally, if—as many economists believe—a prolonged period of relative high unemployment is the unavoidable price of curbing inflation, then a jobs program may simply postpone the inevitable, or cause more inflation. Many economists who believe differently—that is, those who favor strong economic stimulus to relieve unemployment—think a jobs program will be too small to do much good.

Other dilemmas which are not solved by this bill are numerous. Should these jobs be new jobs for the disadvantaged or should they attempt to hire those perhaps better qualified who have recently been dismissed due to lack of State funds. The jobs should be jobs to help our economy over the roughest inflationary period and yet should not be programs which turn into deposits for permanent Federal funding for Federal and State jobs.

The dilemmas are inherent and numerous. However, the Special Emergency Assistance Act of 1974 which authorizes $4 billion to create about 500,000 jobs, representing less than 1 percent of the unemployment total and which contributes insignificantly to providing a productive job program while it continues to increase inflationary spending, is not my idea of a commonsense solution.

EXHIBIT 1

PUBLIC JOBS: COMMONSENSE OR NONSENSE?

(By Robert J. Samuelson)

It's almost impossible to suggest doing anything about the economy these days without running into someone who will suggest just the opposite. You name it—wage-price controls, a tax increase, spending cuts, a tax reduction—and somebody's against it. Except, of course, for "public service" jobs. Nobody, it seems, is against them.

Who could be? With the unemployment rate at 6.5 per cent in November, its highest level since 1961, public service job proposals