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In *University Committee* v. *Gunn*, 289 F. Supp. 469 (W. D. Tex. 1969), for example, the court asserted that "the individual must be afforded some appropriate 'public forum' for his peaceful protests." In *In re Hoffman*, 67 Cal. 2d 845, 434 P. 2d 353, 64 Cal. Rptr. 97 (1967), the Court ruled that a privately owned railway station was open to the public generally, and that anti-war leaflets could not be barred so long as they were consistent with the normal operation of the station. In *Wolin* v. *Port of New York Authority*, 268 F. Supp. 855 (S. D. N. Y. 1967), aff'd, 392 F. 2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968), the court held that the privately owned Port Authority violated the guarantee of equal protection in permitting some speech activities but not others—a discrimination based on the content of the speech. In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), the Supreme Court held that a privately-owned "company town" could not ban certain speech activities. In *Food Employees Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court said that picketers could not be excluded from a private shopping center, stating: "[T]he fact that the property from which appellant was sought to be ejected for exercising her First Amendment rights was owned by a private corporation rather than the State was an insufficient basis to justify the infringement on appellant's right to free expression occasioned thereby." Finally, in *In re Lane*, 457 P. 2d 561, 79 Cal. Rptr. 729 (1969), the court said a pamphleteer could not be barred from a privately owned sidewalk, stating: "[W]hen a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk. * * *"

At the very least, these cases indicate that a private owner of forums traditionally used for the communication of views may not be able to censor, in any manner he wishes, the speech of private individuals who have a right to be there. I believe the Commission should begin to explore the implications of these cases in the area of broadcasting.

(3) According to statements made by Dick Cavett on February 9, 1970, ABC's policy for censoring Judy Collins was "based on its belief that these television remarks could prejudice the possibility of the parties to receive a fair trial. * * * Beyond this * * * ABC's policy is based on the view that continued televising of possibly prejudicial comments on active litigation could threaten the American legal process itself. * * * I have been advised that ABC's policy is supported by recent decisions of the United States Supreme Court. * * *" This is a rather surprising view. In the famous decision, *Bridges* v. *California*, 314 U.S. 252 (1941), Union leader Harry Bridges, the Times-Mirror Company, and the managing editor of the Los Angeles *Times* had been found guilty of contempt by the Los Angeles Superior Court for stating the following, strong opinion on a pending trial: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes [accused of intimidating non-union workers]. This community needs the example of their assignment to the jute mill." On appeal, the Supreme Court (per Justice Black) reversed, stating that the appropriate test was whether " 'the

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Trust Co., 275 U. S. 232; *Shaw*

v. *Oil Corp., supra.* But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, it cannot properly be said that the share of it paid as royalties to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax. (Compare *McCurdy* v. *United States*, 246 U. S. 263.) There is, therefore, nothing in the nature of the income which excepts it from the effect of § 213 (a) of the Revenue Act of 1918.

Affirmed.

NEAR *v.* MINNESOTA EX REL. OLSON, COUNTY ATTORNEY.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 91. Argued January 30, 1931.—Decided June 1, 1931.

1. A Minnesota statute declares that one who engages "in the business of regularly and customarily producing, publishing," etc., "a malicious, scandalous and defamatory newspaper, magazine or other periodical," is guilty of a nuisance, and authorizes suits, in the name of the State, in which such periodicals may be abated and their publishers enjoined from future violations. In such a suit, malice may be inferred from the fact of publication. The defendant is permitted to prove, as a defense, that his publications were true and published "with good motives and for justifiable ends." Disobedience of an injunction is punishable as a contempt. *Held* unconstitutional, as applied to publications charging neglect of duty and corruption upon the part of law-enforcing officers of the State. Pp. 704, 709, 712, 722.
2. Liberty of the press is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. P. 707.
3. Liberty of the press is not an absolute right, and the State may punish its abuse. P. 708.
4. In passing upon the constitutionality of the statute, the court has regard for substance, and not for form; the statute must be tested by its operation and effect. P. 708.

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5. Cutting through mere details of procedure, the operation and effect of the statute is that public authorities may bring a publisher before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular, that the matter consists of charges against public officials of official dereliction—and, unless the publisher is able and disposed to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship. P. 713.

6. A statute authorizing such proceedings in restraint of publication is inconsistent with the conception of the liberty of the press as historically conceived and guaranteed. P. 713.

7. The chief purpose of the guaranty is to prevent previous restraints upon publication. The libeler, however, remains criminally and civilly responsible for his libels. P. 713.

8. There are undoubtedly limitations upon the immunity from previous restraint of the press, but they are not applicable in this case. P. 715.

9. The liberty of the press has been especially cherished in this country as respects publications censuring public officials and charging official misconduct. P. 716.

10. Public officers find their remedies for false accusations in actions for redress and punishment under the libel laws, and not in proceedings to restrain the publication of newspapers and periodicals. P. 718.

11. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity from previous restraint in dealing with official misconduct. P. 720.

12. Characterizing the publication of charges of official misconduct as a "business," and the business as a nuisance, does not avoid the constitutional guaranty; nor does it matter that the periodical is largely or chiefly devoted to such charges. P. 720.

13. The guaranty against previous restraint extends to publications charging official derelictions that amount to crimes. P. 720.

14. Permitting the publisher to show in defense that the matter published is true and is published with good motives and for justifiable ends does not justify the statute. P. 721.

15. Nor can it be sustained as a measure for preserving the public peace and preventing assaults and crime. Pp. 721, 722.

179 Minn. 40; 228 N. W. 326, reversed.

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326, reversed.

APPEAL from a decree which sustained an injunction abating the publication of a periodical as malicious, scandalous and defamatory, and restraining future publication. The suit was based on a Minnesota statute. See also s. c., 174 Minn. 457; 219 N. W. 770.

Mr. Weymouth Kirkland, with whom *Messrs. Thomas E. Latimer, Howard Ellis,* and *Edward C. Caldwell* were on the brief, for appellant.

Messrs. James E. Markham, Assistant Attorney General of Minnesota, and *Arthur L. Markve,* Assistant County Attorney of Hennepin County, with whom *Messrs. Henry N. Benson,* Attorney General, *John F. Bonner,* Assistant Attorney General, *Ea. J. Goff,* County Attorney, and *William C. Larson,* Assistant County Attorney, were on the brief, for appellee.

Appellant's argument is based upon an entirely erroneous construction of Chapter 285, Laws of 1925. He construes it as authorizing the court to prohibit appellant from conducting a newspaper under the name of the Saturday Press, even though such newspaper may be entirely innocent. The law does not permit of such a construction nor did the Supreme Court of the State so construe it.

Conceding arguendo that the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press, (sed v. Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," 39 Harv. L. Rev., p. 431,) the term does not include the unrestricted right to publish everything. The guaranty is not absolute. *Gitlow* v. *New York,* 268 U. S. 652; *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402; *Robertson* v. *Baldwin,* 165 U. S. 275; *Patterson* v. *Colorado,* 205 U. S. 454; *Fox* v. *Washington,* 236 U. S. 273; *Schenck* v. *United States,* 249 U. S. 47; *Frohwerk* v. *United States,* 249 U. S. 204; *Debs* v. *United States,* 249 U. S. 211; *Schaefer* v. *United States,* 251 U. S. 466; *Gilbert* v. *Minnesota,* 254

U. S. 325; *Whitney* v. *California*, 274 U. S. 357; *Tyomico Publishing Co.* v. *United States*, 211 Fed. 385.

The courts have power to restrain by injunction the publication of defamatory matter. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402.

The Minnesota statute merely prohibits engaging in the business of regularly or customarily producing, publishing or circulating a malicious, scandalous and defamatory newspaper. No attempt is made to abridge the freedom of the press or prevent one from engaging in a lawful calling. It is not directed against the incidental publication, distribution, or circulation of defamatory matter. *Olson* v. *Guilford*, 174 Minn. 457, s. c. 179 Minn. 40.

If it could be construed as prohibiting appellant from ever engaging in the publication of a newspaper, and if that construction raises doubt of its constitutionality, this Court should interpret it in such a way as to eliminate the doubt. *Fox* v. *Washington*, 236 U. S. 273, 277.

If the language of the injunction is not justified by the statute, appellant cannot take advantage of this under the record as it stands. He made no suggestion to the trial court that the terms of the injunction were not authorized by the law; nor do his assignments of error in the state court or in this Court raise that point. *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407; *Fiske* v. *Kansas*, 274 U. S. 380.

The power of a state legislature to forbid an innocent calling upon the ground that certain evils exist, incident to the calling, which can not be prevented without preventing the exercise of the calling itself, has been often sustained against attack under the due process clause as respects the taking of property. *Murphy* v. *California*, 225 U. S. 623; *Booth* v. *Illinois*, 184 U. S. 425; *Otis* v. *Parker*, 187 U. S. 606; *Mugler* v. *Kansas*, 123 U. S. 623.

The Act is a legitimate exercise of the police power. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 26; *Lawton* v.

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Steele, 152 U. S. 133, 140; *Phalen* v. *Virginia*, 8 How. 163; Cooley, Const. Lim., 8th ed., Vol. 2, p. 1223; *State* v. *Pitney*, 79 Wash. 608; *People* v. *Weiner*, 271 Ill. 74; *People* v. *Robertson*, 302 Ill. 442; *State* v. *Morse*, 84 Vt. 387; *State* v. *Superior Court*, 103 Wash. 409.

Newspapers that are largely given to scandalous matter have in some States been declared to be criminal publications. *State* v. *McKee*, 73 Conn. 18; *State* v. *Van Wye*, 136 Mo. 227; *Re Banks*, 56 Kan. 243; *United States* v. *Harmon*, 45 Fed. 416; *Ex parte Rapier*, 143 U. S. 110, 134. See also, *State* v. *Pioneer Press Co.*, 100 Minn. 173; *State* v. *Holm*, 139 Minn. 267; *State* v. *Gilbert*, 126 Minn. 95.

The evil which the Act seeks to suppress is a nuisance in fact. 3 Blackstone's Comm., c. 13, p. 216; 20 R. C. L. 384, § 7; *Vegelahn* v. *Gunther*, 167 Mass. 92; *Sherry* v. *Perkins*, 147 Mass. 212; *Rhodes* v. *Dunbar*, 57 Pa. St. 274; *Oehler* v. *Levy*, 234 Ill. 595; Wood on Nuisances, 3d ed., Vol. 1, p. 92, § 70; 20 R. C. L. 428; *Davis* v. *Sawyer*, 133 Mass. 289; *State* v. *Graham*, 3 Sneed 134; *Commonwealth* v. *Oaks*, 113 Mass. 8; *Tanner* v. *Trustees*, 5 Hill 121; *Regina* v. *Foxby*, 6 Mod. 213; *Commonwealth* v. *Mohn*, 52 Pa. St. 243; *Mohr* v. *Gault*, 10 Wis. 513; *Gifford* v. *Hulett*, 62 Vt. 342; *State* v. *Diamant*, 73 N. J. L. 131; *New Jersey* v. *Martin*, 77 N. J. L. 652; *State* v. *Guilford*, 174 Minn. 457; *Eilenbecker* v. *District Court*, 134 U. S. 31; *Munn* v. *Illinois*, 94 U. S. 114; *Booth* v. *Illinois*, 184 U. S. 425, 431; *Bonnard* v. *Perryman* (1891), LXV Law Times (N. S.) 506; 18 Halsbury's Laws of England, 733.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Chapter 285 of the Session Laws of Minnesota for the year 1925[1] provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory news-

[1] Mason's Minnesota Statutes, 1927, 10123-1 to 10123-3.

paper, magazine or other periodical." Section one of the Act is as follows:

"Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation.

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report (*sic*) to issues or editions of periodicals taking place more than three months before the commencement of the action."

Section two provides that whenever any such nuisance is committed or exists, the County Attorney of any county where any such periodical is published or circulated, or, in case of his failure or refusal to proceed upon written request in good faith of a reputable citizen, the Attorney General, or upon like failure or refusal of the latter, any citizen of the county, may maintain an action in the district court of the county in the name of the State to enjoin

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pinion of the Court. 283 U.S.

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perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted. The defendants have the right to plead by demurrer or answer, and the plaintiff may demur or reply as in other cases.

The action, by section three, is to be "governed by the practice and procedure applicable to civil actions for injunctions," and after trial the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation and, "in and by such judgment, such nuisance may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than $1,000 or by imprisonment in the county jail for not more than twelve months.

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine and periodical," known as "The Saturday Press," published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical which were "largely devoted to malicious, scandalous and defamatory articles" concerning Charles G. Davis, Frank W. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the Grand Jury of Hennepin County impaneled in November, 1927, and then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it

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appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank W. Brunskill was its Chief of Police, and that Floyd B. Olson (the relator in this action) was County Attorney.

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

At the beginning of the action, on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical from September

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24, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, "any future editions of said The Saturday Press" and "any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise."

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and on this demurrer challenged the constitutionality of the statute. The District Court overruled the demurrer and certified the question of constitutionality to the Supreme Court of the State. The Supreme Court sustained the statute (174 Minn. 457; 219 N. W. 770), and it is conceded by the appellee that the Act was thus held to be valid over the objection that it violated not only the state constitution but also the Fourteenth Amendment of the Constitution of the United States.

Thereupon, the defendant Near, the present appellant, answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. The plaintiff offered in evidence the verified complaint, together with the issues of the publication in question, which were attached to the complaint as exhibits. The defendant objected to the introduction of the evidence, invoking the constitutional provisions to which his answer referred. The objection was overruled, no further evidence was presented, and the plaintiff rested. The defendant then rested, without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done.

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The District Court made findings of fact, which followed the allegations of the complaint and found in general terms that the editions in question were "chiefly devoted to malicious, scandalous and defamatory articles," concerning the individuals named. The court further found that the defendants through these publications "did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper," and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State." Judgment was thereupon entered adjudging that "the newspaper, magazine and periodical known as The Saturday Press," as a public nuisance, "be and is hereby abated." The judgment perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law," and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title."

The defendant Near appealed from this judgment to the Supreme Court of the State, again asserting his right under the Federal Constitution, and the judgment was affirmed upon the authority of the former decision. 179 Minn. 40; 228 N. W. 326. With respect to the contention that the judgment went too far, and prevented the defendants from publishing any kind of a newspaper, the court observed that the assignments of error did not go to the form of the judgment and that the lower court had not been asked to modify it. The court added that it saw no reason "for defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield," that the allegations of the complaint had been

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found to be true, and, though this was an equitable action, defendants had not indicated a desire "to conduct their business in the usual and legitimate manner."

From the judgment as thus affirmed, the defendant Near appeals to this Court.

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Stromberg* v. *California*, *ante*, p. 359. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Thus, while recognizing the broad discretion of the legislature in fixing rates to be charged by those undertaking a public service, this Court has decided that the owner cannot constitutionally be deprived of his right to a fair return, because that is deemed to be of the essence of ownership. *Railroad Commission Cases*, 116 U. S. 307, 331; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 596. So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States*, 157 U. S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed

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to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages. *Tyson Bros.* v. *Banton*, 273 U. S. 418; *Ribnik* v. *McBride*, 277 U. S. 350; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 560, 561. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. *Whitney* v. *California, supra; Stromberg* v. *California, supra.* Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

The appellee insists that the questions of the application of the statute to appellant's periodical, and of the construction of the judgment of the trial court, are not presented for review; that appellant's sole attack was upon the constitutionality of the statute, however it might be applied. The appellee contends that no question either of motive in the publication, or whether the decree goes beyond the direction of the statute, is before us. The appellant replies that, in his view, the plain terms of the statute were not departed from in this case and that, even if they were, the statute is nevertheless unconstitutional under any reasonable construction of its terms. The appellant states that he has not argued that the temporary and permanent injunctions were broader than were warranted by the statute; he insists that what was done was properly done if the statute is valid, and that the action taken under the statute is a fair indication of its scope.

With respect to these contentions it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. *Henderson* v. *Mayor*, 92 U. S. 259, 268; *Bailey* v. *Alabama*, 219

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U. S. 219, 244; *United States* v. *Reynolds*, 235 U. S. 133, 148, 149; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237. That operation and effect we think is clearly shown by the record in this case. We are not concerned with mere errors of the trial court, if there be such, in going beyond the direction of the statute as construed by the Supreme Court of the State. It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter.[2] The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good motives and

[2] Mason's Minn. Stats. 10112, 10113; *State* v. *Shipman*, 83 Minn. 441, 445; 86 N. W. 431; *State* v. *Minor*, 163 Minn. 109, 110; 203 N. W. 596.

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for justifiable ends.[2] It is apparent that under the statute the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words: "There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare."

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges by their very nature create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.[3]

[2] It may also be observed that in a prosecution for libel the applicable Minnesota statute (Mason's Minn. Stats., 1927, §§ 10112, 10113), provides that the publication is justified "whenever the matter charged as libelous is true and was published with good motives and for justifiable ends," and also "is excused when honestly made, in

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Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance, does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in

belief of its truth, and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of a person in respect to public affairs." The clause last mentioned is not found in the statute in question.

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addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the manifest inference is that, at least with respect to a

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new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

If we cut through more details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press.[4] The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an

[4] May, Constitutional History of England, vol. 2, chap. IX, p. 4; DeLolme, Commentaries on the Constitution of England, chap. IX, pp. 318, 319

undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, "the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543. This Court said, in *Patterson* v. *Colorado*, 205 U. S. 454, 462: "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth* v. *Blanding*, 3 Pick. 304, 313, 314; *Respublica* v. *Oswald*, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth* v. *Blanding*, *ubi sup.*; 4 Bl. Com. 150."

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by

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state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"; and that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson* v. *Colorado*, *supra*; *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 419.[5] In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too

[5] See *H*[illegible] *Case*, 2 Atk. 469; *Respublica* v. *O*[illegible] 319; *Cooper* [illegible], 13 Colo. 337, 373; 22 Pac. 7[illegible] Neb. [illegible] 83 N. W. [illegible]; *State* v. *F*[illegible] W. 238; 52 Pac. 1056; *People* v. *Wilson*, 64 Ill. 195; *Storey* v. *People*, [illegible] Ill. 45; *State* v. *Circuit Court*, 97 Wis. 1; 72 N. W. 193.

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broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck* v. *United States*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.[6] On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, 439." *Schenck* v. *United States*, *supra*. These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.[7]

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the progress of the colonial

[6] Ch fee, Freedom of Speech, p. 10.
[7] See 29 Harvard Law Review, 640.

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period and with the efforts to secure freedom from oppressive administration.[8] That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. As was said by Chief Justice Parker, in *Commonwealth* v. *Blanding*, 3 Pick. 304, 313, with respect to the constitution of Massachusetts: "Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse." In the letter sent by the Continental Congress (October 26, 1774) to the Inhabitants of Quebec, referring to the "five great rights" it was said: [9] "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions: [10]

[8] See Duniway "The Development of Freedom of the Press in Massachusetts," p. 123; Bancroft's History of the United States, vol. 2, 261.

[9] Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108.

[10] Report on the Virginia Resolutions, Madison's Works, vol. iv, 544.

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"In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and

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Public officers, whose character and

conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.[11]

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and

[11] *Dailey* v. *Superior Court*, 112 Cal. 94, 98; 44 Pac. 458; *Jones, Varnum & Co.* v. *Townsend's Admx.*, 21 Fla. 431, 450; *State ex rel. Liversey* v. *Judge*, 34 La. 741, 743; *Commonwealth* v. *Blanding*, 3 Pick. 304, 313; *Lindsay* v. *Montana Federation of Labor*, 37 Mont. 264, 275, 277; 96 Pac. 127; *Howell* v. *Bee Publishing Co.*, 100 Neb. 39, 42; 158 N. W. 358; *New Yorker Staats-Zeitung* v. *Nolan*, 89 N. J. Eq. 387; 105 Atl. 72; *Beverly* v. *Lowe*, 8 Paige (N. Y.) 568; *New York Juvenile Guardian Society* v. *Roosevelt*, 7 Daly 188; *Ulster Square Dealer* v. *Fowler*, 111 N. Y. Supp. 16; *Star Co.* v. *Brush*, 170 *id.* 987; 172 *id.* 320; 172 *id.* 851; *Dopp* v. *Doll*, 9 Ohio Dec. Rep. 428; *Respublica* v. *Oswald*, 1 Dall. 319, 325; *Respublica* v. *Dennie*, 4 Yeates 267, 269; *Ex parte Neff*, 32 Tex. Cr. 275; 22 S. W. 923; *Mitchell* v. *Grand Lodge*, 56 Tex. Civ. App. 300, 309; 121 S. W. 178; *Sweeney* v. *Baker*, 13 W. Va. 158, 182; *Citizens Light, Heat & Power Co.* v. *Montgomery Light & Water Co.*, 171 [illegible]; *Peck* v. *Ogden*, 231 Fed. 1001, 1010; *Dearborn Publishing Co.* v. *Fitzgerald*, 271 Fed. 479, 485.

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property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of

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public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth. *Patterson* v. *Colorado*, *supra*.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tend-

to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. "To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct." [12] There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung* v. *Nolan*, 89 N. J. Eq. 387, 388; 105 Atl. 72: "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited." The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b)

[12] Madison, *op. cit.* p. 549.

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of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Judgment reversed.

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TRINITY METHODIST CHURCH, SOUTH, v. FEDERAL RADIO COMMISSION (LYON, Intervener).

No. 5561.

Court of Appeals of the District of Columbia.

Argued May 3 and 4, 1932.

Decided Nov. 28, 1932.

Rehearing Denied Dec. 2, 1932.

1. Constitutional law ⇐90.

Citizen may utter or publish sentiments under constitutional guaranties of freedom of speech and press, subject to limitation that he is responsible for any abuse of that right (Const. Amend. 1).

2. Constitutional law ⇐90.
Telegraphs and telephones ⇐26½.

Refusing renewal of radio broadcasting license to one who has abused it by broadcasting defamatory and untrue matter is not denial of freedom of speech (Radio Act 1927, § 1, 47 USCA § 81; Const. Amend. 1).

Such refusal is not denial of freedom of speech, but merely the application of regulatory power of Congress in field within scope of its authority.

3. Commerce ⇐3.

Power of Congress to regulate interstate commerce may be exercised without limitation other than prescribed in Constitution.

4. Constitutional law ⇐90.

Power of Congress to regulate radio broadcasting, as respects freedom of speech, depends on whether regulatory statute is reasonable exercise of governmental control (Const. Amend. 1).

5. Constitutional law ⇐90.
Telegraphs and telephones ⇐26½.

Finding that continuance of broadcasting by applicant for renewal of license was not in public interest *held* justified and not violative of constitutional guaranty of freedom of speech (Radio Act 1927, § 1, 47 USCA § 81; Const. Amend. 1).

6. Telegraphs and telephones ⇐30.

In passing on application for renewal of radio broadcasting license, Commission must notice applicant's conduct in his previous use of permit (Radio Act 1927, § 1, 47 USCA § 81).

7. Constitutional law ⇐280.

Denial of application for renewal of radio broadcasting license as not in public interest *held* not "taking of property" without due process (Const. Amend. 5; Radio Act 1927, § 1, 47 USCA § 81).

The denial of the application did not constitute "taking of property" because one who obtains a grant or permit from a state or from the United States to make use of interstate commerce under control and subject to dominant power of government takes grant or right subject to exercise of government's power in public interest to withdraw it without compensation.

[Ed. Note.—For other definitions of "Taking (In Eminent Domain)," see Words and Phrases.]

8. Eminent domain ⇐2(1).

If injury is only incidental to legitimate exercise of governmental power, there is no "taking of property" for public use (Const. Amend. 5)

Appeal from the Federal Radio Commission.

Application by the Trinity Methodist Church, South, for the renewal of its radio broadcasting station license, in which proceeding George D. Lyon intervened. From a decision of the Federal Radio Commission denying the application, applicant appeals.

Affirmed.

Louis G. Caldwell and Arthur W. Scharfeld, both of Washington, D. C., for appellant.

Thad H. Brown, D. M. Patrick, and Fanney Neyman, all of Washington, D. C., for appellee.

Thomas P. Littlepage, John M. Littlepage, and Paul D. P. Spearman, all of Washington, D. C., for intervener.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

GRONER, Associate Justice.

Appellant, Trinity Methodist Church, South, was the lessee and operator of a radio broadcasting station at Los Angeles, Cal., known by the call letters KGEF. The station had been in operation for several years. The Commission, in its findings, shows that, though in the name of the church, the station was in fact owned by the Reverend Doctor Shuler and its operation dominated by him. Dr. Shuler is the minister in charge of Trinity Church. The station was operated for a total of 23¼ hours each week.

In September, 1930, appellant filed an application for renewal of station license. Numerous citizens of Los Angeles protested, and the Commission, being unable to determine

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that public interest, convenience, and necessity would be served, set the application down for hearing before an examiner. In January, 1931, the matter was heard, and the testimony of ninety witnesses taken. The examiner recommended renewal of the license. Exceptions were filed by one of the objectors, and oral argument requested. This was had before the Commission, sitting in banc, and, upon consideration of the evidence, the examiner's report, the exceptions, etc., the Commission denied the application for renewal upon the ground that the public interest, convenience, and/or necessity would not be served by the granting of the application. Some of the things urging it to this conclusion were that the station had been used to attack a religious organization, meaning the Roman Catholic Church; that the broadcasts by Dr. Shuler were sensational rather than instructive; and that in two instances Shuler had been convicted of attempting in his radio talks to obstruct the orderly administration of public justice.

This court denied a motion for a stay order, and this appeal was taken. The basis of the appeal is that the Commission's decision is unconstitutional, in that it violates the guaranty of free speech, and also that it deprives appellant of his property without due process of law. It is further insisted that the decision violates the Radio Act because not supported by substantial evidence, and therefore is arbitrary and capricious.

We have been at great pains to examine carefully the record of a thousand pages, and have reached the conclusion that none of these assignments is well taken.

[1, 2] We need not stop to review the cases construing the depth and breadth of the first amendment. The subject in its more general outlook has been the source of much writing since Milton's Areopagitica, the emancipation of the English press by the withdrawal of the licensing act in the reign of William the Third, and the Letters of Junius. It is enough now to say that the universal trend of decisions has recognized the guaranty of the amendment to prevent previous restraints upon publications, as well as immunity of censorship, leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare. In this aspect it is generally regarded that freedom of speech and press cannot be infringed by legislative, executive, or judicial action, and that the constitutional guaranty should be given liberal and comprehensive construction. It may therefore be set down as a fundamental principle that under these constitutional guaranties the citizen has in the first instance the right to utter or publish his sentiments, though, of course, upon condition that he is responsible for any abuse of that right. Near v. Minnesota ex rel. Olson, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357. "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." 4th Bl. Com. 151, 152. But this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it to broadcast defamatory and untrue matter. In that case there is not a denial of the freedom of speech, but merely the application of the regulatory power of Congress in a field within the scope of its legislative authority. See KFKB Broadcasting Ass'n v. Federal Radio Commission, 60 App. D. C. 79, 47 F.(2d) 670.

Section 1 of the Radio Act of 1927 (44 Stat. 1162, title 47, USCA, § 81) specifically declares the purpose of the act to be to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmissions; and to provide for the use of such channels for limited periods of time, under licenses granted by federal authority. The federal authority set up by the act to carry out its terms is the Federal Radio Commission, and the Commission is given power, and required, upon examination of an application for a station license, or for a renewal or modification, to determine whether "public interest, convenience, or necessity" will be served by the granting thereof, and any applicant for a renewal of license whose application is refused may of right appeal from such decision to this court.

[3] We have already held that radio communication, in the sense contemplated by the act, constituted interstate commerce, KFKB Broadcasting Ass'n v. Federal Radio Commission, supra; General Elec. Co. v. Federal Radio Commission, 58 App. D. C. 386, 31 F.(2d) 630, and in this respect we are supported by many decisions of the Supreme Court, Pensacola Telegraph Co. v. Western Union Tel. Co., 96 U. S. 1, 9, 24 L. Ed. 708; International Text-Book Co. v. Pigg, 217 U. S. 91, 106, 107, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. [illegible]; Western Union Teleg. Co. v. Pendleton, 122

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U. S. 347, 356, 7 S. Ct. 1126, 30 L. Ed. 1187. And we do not understand it is contended that where, as in the case before us, there is no physical substance between the transmitting and the receiving apparatus, the broadcasting of programs across state lines is not interstate commerce, and, if this be true, it is equally true that the power of Congress to regulate interstate commerce, complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than such as prescribed in the Constitution (Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23), and these powers, as was said by the Supreme Court in Pensacola Tel. Co. v. Western Union Tel. Co., supra, "keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."

[4] In recent years the power under the commerce clause has been extended to legislation against interstate commerce in stolen automobiles, Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407; to transportation of adulterated foods, Hipolite Egg Co. v. United States, 220 U. S. 45, 31 S. Ct. 364, 55 L. Ed. 364; in the suppression of interstate commerce for immoral purposes, Hoke v. United States, 227 U. S. 308, 33 S. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; and in a variety of other subjects never contemplated by the framers of the Constitution. It is too late now to contend that Congress may not regulate, and, in some instances, deny, the facilities of interstate commerce to a business or occupation which it deems inimical to the public welfare or contrary to the public interest. Lottery Cases, 188 U. S. 321, 352, 23 S. Ct. 321, 47 L. Ed. 492. Everyone interested in radio legislation approved the principle of limiting the number of broadcasting stations, or, perhaps, it would be more nearly correct to say, recognized the inevitable necessity. In these circumstances Congress intervened and asserted its paramount authority, and, if it be admitted, as we think it must be, that, in the present condition of the science with its limited facilities, the regulatory provisions of the Radio Act are a reasonable exercise by Congress of its powers, the exercise of these powers is no more restricted by the First Amendment than are the police powers of the States under the Fourteenth Amendment. See In re Kemmler, 136 U. S. 436, 448, 449, 10 S. Ct. 930, 34 L. Ed. 519; Hamilton v. Kentucky, etc., Co., 251 U. S. 146, at page 156, 40 S. Ct. 106, 64 L. Ed. 194. In either case the answer depends upon whether the statute is a reasonable exercise of governmental control for the public good.

[5, 6] In the case under consideration, the evidence abundantly sustains the conclusion of the Commission that the continuance of the broadcasting programs of appellant is not in the public interest. In a proceeding for contempt against Dr. Shuler, on appeal to the Supreme Court of California, that court said (In re Shuler, 210 Cal. 377, 292 P. 481, 492) that the broadcast utterances of Dr. Shuler disclosed throughout the determination on his part to impose on the trial courts his own will and views with respect to certain causes then pending or on trial, and amounted to contempt of court. Appellant, not satisfied with attacking the judges of the courts in cases then pending before them, attacked the bar association for its activities in recommending judges, charging it with ulterior and sinister purposes. With no more justification, he charged particular judges with sundry immoral acts. He made defamatory statements against the board of health. He charged that the labor temple in Los Angeles was a bootlegging and gambling joint. In none of these matters, when called on to explain or justify his statements, was he able to do more than declare that the statements expressed his own sentiments. On one occasion he announced over the radio that he had certain damaging information against a prominent unnamed man which, unless a contribution (presumably to the church) of a hundred dollars was forthcoming, he would disclose. As a result he received contributions from several persons. He freely spoke of "pimps" and prostitutes. He alluded slightingly to the Jews as a race, and made frequent and bitter attacks on the Roman Catholic religion and its relations to government. However inspired Dr. Shuler may have been by what he regarded as patriotic zeal, however sincere in denouncing conditions he did not approve, it is manifest, we think, that it is not narrowing the ordinary conception of "public interest" in declaring his broadcasts—without facts to sustain or to justify them—not within that term, and, since that is the test the Commission is required to apply, we think it was its duty in considering the application for renewal to take notice of appellant's conduct in his previous use of the permit, and, in the circumstances, the refusal, we think, was neither arbitrary nor capricious.

If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to

the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.

[7, 8] Nor are we any more impressed with the argument that the refusal to renew a license is a taking of property within the Fifth Amendment. There is a marked difference between the destruction of physical property, as in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321, and the denial of a permit to use the limited channels of the air. As was pointed out in American Bond & Mtg. Co. v. United States (C. C. A.) 52 F.(2d) 318, 320, the former is vested, the latter permissive, and, as was said by the Supreme Court in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 26 S. Ct. 341, 350, 50 L. Ed. 596, 4 Ann. Cas. 1175: "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution." When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether the restrictive measures are reasonably adapted to secure the purposes and objects of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not an unconstitutional taking of property without compensation or without due process of law." Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 34 S. Ct. 364, 368, 58 L. Ed. 721.

A case which illustrates this principle is Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251, 35 S. Ct. 551, 59 L. Ed. 939. In that case the state of Virginia had established lines of navigability in the harbor of Norfolk. The lumber company applied for and obtained permission from the state to build a wharf from its upland into the river to the line of navigability. Some twenty years later the government, in the exercise of its control of the navigable waters and in the interest of commerce and navigation, adopted the lines of navigability formerly established by the state of Virginia, but a few years prior to the commencement of the suit the Secretary of War, by authority conferred on him by the Congress, re-established the lines, as a result of which the riparian proprietor's wharf extended some two hundred feet within the new lines of navigability. The Secretary of War asserted the right to require the demolition of the wharf as an obstruction to navigation. The owner insisted that, having received a grant of privilege from the state of Virginia prior to the exercise by the government of its power over the river, and subsequently acquiesced in by its adoption of the state lines, the property right thus acquired became as stable as any other property, and the privilege so granted irrevocable, and that it could be taken for public use only upon the payment of just compensation. The contention was rejected on the principle that the control of Congress over the navigable streams of the country is conclusive, and its judgment and determination the exercise of a legislative power in respect of a subject wholly within its control. To the same effect is Gibson v. United States, 166 U. S. 269, 17 S. Ct. 578, 41 L. Ed. 996, in which a work of public improvement in the Ohio river diminished greatly the value of the riparian owner's property by destroying his access to navigable water; and Union Bridge Co. v. United States, 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523, where the owner of a bridge was required to remodel the same as an obstruction to navigation, though erected under authority of the state when it was not an obstruction to navigation; and Louisville Bridge Co. v. United States, 242 U. S. 409, 37 S. Ct. 158, 61 L. Ed. 395, in which the same rule was applied in the case of a bridge erected expressly pursuant to an act of Congress. So also in United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 S. Ct. 667, 57 L. Ed. 1063, the right of the govern-

ment to destroy the water power of a riparian owner was upheld; and in Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82, 33 S. Ct. 679, 57 L. Ed. 1083, the right of compensation for the destruction of privately owned oyster beds was denied. All of these cases indubitably show adherence to the principle that one who applies for and obtains a grant or permit from a state, or the United States, to make use of a medium of interstate commerce, under the control and subject to the dominant power of the government, takes such grant or right subject to the exercise of the power of government, in the public interest, to withdraw it without compensation.

Appellant was duly notified by the Commission of the hearing which it ordered to be held to determine if the public interest, convenience, or necessity would be served by granting a renewal of its license. Due notice of this hearing was given and opportunity extended to furnish proof to establish the right under the provisions of the act for a renewal of the grant. There was, therefore, no lack of due process, and, considered from every point of view, the action of the Commission in refusing to renew was in all respects right, and should be, and is, affirmed.

Affirmed.

VAN ORSDEL, Associate Justice, concurs in the result.

NELSON BROS. BOND & MORTGAGE CO. (STATION WIBO) v. FEDERAL RADIO COMMISSION (JOHNSON-KENNEDY RADIO CORPORATION et al., Interveners).

NORTH SHORE CHURCH OF CHICAGO, ILL. (STATION WPCC) v. SAME.

Nos. 5530, 5533.

Court of Appeals of the District of Columbia.

Argued May 2, 1932.

Decided Dec. 5, 1932.

1. Commerce ⇐28.

Business of radio broadcasting, being species of interstate commerce, is subject to reasonable regulation of Congress.

2. Telegraphs and telephones ⇐30.

It would not be consistent with legislative policy to equalize broadcasting facilities of states or zones by unnecessarily injuring established stations rendering valuable services to their natural service areas (Radio Act 1927, § 9, as amended [47 USCA § 89]).

3. Telegraphs and telephones ⇐30.

Granting radio station's application for change of frequency, necessitating forfeiture of licenses of two other stations sharing such frequency, *held* arbitrary and capricious (Radio Act 1927, § 9, as amended [47 USCA § 89]).

The facts disclosed that the two stations whose licenses were forfeited by granting of application for change of frequency had been operated in the public interest, and that only apparent reason for granting the application and thus destroying such two stations was that applicant was in an underquota state, while the other two stations were in an overquota state in the same zone.

4. Telegraphs and telephones ⇐26½.

That Radio Commission's decision granting application for change of broadcasting station's frequency was rendered without notice to other stations affected could not be raised by such other stations on appeal, where they did not seek hearing (Radio Act 1927, § 9, as amended [47 USCA § 89]).

GRONER, and HITZ, Associate Justices, dissenting.

Appeals from the Federal Radio Commission.

Application by Johnson-Kennedy Radio Corporation as owner of Radio Broadcasting Station WJKS for a change of frequency to the frequency shared by Stations WIBO, owned by Nelson Bros. Bond & Mortgage Company, and WPCC, owned by the North Shore Church of Chicago, Ill., in which Strawbridge & Clothier intervened. From a decision of the Federal Radio Commission granting the application, the other parties appeal.

Reversed and remanded.

Levi Cooke, of Washington, D. C., for appellant Nelson Bros. Bond & Mortgage Co.

Levi Cooke and Edward Clifford, both of Washington, D. C., for appellant North Shore Church.

Thad H. Brown, D. M. Patrick, and Fanney Neyman, all of Washington, D. C., for Federal Radio Commission.

M. W. Willebrandt, of Washington, D. C., for intervener Johnson-Kennedy Radio Corporation.

Bethuel M. Webster, Jr., and Paul M. Segal, both of Washington, D. C., for intervener Strawbridge & Clothier.

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station, they drove back to Louisville without Freeman.

Freeman had told Special Agent Domalewski that, although he drove to Cleveland with Peacock the day before the bank robbery, he had not stayed overnight with him. The girl's uncontradicted testimony demolished Freeman's claim and placed him with Peacock during the night preceding the robbery and on the morning of the robbery just outside Cleveland, Ohio.

Where the $18,000, stolen from the bank, was taken, no one knows as far as disclosed by the evidence. As to where Freeman went after the robbery, there is no evidence, but it is clear that the girl was driven to the train station by Peacock and left there a couple of hours while the bank robbery was being carried out by Peacock and Freeman. From everything that appears, the girl was completely innocent of any knowledge of the bank robbery or any knowledge that Peacock or Freeman were engaged in a criminal enterprise.

On the whole, the investigation of the bank robbery, the tracing of the getaway car, and the accumulation of the evidence over a long period of time, which finally led to the arrest and conviction of Peacock and Freeman constituted one of those unsung exploits of intelligence, perseverance, and detective skill that are so infrequently appreciated and so often carried through to a successful conclusion by the Federal Bureau of Investigation.

We have reviewed other contentions made during the trial and in the briefs on appeal, and find them unnecessary to consider.

In accordance with the foregoing, the judgment of the District Court is affirmed.

EDWARDS, Circuit Judge (concurring).

I concur in Judge McAllister's opinion, including the holding therein that no prejudicial error resulted from the offer in evidence of the bank guns seized at the time of arrest of defendant Freeman. This holding, however, I would relate to the admissibility of such testimony as bearing on the state of mind of the accused. Banning v. United States, 130 F. 2d 330 (6th Cir. 1942), cert. denied, 317 U.S. 695, 63 S.Ct. 434, 87 L.Ed. 556 (1943); Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896); Hall v. People, 39 Mich. 717 (1878); 2 JONES ON EVIDENCE § 386 (5th ed., Gard rev. 1958).

RADIO TELEVISION NEWS DIRECTOR; ASSOCIATION et al., Petitioners,

v.

UNITED STATES of America and Federal Communications Commission, Respondents.

COLUMBIA BROADCASTING SYSTEM, INC., Petitioner,

v.

UNITED STATES of America and Federal Communications Commission, Respondents.

NATIONAL BROADCASTING COMPANY, Inc., Petitioner,

v.

UNITED STATES of America and Federal Communications Commission, Respondents.

Nos. 16369, 16498–16499.

United States Court of Appeals
Seventh Circuit.

Sept. 10, 1968.

Certiorari Denied Jan. 13, 1969.

See 89 S.Ct. 631.

Proceeding on petitions for review of orders of Federal Communications Commission. The Court of Appeals, Swygert, Circuit Judge, held that Federal Communications Commission rule that licensee, broadcasting political editorials or personal attacks on honesty, character, integrity or like personal qualities of identified person or group, notify person or group and afford reasonable

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opportunity to reply was vague, posed substantial likelihood of inhibiting broadcast licensee's dissemination of views of political candidates and controversial issues of public importance and contravened First Amendment in absence of Commission demonstration that fairness in broadcasting was unobtainable by less restrictive and oppressive means.

Commission's order set aside.

1. Constitutional Law ⇐90

Vague laws in any area suffer constitutional infirmity, but when First Amendment rights are involved the court looks even more closely, lest, under guise of regulating conduct that is reachable by police power, freedom of speech or of press suffer. U.S.C.A.Const. Amend. 1.

2. Constitutional Law ⇐82

Government may regulate in area of First Amendment freedoms only with narrow specificity. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐90

Freedom of press to disseminate views on issues of public importance must be protected from imposition of unreasonable burdens by governmental action. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐90

Federal Communications Commission rule that licensee, broadcasting political editorials or personal attacks on honesty, character, integrity or like personal qualities of identified person or group, notify person or group and afford reasonable opportunity to reply was vague, posed substantial likelihood of inhibiting broadcast licensee's dissemination of views on political candidates and controversial issues of public importance and contravened First Amendment in absence of Commission demonstration that fairness in broadcasting was unobtainable by less restrictive and oppressive means. Communications Act of 1934, § 315(a), as amended 47 U.S.C.A. § 315(a); U.S.C.A.Const. Amend. 1.

5. Constitutional Law ⇐90

In view of vagueness of Federal Communications Commission's rules relating to broadcasting of personal attacks and political editorials, burden imposed on licensees and possibility of both Commission's censorship and licensee self-censorship, rule could be sustained against First Amendment attack only if Commission demonstrated significant public interest in attainment of fairness in broadcasting to remedy the problem and that Commission was unable to obtain such fairness by less restrictive and oppressive means. Communications Act of 1934, § 315(a), as amended 47 U.S.C.A. § 315(a); U.S.C.A.Const. Amend. 1.

Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Washington, D. C., Raymond L. Falls, Jr., Lawrence J. McKay, Herbert Wechsler, New York City, Archibald Cox, Cambridge, Mass., Maurice Rosenfield, Harry Kalven, Jr., Chicago, Ill., W. Theodore Pierson, Vernon C. Kohlhaas, Robert N. Lichtman, Pierson, Ball & Dowd, Harold David Cohen, Washington, D. C., Newton N. Minow, Chicago, Ill., Royal E. Blakeman, New York City, for petitioners.

Thomas E. Ervin, Howard Monderer, Douglas E. Cutler, New York City (Cahill, Gordon, Sonnett, Reindel & Ohl, New York City, of counsel), for petitioner, National Broadcasting Company, Inc.

Howard E. Shapiro, Dept. of Justice, Washington, D. C., Daniel R. Ohlbaum, Deputy Gen. Counsel, Robert D. Hadl, Henry Geller, John H. Conlin, Leonore G. Ehrig, Federal Communications Commission, Washington, D. C., Donald F. Turner, Asst. Atty. Gen., Gregory B. Hovendon, Arthur I. Cantor, Attys., Dept. of Justice, Washington, D. C., for respondent.

Michael H. Bader, William J. Potts, Jr., Washington, D. C., Edwin Lukas, Orrin G. Judd, Earle K. Moore, Ed A. Bernstein, New York City, Ernest F. Staub, Chicago, Ill., for amicus curiae

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Office of Communication of the United Church of Christ, United Church Board for Homeland Ministries, Board of National Missions of the United Presbyterian Church in the U. S. A., National Division of the Methodist Board of Missions, General Board of Christian Social Concerns of the Methodist Church, The American Jewish Committee, and National Catholic Conference for Interracial Justice, amici curiae, William B. Ball, Harrisburg, Pa., of counsel.

Lois P. Siegel, Kenneth W. Gross, Washington, D. C., for amicus curiae, King Broadcasting Company; Haley, Bader & Potts, Washington, D. C., of counsel.

Marshall, Bratter, Greene, Allison & Tucker, New York City, for National Academy of Television Arts and Sciences, amicus curiæ; Royal E. Blakeman, New York City, of counsel.

Before CASTLE, Chief Judge, KILEY and SWYGERT, Circuit Judges.

SWYGERT, Circuit Judge.

This review raises the question of the constitutionality of the Federal Communications Comimssion's recently promulgated rules concerning the airing of personal attacks and political editorials by broadcasters licensed by the Commission. An unincorporated association of radio and television journalists and eight companies holding licenses for radio and television stations [1] petitioned this court to review and set aside the final order of the Commission,[2] issued on July 10, 1967, (adopted on July 5, 1967) which set forth the new rules.[3] The Columbia Broadcasting System, Inc., (CBS) and the National Broadcasting Co., Inc. (NBC) filed separate petitions to review the Commission's order in the Court of Appeals for the Second Circuit. These petitions were transferred to this court (28 U.S.C. § 2112), and pursuant to our order, the three petitions were consolidated.[4]

On April 8, 1966, the Commission released a Notice of Proposed Rule Making. The announced purposes of the rules proposed by the Commission were "to codify the procedures which licensees are required to follow in personal attack situations" and "to implement the *Times-Mirror* [5] ruling as to station editorials

1. These petitioners are Radio Television News Directors Association, Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc. This group of petitioners will be collectively referred to hereafter as RTNDA.

2. Commissioner Bartley dissented, Commissioner Loevinger concurred and Commissioner Wadsworth was absent.

3. The rules as set forth in the July 10 order appear in the appendix to this opinion.

4. Three amicus curiae briefs were filed in this court. The briefs of King Broadcasting Company and the National Academy of Television Arts and Sciences opposed the Commission's rules. The brief of the Office of Communication of the United Church of Christ and other religious organizations [illegible] Commission's rules.

5. Times-Mirror Broadcasting Co. (KTTV), 24 P & F Radio Reg. 404 (1962). During the 1962 California gubernatorial campaign, a television station engaged in the "'continuous' and 'repetitive' * * * presentation of views * * * on the campaign as compared to a 'minimal opportunity afforded to opposing viewpoints' and * * * from time to time, 'personal attacks on individuals and groups involved in the * * * campaign'." 24 P & F Radio Reg. at 405. The Commission informed the licensee:

"Under the fairness doctrine, when a broadcast station permits, over its station facilities, a commentator or any person other than a candidate to take a partisan position on the issues involved in a race for political office and/or to attack one candidate or support another by direct or indirect identification, then it should send a transcript of the pertinent continuity in each such program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate

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endorsing or opposing political candidates." In its notice, the Commission invited interested parties to file comments on the proposed rules. Of the twenty-six comments filed with the Commission, eighteen opposed and eight favored the adoption of the proposed rules.

In the rules dealing with the responsibilities and obligations of licensees with respect to personal attacks, a "personal attack" was defined as an attack upon the "honesty, character, integrity or like personal qualities of an identified person or group." A personal attack would come within the ambit of the rules however, only if made "during the presentation of views on a controversial issue of public importance."

According to the Commission's Memorandum Opinion and Order, the personal attack rules were "simply a particular aspect of the Fairness Doctrine," and did "not alter or add to the substance of the Doctrine." The Fairness Doctrine was initially articulated in the Report of the Commission in the Matter of Editorialization by Broadcast Licensees, 13 F.C.C. 1246 (1949). In that report, the Commission stated the basic obligation of licensees to present broadcasts concerning public issues, in a manner which would insure that the listening public would be exposed to a broad spectrum of views on a given issue.[6] The Commission indicated that "specific Congressional approval" of the Fairness Doctrine was contained in the 1959 Amendments to section 315 of the Communications Act.[7]

When a personal attack has been broadcast by a licensee, the rules require that the licensee, within a reasonable time, but not later than one week after the attack, notify the person or group attacked of the "date, time and identification of the broadcast," provide "a script or tape (or an accurate summary if a script or tape is not available)," and offer to the person or group attacked "a reasonable opportunity to respond over the licensee's facilities."

spokesman to answer the broadcast." Id.

However, the Commission indicated that newscasts, news interviews, news documentaries, and on-the-spot coverage of news events "would not, as a general matter * * * appear to be encompassed by the Commission's ruling." Id. at 406.

6. The specific language in the report which gave birth to the personal attack aspect of the Fairness Doctrine follows:

> It should be recognized 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. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.* (Emphasis added.)

7. That portion of the 1959 amendment to which the Commission referred follows (47 U.S.C. § 315):

> 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.

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Because "the procedures specified [in prior Commission rulings] [8] have not always been followed [by licensees], even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue," the Commission perceived the need for the specific rules here at issue. The Commission's avowed purpose in embodying the procedural aspects of the "long-adhered to" personal attack principle in rules was twofold: first, to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks"; and second, to enable the Commission "to impose appropriate forfeitures * * * in cases of clear violations by licensees which would not warrant designating their application for hearing at renewal time or instituting revocation proceedings but * * * do warrant more than a mere letter of reprimand."

Although the promulgation of the rules represented an attempt to "clarify" a licensee's obligations, the Commission said the "rules are not designed to answer such questions" as whether a "personal attack" had occurred or whether the person or group attacked was "identified." In spite of the fact that unanswered questions were to be left to the licensee's "good faith judgment," if the licensee remained doubtful of his obligations, the Commission invited prompt consultation to obtain interpretation of its rules.

Some of the comments submitted in opposition to the proposed rules contained expressions of fear that the rules would both discourage controversial issue programming and infringe the first amendment guarantee of a free press. With respect to the alleged discouragement of controversial issue programming, the Commission responded:

> Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities.

Regarding the constitutional question, which the Commission believed to be "without merit," it responded:

> As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting veiwpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules—namely operation by a licensee limited to informing the public of only one side of these issues, i. e., the personal attack or the licensee's editorial.

In addition, the Commission referred in this regard to the discussion of the "constitutionality of the fairness doctrine generally in the Report on Editorialization," 13 F.C.C. 1246 (1949) and the decision in Red Lion Broadcasting Co., Inc. v. FCC, 127 U.S.App.D.C. 129, 381 F.2d 908, cert. granted, 389 U.S. 968, 88 S.Ct. 470, 19 L.Ed.2d 458 (1967).[9]

8. In particular, the Commission referred to the Public Notice of July 26, 1963: Controversial Issue Programming, F.C.C. 63-734 and Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed.Reg. 10415 (1964).

9. On January 29, 1968, the Supreme Court entered an order postponing the oral argument in *Red Lion* pending the decision of this court in the instant review and the Supreme Court's action on any petition for certiorari to review this court's decision, 390 U.S. 916, 88 S.Ct. 848, 19 L.Ed.2d 977 (1968). On the same day, the Supreme Court denied the petition of RTNDA for certiorari before the judgment of this court, 390 U.S. 922, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968).

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Specific exemptions from the requirements of the personal attack rules were provided in two instances: attacks on "foreign groups or foreign public figures," and personal attacks by qualified candidates on other qualified candidates.[10] The latter exemption was thought to be appropriate in view of the "equal opportunities" provision of 47 U.S.C. § 315 [11] with respect to broadcasts by political candidates.

The Commission's purpose in promulgating the political candidate editorial rules was to clarify the "licensee's obligations in regard to station editorials endorsing or opposing political candidates." The rules require that a licensee who broadcasts an editorial endorsing or opposing a candidate for public office must offer the other qualified candidates or the candidate opposed "a reasonable opportunity * * * to respond." [12] The response can be made through a spokesman of the candidate's choice.[13] A twenty-four hour notification requirement was imposed because "time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial." In those situations where a political editorial is broadcast within seventy-two hours of the day of election, the rules require notification before the broadcast. Although disclaiming any intention to prohibit "last-minute editorials," the Commission believed "such editorials would be patently contrary to the public interest and the personal attack principle" unless the candidate were notified sufficiently far in advance to present a timely response.[14]

On August 7, 1967 the Commission [15] issued a Memorandum Opinion and Order (adopted on August 2, 1967), enlarging the specific exemptions from the requirements of the previously-adopted personal attack rules.[16] Under the

10. This exemption also included attacks by a candidate's authorized spokesmen or campaign associates on opposing candidates, their spokesmen or their campaign associates.

11. In pertinent part, section 315 reads:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

12. The Commission elaborated on the phrase "reasonable opportunity to respond" in its memorandum opinion:

The phrase "reasonable opportunity" to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a meaningful response.

13. The provision allowing the spokesman of the candidate to make the response was intended to enable the licensee "to avoid any Section 315 'equal opportunities' cycle" which might be initiated if the candidate himself responded.

14. The rules issued on July 10, 1967 were to become effective on August 14, 1967.

15. Commissioners Bartley, Loevinger, and Wadsworth were absent. Commissioner Cox concurred in the result.

16. The respective petitions for review were supplemented to take account of the August 7 order.

amendment,[17] the personal attack rules were no longer applicable "to the bona fide newscast or on-the-spot coverage of a bona fide news event." The Fairness Doctrine, however, remained applicable to the exempt categories. The Commission considered the amendment necessary because the application of the specific personal attack requirements to these two news categories would be "impractical and might impede the effective execution of the important news functions of licensees or networks" by replacing news broadcasts with responses to personal attacks. The Commission exempted broadcast of on-the-spot coverage of a bona fide news event, because "this area is akin to the newscast area," personal attacks in such programs are "unlikely to be large in number * * * the notification aspect is relatively less needed in this area," and application of the Fairness Doctrine in this area was sufficient.

"[E]ditorials or similar commentary, embodying personal attacks, broadcast in the course of newscasts," were specifically referred to in the Commission's memorandum opinion as not being exempt from the personal attack rules. If a licensee chose to present a personal attack in these broadcasts, the Commission believed that the licensee should not make the determination as to what the public would or would not hear in response to the personal attack. In addition, "time and practical considerations, discussed with respect to the news itself," were not thought to be germane to "editorials or similar commentary." The Commission did not exempt "news documentaries" from the personal attack rules because they were not thought to "involve the time and practical considerations" which necessitated the other exemptions and because "a documentary, even though fairly presented, may necessarily embody a point of view." "News interview shows" were not exempted because of the absence of "time and practical considerations" and because a licensee having "chosen to provide one person with an 'electronic platform' for an attack" was required, by "elemental fairness and the duty to inform the public," to allow the person attacked to respond.

While the instant petitions were pending in this court, the Commission filed a motion requesting authority to once again revise the personal attack rules.[18] We granted the Commission's request,

17. The amendment as set forth in the August 7 order appears in the appendix to this opinion.

18. The Commission's motion was filed on March 4, 1968. As originally presented, the motion requested that this court hold the pending petitions for review in abeyance and authorize the Commission to conduct further rule making proceedings. According to the motion, the Commission proposed to "set aside those parts of the rules * * * dealing with personal attacks" and "to conduct an expeditious rule making proceedings looking toward their revision." The motion was apparently prompted by consultation between the Commission and the Department of Justice and a letter from the Assistant Attorney General, Antitrust Division, to the Commission's chairman. In pertinent part, the letter read:

> [W]e are fully prepared to support the Commission's position that the "fairness doctrine" is constitutional and within the [illegible] power ... and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve.

The motion was opposed by NBC. Neither RTNDA nor CBS had any objection to granting the motion so long as the enforcement of the rules, as originally promulgated, was stayed pending the proposed revision. In its reply, the Commission abandoned its plan to conduct additional rule making proceedings and instead appended a proposed memorandum opinion and order, revising the personal attack rules. This court's order of March 22, 1968 denied the Commission's motion to hold the review in abeyance but allowed the Commission leave to revise the personal attack rules.

and on March 29, 1968, the Commission [19] issued a Memorandum Opinion and Order (adopted on March 27, 1968) containing a revision of the personal attack rules. The revision [20] further enlarged the categories of news-related programs which would be exempt from the personal attack rules. The two added exemptions covered the "bona fide news interview" and the "news commentary of analysis contained" in either bona fide newscasts, bona fide news interviews, or on-the-spot coverage of a bona fide news event.

In the memorandum opinion accompanying the new revision, the Commission stated that the "revision * * * [was] of a relatively narrow nature," [21] and was in response to allegations of the "inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licenses." The Commission believed that its revision would avoid "*any* possibility of inhibition in these important areas of broadcast journalism" even though "the showing as to inhibiting effects remains speculative." (Emphasis in the original.)

Several additional considerations prompted the Commission to make the new revisions. First, noting the exemptions of four categories of news-type programs from the "equal opportunities" requirement of section 315,[22] the Commission observed that "the personal attack facet can have some similarities to the 'equal opportunities' requirement in its application in this area." Second, the Commission had not found, in the exempt news categories, the "flagrant failures by licensees to follow the requirements of the fairness doctrine" evident in "editorializing by licensees or syndicated programming." Third, the Commission desired "to promote the fullest possible robust debate on public issues."

Although enlarging the scope of the exemptions, the Commission reiterated that the Fairness Doctrine (giving "the licensee considerable discretion") remained applicable to the exempt categories. In particular, when personal attacks occurred in the course of any of the exempt broadcasts, the Commission stated:

> [O]ur revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

The "labelled station or network editorial" and the "news documentary" were not added to the group of exempt broadcasts. Although the Commission viewed "news commentary or analysis" to be "an integral and important part of the news process involved in the category 'bona fide newscast'" and viewed "the bona fide news interview" to be "a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments [to

19. Commissioners Bartley and Loevinger dissented, the latter writing a lengthy opinion setting forth views critical of the Commission's action. Commissioner Cox concurred. Commissioner Johnson concurred in the result.

20. The amendment as set forth in the March 29 order appears in the appendix to this opinion.

21. The Commission did, however, attempt to impart some clarity to the requirements of the personal attack rules. In a footnote, the Commission said:

> Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, "when, during the presentation of views on a controversial issue of public importance * * *," the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion.

22. See note 11, supra.

section 315],"[23] the "labelled station or network editorial" was viewed as "akin to * * * the political editorializing area." With respect to its reasons for not exempting news documentaries, the Commission could foresee "no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time." (Emphasis in the original.) In addition, the Commission stressed that the documentaries exempted by Congress in section 315 were unique in that, "the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all."

Petitioners' primary contention is that the Commission's personal attack and political editorial rules, as amended, will impose unconstitutional burdens on the freedom of the press protected by the first amendment.[24] The petitioners urge that a variety of such burdens will result from the Commission's enforcement of these rules. (1) A licensee will be unwilling to broadcast personal attacks and political editorials or to allow his facilities to be used as a vehicle for such broadcasts if he is required by the Commission's rules to incur the expense of notifying the person or group attacked, of providing a transcript of the attack, and of donating free time for a reply. This burden will be exacerbated by the potential disruption that the necessity of airing replies will have in displacing previously scheduled programs. (2) A conscientious licensee will be inhibited from speaking out on either controversial issues or impending elections if to do so means that he must provide time for the airing of unorthodox views in reply. (3) The broadcasting of controversial issues of public importance will be inhibited due to the licensee's uncertainty concerning the application of the Commission's rules to a given situation. (4) The licensee's journalistic judgment and spontaneity in programming will be impeded because the Commission's rules require the licensee to determine on a broadcast-by-broadcast basis whether compliance with the rules has been met. (5) An individual licensee affiliated with a network will be reluctant to carry a network program covered by the rules because if a response to a network program broadcast by the affiliate is required, the affiliate must either air the network's response or make independent arrangements to comply with the rules. (6) A licensee will be required to impose rigorous censorship on those who use his facilities since the licensee is individually reponsible for all the material which he broadcasts.

Besides the alleged unreasonable burdens imposed upon licensees, the petitioners point to several additional difficulties which they argue inhere in the Commission's rules. They contend that the rules are too vague, given the wide range of severe penalties a licensee faces for failing to comply with them. Petitioners refer to the uncertain meaning of terms in the rules such as "attack," "character," "like personal qualities," and "identified individual." Moreover, they argue that the Commission's offer to make itself available promptly to resolve these interpretative questions could place the Commission in the role of a censor. Through the power to interpret vague rules, the Commission would be in a position to determine which views, opposing those expressed over a licensee's facilities, do or do not merit a right of reply. The petitioners claim that this discretionary power is susceptible to the

23. Throughout its memorandum opinion, the Commission emphasized the parallel between its action and the 1959 Amendments. At one point the Commission said:

> We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertinent, will be followed in this field also.

24. RTNDA not only urges the unconstitutionality of the specific rules here in issue, but of the Fairness Doctrine itself.

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possibility of abuse. In effect, they urge that the rules could result in the Commission substituting its judgment concerning what is to be broadcast for the judgment of individual licensees. The petitioners argue that in order to avoid this prospect, a licensee might attempt to either broadcast every side of every issue or curtail the broadcasting of controversial public issues and political editorials altogether. The result of each alternative would be a bland neutrality in the broadcasting media which petitioners urge is not in the public interest.

Neither the Commission's three memorandum opinions nor its brief filed in this court are altogether responsive to the various contentions raised by the petitioners. The Commission characterizes the petitioners' arguments as asserting "a constitutional right to make a one-sided presentation." This non-existent constitutional right, according to the Commission, is predicated on the petitioners' failure to recognize the substantial differences between the various communication media, particularly the differences between newspapers and radio and television. Because of this failure, the Commission believes that the petitioners' arguments lead to the untenable conclusion that the entire licensing scheme of the Communications Act is unconstitutional. Although conceding that the first amendment applies to broadcasting, the Commission urges that "different rules and standards are appropriate for different media of expression in light of their differing natures." Finally, the Commission flatly asserts in a perfunctory fashion that under the rules as amended, there is no "possibility of inhibition" of licensees.

[1, 2] We approach the primary question raised in this review—the constitutionality of the Commission's personal attack and political editorial rules—against the backdrop of a host of Supreme Court decisions. Those decisions have established the standards by which to assess claims that governmental statutes, regulations or practices abridge freedom of speech in violation of the first amendment. For example, the Supreme Court has said: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely, lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer" Ashton v. Kentucky, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 432, 433, 83 S.Ct. 328, 337, 338, 9 L.Ed.2d 405 (1963).

Turning from cases dealing generally with the first amendment to cases dealing with the freedom of the press in particular, a series of recent Supreme Court decisions, beginning with New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), delineated the Court's views on the proper accommodation of the private interests served by libel actions in vindicating those who are defamed with the public interests served by the printed press in criticizing public officials or public figures and in illuminating public issues.[25] In the *New York Times* case,

25. Other decisions in which the Supreme Court explored the implications of New York Times are: St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) (public official's defamation action after televised speech critical of him); Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (public figures' libel action after printed articles critical of them); Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (action under right of privacy statute after publication of article concerning newsworthy people and events); Mills v. State of Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) (criminal action pursuant to Corrupt Practices Act after publication of a political editorial on election day); and Garrison v.

a public official, one of the city commissioners of Montgomery, Alabama, brought a libel action against certain individuals and the Times as a result of critical statements appearing in a full page advertisement. After reviewing previous decisions, the Court said, "None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." 376 U.S. at 268, 84 S.Ct. at 719. The Court observed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270, 84 S.Ct. at 721. Nor was this commitment of recent origin, as, "The right of free discussion of the stewardship of public officials was * * * in Madison's view, a fundamental principle of the American form of government." 376 U.S. at 275, 84 S.Ct. at 723. In ruling that actual malice must be the standard of proof in such libel actions, the Court said that under a less stringent standard:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. * * * Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive. 376 U.S. at 277, 278, 84 S.Ct. at 724, 725.

[3] The import of *New York Times* and its progeny is that the freedom of the press to disseminate views on issues of public importance must be protected from the imposition of unreasonable burdens by governmental action. We address ourselves, therefore, to the question whether the Commission's rules here in issue pose unreasonable burdens on licensees.

[4] Despite the Commission's disclaimers to the contrary, we agree with the petitioners that the rules pose a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance.[26] This inhibition stems, in part, from the substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply.[27]

State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (criminal action pursuant to Criminal Defamation Statute after criticism of public officials).

26. The amicus curiae brief filed in this court by the King Broadcasting Company graphically illustrates the inhibitory effect on the broadcast of political editorials of the Commission's requirement of a "reasonable opportunity to respond." In two instances, the broadcast of editorials endorsing candidates for the Seattle City Council was delayed for several weeks while one of the unendorsed candidates in each instance prosecuted a complaint before the Commission alleging that King's division of that person's reply time was unreasonable. Although not ordering King to give the complaining candidates additional reply time, the Commission determined into how many segments the total amount of time should be divided. This action indicates the degree to which the Commission has gone in imposing supervision on licensees.

27. The Commission's so-called exemptions from the requirements of the personal attack rules, which were contained in the August, 1967 and March, 1968 amendments, are illusory. Our reading of the latest amendment indicates that unless the response of the person attacked is fairly presented by the licensee on the "attack issue" of the "exempt" broadcast, the licensee must adhere to the explicit requirements of the rules. But, the alternative of presenting the reply on the "attack issue" might lead licensees to view every personal attack as a controversial public issue in order to avoid compliance with the strict requirements of the rules. Because of the possible disruptive effect and difficulty in complying with the alternative, a licensee might choose to avoid controversial issue programming altogether so as to remove the possibility of broadcasting personal attacks.

Although most of the rules' specific requirements have been the subject of Commission rulings pursuant to individual complaints under the Fairness Doctrine, there are two crucial differences between the specific rules we are reviewing and that doctrine. A major premise underlying the Fairness Doctrine is the Commission's trust in the good faith and sensible judgment of a broadcast licensee in dealing with personal attacks and political editorials in a fair and reasonable manner.[28] Under the rules here in question, however, much of the licensees' discretion is replaced by mandatory requirements applicable to each broadcast. The other difference between the rules and the Fairness Doctrine is that the only sanction for noncompliance with the Fairness Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the "public interest, convenience, and necessity." This determination and the accompanying sanction would be based on the licensee's overall performance during the preceding three years. Under the rules here in issue, however, the question whether a licensee would be subjected to the Commission's broad range of enforcement powers[29] could be determined on the basis of a single broadcast by the licensee. As a consequence, whatever discretion is still reposed in a licensee under the new rules with respect to his handling of personal attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties.[30]

28. See note 6, supra.

29. The Commission referred specifically to 47 U.S.C. § 503(b) in this regard in its memorandum opinion issued on July 10, 1967. In pertinent part, that section provides:

> (b) Violation of rules, regulations, etc. * * *
>
> (1) Any licensee or permitee of a broadcast station who—
>
> * * * * *
>
> (B) willfully or repeatedly fails to observe any of the provisions of this chapter or of any rule or regulation of the Commission prescribed under authority of this chapter or under authority of any treaty ratified by the United States.
>
> * * * * *
>
> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter.

In addition, a willful and knowing violation of the Commission's rules will subject the violator to criminal sanctions, which are set forth in 47 U.S.C. § 502. In pertinent part, that section provides:

> Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter * * * shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

Finally, violations of the Commission's rules could subject a violator to administrative sanctions, which are set forth in 47 U.S.C. § 312. In pertinent part, that section provides:

> (a) Revocation of station license or construction permit.
>
> The Commission may revoke any station license or construction permit—
>
> * * * * *
>
> for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;
>
> * * * * *
>
> (b) Cease and desist orders.
>
> Where any person * * * (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

30. In its first memorandum opinion, the Commission said, "the *only* new requirement in these rules are the time limits." (Emphasis added.) A crucial difference between the rules and the Fairness Doctrine, however, is the fact that the licensee's obligations are incorporated in specific rules with which he must comply in every instance under the threat of severe sanctions.

We need not elucidate the proposition that the public interest will not best be served if the Commission's rules operate to discourage a licensee from engaging in the broadcast of controversial issues or political editorials. Moreover, the public interest will not necessarily best be served if a licensee adheres meticulously to the Commission's rules. Strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules. Apparently the Commission views programming which takes sides on a given issue to be somehow improper or contrary to the public interest. Thus, in explaining its failure to exempt documentaries from the personal attack rules, the Commission stated in its memorandum opinion of August 7, 1967, "that a documentary, even though fairly presented, may necessarily embody a point of view." This statement and the thrust of the rules themselves reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills.[31]

In addition, the petitioners express fears that a licensee's strict adherence to the requirement that he provide an opportunity to reply might result in the public airing of obnoxious or extreme views. Of course, the Commission might take the position that a licensee need not comply in those situations. But allowing the Commission selectively to enforce the rules so as to prevent the expression of those views it believes to be contrary to the best interests of the American public would cast the Commission in the role of a censor, contrary to the express provisions of the Communications Act.[32]

An even greater threat of Commission censorship arises due to the lack of specificity in the rules. The Commission has invited a licensee to seek its advice whenever he is unsure of his obligations under the rules. In fact, the Commission itself has recognized the possibility that such situations will arise.[33] But if the rules are so unclear that a licensee needs to obtain advisory interpretations from the Commission, it follows that the Commission, through interpretation of its own vague rules, has the power to effectively preclude the expression of views, whether by a licensee or a respondent, with which it does not agree.[34]

We agree with the petitioners that such terms as "attack," "character," and

31. In Mills v. State of Alabama, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966), the Supreme Court discussed the vanguard role of the press in the following language:

> Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials * * * responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

32. 47 U.S.C. § 326, prohibiting Commission censorship of program content, provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

33. See text supra at 7.

34. "[I]n appraising a statute's inhibitory effect upon such [first amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." NAACP v. Button, 371 U.S. 415, 432, 83 S.Ct. 328, 337, 9 L.Ed. 2d 405 (1963).

"like personal qualities" are subject to diverse interpretations and applications. Besides the unclear meaning of these essential terms in the rules, the Commission has failed to articulate the meaning of the rules. That the rules have been twice amended since their initial promulgation (once even while the instant reviews were pending in this court) [35] suggests that the Commission's aims in promulgating the rules are uncertain and changing. In its initial memorandum opinion, the Commission illustrated a situation in which the obligations imposed by the personal attack rules would arise, namely, the making of "a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist." [36] In its memorandum opinion accompanying the most recent revision of the rules, the Commission, in a footnote, redefined when the personal attack rules become applicable. The Commission said, "The rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity or character of an identified person or group an issue in that discussion." The Commission's first formulation suggests that any personal attack occurring during the course of a controversial issue broadcast is subject to the rules. The Commission's last formulation, however, suggests that only those personal attacks which are themselves an issue in the broadcast are subject to the rules.

Another example of the Commission's uncertain position regarding a licensee's obligations under the rules concerns its treatment of personal attacks occurring during the course of editorials or commentary. When the Commission first amended the rules to exempt the "bona fide newscast" and "on-the-spot coverage of a bona fide news event," the Commission said in its accompanying memorandum opinion that the exemption was inapplicable to "editorials or similar commentary." The clear implication from the last quoted language is that there is little, if anything, distinguishing "edtiorials" from "similar commentary." Yet in the memorandum opinion accompanying its last amendment to the rules, the Commission made a distinction between the two categories for it exempted "news commentary or analysis in a bona fide newscast" but left the "labeled station or network editorial" still subject to the rules.[37]

Similar uncertainty is evident in the Commission's treatment of the "news documentary." The Commission said in creating the various exemptions from the personal attack rules that it was "following the line drawn by Congress" when Congress created the exemptions in section 315. Congress exempted the news documentary, "if the appearance of the candidate is incidental to the presen-

35. The latest revision was prompted, according to an Assistant Attorney General, by a "concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions."

36. On previous occasions, the Commission has taken a different view on the rights of communists under the Fairness Doctrine. Thus, in the Fairness Primer, the Commission stated, "it is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." 29 Fed.Reg. at 10418 (1964). The statement quoted in the text apparently suggests that the Commission has altered its view respecting communists. This apparent change of attitude on the Commission's part, however, indicates only that the Commission has been inconsistent in its application of the Fairness Doctrine. And if the rules are vague enough to require a licensee to seek Commission interpretations, there exists the possibility of further such inconsistencies in the future.

37. A "news commentary or analysis" broadcast "outside one of the exempt program categories" will still be subject to the Commission's rules. Thus, depending solely on when it is broadcast, the same commentary would be either exempt or not exempt. The Commission itself recognized this anomaly, explaining it by saying that the same result occurred under section 315 which it was following.

tation of the subject or subjects covered by the news documentary." Yet the Commission did not exempt the news documentary from the personal attack rules even though any personal attack which might occur would likewise be incidental to the subject of the documentary.[38] The Commission's explanation for its failure to treat news documentaries as Congress treated them in section 315 was expressed by the Commission in its last memorandum opinion: "[T]here is no factor of even *possible* inhibition in the case of a documentary which is assembled over a period of time." (Emphasis in the original.) This explanation is debatable in view of the ever increasing pace of significant news developments and the valuable function served by documentaries in illuminating these developments.[39]

What these examples demonstrate is that the Commission's rules are too vague because they lack standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. When a licensee considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing. Consequentially, he will "steer far wider of the unlawful zone." Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958). Given the fast pace of news developments, a licensee will be understandably reluctant to make the difficult on-the-spot judgments demanded by the Commission's rules, the meaning of which are uncertain to both the licensee and the Commission. In Farmers Educational and Cooperative Union of America, North Dakota Division v. WDAY, Inc., 360 U.S. 525, 530, 79 S.Ct. 1302, 1306, 3 L.Ed.2d 1407 (1959), the Supreme Court commented on the practical difficulties facing licensees in an analogous situation concerning the censorship prohibition of section 315:

> The dec sion a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question * * * Such issues have always troubled courts. Yet, under petitioner's view * * * they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, * * * all remarks even faintly objectionable would be excluded out of an excess of caution.

In addition, due to a licensee's uncertainty of his obligations under the rules, it is more likely that he will engage in rigorous self-censorship of the material he broadcasts, than if he were subject only to the Fairness Doctrine.[40] Such

38. There is some question whether the Commissions' action in following the "line drawn by Congress" in section 315 was appropriate. Section 315 dealt with the problem of equal time for political candidates, not with the problem of personal attacks and political editorials. The fact that Congress exempted certain types of news-related programs from the equal time requirement in no way indicates what judgments Congress would have made (if in fact it could constitutionally have acted in this area at all) in deciding the scope of exemptions with respect to personal attacks and political editorials.

39. For a discussion of the problems of time and planning that attend the preparation of a news documentary, see W. WOOD, ELECTRONIC JOURNALISM, 46–49 (1967).

40. The Commission has made clear that "the obligation for compliance with these rules is on each individual licensee." If a licensee offers the use of his facilities to others who make a personal attack, the licensee remains responsible for complying with the Commission's rules. Under these circumstances, a licensee might also undertake to censor what others broadcast over his facilities.

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self-censorship would restrict the dissemination of views on public issues—essential to an informed citizenry. In Smith v. People of State of California, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed. 205 (1959), the Supreme Court had occasion to comment on the evils of self-censorship, saying:

> The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded.

In response to the petitioners' attack on the rules, the Commission has advanced two arguments to support its position that the rules are constitutional. First, the Commission relies on the recent decision in Red Lion Broadcasting Co., Inc. v. FCC, 127 U.S.App.D.C. 129, 381 F.2d 908, cert. granted, 389 U.S. 968, 88 S.Ct. 470, 19 L.Ed.2d 458 (1967). *Red Lion* concerned the challenge by a radio station licensee of a Commission order requiring the licensee to make free reply-time available to a person who had been personally attacked on a program broadcast over the licensee's station. The Commission's order predated the personal attack rules here in question.

In correspondence with the licensee prior to the issuance of the order, the Commission indicated that the procedural requirements (later formalized in the new personal attack rules) should be complied with by the Red Lion radio station. The Commission wrote:

> The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack '* * * on an individual's or group's honesty, character, integrity, or like personal qualities * * *' in connection with a controversial issue of public importance * * *.
>
> Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond.

The Commission also indicated in the course of this correspondence that its ruling was an application of the Fairness Doctrine, "as applied to this situation."

Judge Tamm, who wrote the principal opinion sustaining the Commission's order (Judge Fahy concurred in the result; Judge Miller did not participate in the decision on the merits), devoted the major portion of his discussion to a consideration of the constitutionality of the Fairness Doctrine. He held that Congress did not unconstitutionally delegate its legislative function to the Commission by enacting 47 U.S.C. § 315, which "adopted" the Fairness Doctrine, and he concluded:

> The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights. * * * [And that] under the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution nor is the Doctrine violative of either the ninth and tenth amendments. 381 F.2d at 930.

We believe two observations are in order with reference to Judge Tamm's opinion and the holding in that case. First, we draw a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine as referred to in section 315.[41] With that

41. See pages 15–18, supra.

distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review. Second, we are in disagreement with the District of Columbia Circuit's holding in *Red Lion*, sustaining the Commission's order, inasmuch as we think that the order was essentially an anticipation of an aspect of the personal attack rules which are here being challenged.

Second, the Commission relies on the alleged difference between the broadcast press and the printed press to sustain its position that the rules are constitutional. Although the Commission denies that its rules either impose unreasonable burdens on licensees or raise any constitutional difficulties,[42] it does concede that "it is undisputed that the protections of the First Amendment apply to broadcasting." But this concession is diluted by the Commission's contention that the broadcast press is entitled to a lower order of first amendment protection than the printed press. The Commission argues (relying on National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943)) that "since radio is inherently not available to all, its use may be constitutionally regulated in the public interest."[43] What the Commission urges upon this court is the argument that once the need for some regulation of radio and television licensees is recognized—to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems—it must follow that the Commission's power extends to the promulgation of other kinds of regulations. According to the Commission, a failure to make this concession results in the Commission's inability to impose any regulations, technical or otherwise.[44] This argument begs the question at issue, which is, whether the need for technical, financial, and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

The characteristic most frequently advanced by the Commission to distinguish the printed press from the broadcast press is that radio and television broadcasting frequencies are not available to all. Data comparing the broadcast press and the printed press, however, shows that there are more commercial radio and television stations in this country than there are general circulation daily news-

42. In its three memorandum opinions, much of the Commission's discussion of the constitutional impact of its rules, apart from relying on *Red Lion*, is limited to a cryptic reference in its first memorandum opinion to paragraphs 19 and 20 of the 1949 Report on Editorializing. Those two general paragraphs, written almost twenty years ago, provide no answer to the constitutional issues raised here. Also inadequate are the frequent conclusional statements that the rules neither burden nor inhibit licensees. Categorical conclusions are no substitute for reasoned analysis. Finally, the Commission, in its brief filed in this court, fails to discuss the impact of New York Times and its progeny.

43. National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943), does not support the Commission's position that the broadcast press is not entitled to the same order of first amendment protection as the printed press. At issue in that case was the validity of the Commission's chain broadcasting regulations. The only constitutional issue raised there was whether the denial of a station license for engaging in certain network practices was a denial of free speech. Moreover, in the earlier case of FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869 (1940), the Supreme Court said: "[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

44. Illustrative of the Commission's argument on this point is the assertion in its brief that "repeal of the Communications Act would still create chaos."

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papers.[45] In most major metropolitan areas, there are several times as many radio and television stations as there are newspapers.[46]

The Commission replies to this data by arguing that the only barrier to the publication of additional newspapers is an economic one, whereas the barrier to the operation of additional radio and television stations is a technical one—a limitation of available frequencies. For two reasons, the Commission's reply is unpersuasive. First, the fact that a number of allocated radio and television broadcast frequencies remain inoperative suggests that economic barriers also play a significant role in determining the number of operating broadcasters. Second the recent availability of UHF television frequencies suggests that technological development is not at a standstill and may result in increasing further the availability of broadcasting frequencies in the future.

An additional characteristic is also advanced by the Commission to distinguish the broadcast press from the printed press. Since broadcasting licenses are not available to all and licenses are issued for a limited period of time, the Commission maintains that those who obtain licenses are granted a "privilege" and consequently must act as "trustee[s] for the public" since "the airwaves belong to the public." Therefore, according to the Commission, a licensee, exercising such a privilege, must abide by Commission imposed rules concerning personal attacks and political editorials.

The Commission's reliance on the concept of public ownership of space or airwaves to distinguish the broadcast press from the printed press, is as one commentator has observed: "[L]ogically * * * meaningless. To say that the airways or spectrum can be owned by anyone is simply to indulge in fantasy."[47] Carried to its logical conclusion, the concept might sanction inhibitory regulation of other communication media for many such media make use of "publicly-owned" space to disseminate their respective messages. Moreover, the Supreme Court has indicated that "[A] State cannot foreclose the exercise of constitutional rights by mere labels." NAACP v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963).

45. In 1967 there were 6,253 commercial radio and television stations broadcasting as opposed to 1,754 daily newspapers. U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967, nos. 737, 746 (88th ed.)

46. RTNDA has provided us with the following chart illustrating this point:

Standard Metropolitan Statistical Areas	Daily Newspapers	Broadcasting Stations on the Air—AM-FM-TV
Chicago	13	86
Milwaukee	3	32
Indianapolis	9	29
Peoria	2	11
Madison	2	15
Champaign-Urbana	2	12
Green Bay	1	8

(Source: U. S. Bureau of the Census, *County and City Data Book 1967* 636, 637, 672 (Statistical Abstract Supp.); *Editor and Publisher International Year Book—1967*; Television Digest, Inc., *Television Factbook* (Stations Vol., 1967 ed.); Broadcasting Publications, Inc., *1967 Yearbook Issue.*)

47. Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations, 52 MINN.L.REV. 67, 152 (1967). Professor Robinson's article, an insightful and, at times, critical analysis of the Commission's regulatory activities, was written after the decision in *Red Lion.*

The Supreme Court has applied this same principle to attempted infringements of freedom of the press. In one such case, Hannegan v. Esquire, Inc., 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586 (1946), concerning the denial of a second-class postal rate to a magazine, the Court said:

> [G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. * * * [It would be] a radical departure from our traditions * * * to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

See also Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965).[48] Accordingly, the Commission cannot impose unreasonable burdens on a licensee's dissemination of views on controversial public issues by arguing that obtaining and exercising a broadcast license is a "privilege."

[5] In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means. Keyishian v. Board of Regents, 385 U.S. 589, 602, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), and Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed. 231 (1960). We do not believe the Commission has made such a demonstration.

According to the Commission, "[T]he development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day is the keystone of the Fairness Doctrine" as well as the rules here in question. The Commission assumes, however, that television viewers and radio listeners are in fact ill-informed, that they are isolated from other media of communication, and that those other media do not fully inform them of all sides of controversial public issues. We do not believe this assumption is warranted. The Commission's rules apply only to controversial issues of public importance and to political candidate editorials. Thus, the rules deal with subjects which are likely to receive thorough exposure and illumination in all media of communication. Although we would agree that radio and television are major vehicles for the dissemination of views on controverisal public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television in conjunction with other media of communication.

An important reason advanced by the Commission for promulgating the personal attack and political editorial rules was to broaden the range of available sanctions to deal with licensees who fail to comply with the requirements of the Fairness Doctrine. In its initial memorandum opinion, however, the Commission disclaimed any intention of using the rules "as a basis for sanctions against those licensees who in *good faith* seek to comply with the personal attack principle."[49] (Emphasis added.) When this

48. The Supreme Court has expressed the view on occasion that in determining the applicability of first amendment safeguards there is no basis for distinguishing among the various communication media. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); Lovell v. City of Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

49. The Commission's announced intention to enforce its rules selectively is no substitute for rules narrowly drawn to deal

364 U.S. 479, 488, 231 (1960). We mission has made

ommission, "[T]he ormed public opin- dissemination of ning the vital issues one of the Fairness the rules here in mission assumes, sion viewers and a fact ill-informed, from other media d that those other nform them of all public issues. We ssumption is war- ssion's rules apply issues of public im- tical candidate edi- ules deal with sub- to receive thorough ation in all media of though we would vision are major semination of views lic issues, the Com- o demonstrate that ides of a given issue dio and television in her media of com-

son advanced by the omulgating the per- litical editorial rules range of available h licensees who fail requirements of the In its initial memo- owever, the Commis- intention of using for sanctions against in *good faith* seek to ersonal attack prin- s added.) When this

; Lovell v. City of 44, 452, 58 S.Ct. 666,).

announced intention fectively is no sub- wly drawn to deal

disclaimer is added to the Commission's failure to demonstrate the existence of widespread noncompliance with the doctrine, it becomes evident that the Commission's rules are broader than necessary; for they impose substantial burdens on all licensees in the expectation of dealing more severely with a minority of licensees who engage in "willful or repeated" acts of unfairness.[50] In addition, there is some question whether the reply requirements of the rules are well-suited for attaining the fair presentation of all sides of controversial public issues which the Commission believes to be presently lacking. One commentator, considering the efficacy of the reply requirements, has observed:

> I think that the case for the value of the broadcast reply is much weaker than it is assumed to be. Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply? How will the mandated reply or defense reach him? Does he know whether or when it will be broadcast? The advance programs do not give notice of specific replies (though it would be possible for the regulation to require such notice). It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper, i. e., as a news item, is more likely to reach a listener than the later program. The newspaper both in time and space has greater extension and great permanency. JAFFE, THE FAIRNESS DOCTRINE, EQUAL TIME, REPLY TO PERSONAL ATTACKS, AND THE LOCAL SERVICE OBLIGATIONS; IMPLICATIONS OF TECHNOLOGICAL CHANGE 2 (U. S. Government Printing Office, 1968).

The petitioners also challenge the personal attack and political editorial rules on the ground that Congress has not authorized the Commission to promulgate them. They argue that the required explicit Congressional authority, essential in "areas of doubtful constitutionality," Greene v. McElroy, 360 U.S. 474, 507, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), is lacking. And even if it could not be determined that the rules clearly abridge first amendment safeguards, they urge that sufficient constitutional doubt remains to invalidate the rules pursuant to the principle enunciated in Greene v. McElroy.

The Commission has responded to this argument by calling attention to two provisions which it claims authorize the promulgation of the rules in question. First, it points to the "public interest" standard contained in the Communications Act, from which it finds the grant of authority to devise rules requiring fairness in the treatment of public issues, citing National Broadcasting Co. Inc. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943). Second, the Commission maintains that the 1959 amendment of section 315(a) of the Act, clearly and unmistakably conferred upon it authority to refine and implement the Fairness Doctrine which Congress had recognized and approved through the amendment.

Since we have determined that the rules here challenged collide with the free speech and free press guarantees contained in the first amendment, we need not resolve the authorization issue presented in this review.

The Commission's order adopting the personal attack and political editorial rules, as amended, is set aside.

APPENDIX

The full text of the Commission's rules issued on July 10, 1967 follows:

Personal attacks; political editorials.

with a specific problem. For despite the disclaimer, a licensee still faces the possibility of suffering the imposition of severe penalties for noncompliance with the [illegible]; the exercise of his first amendment rights.

50. The sanctions available to the Commission under 47 U.S.C. §§ 312, 503(b) require willful or repeated violations by a licensee. The sanctions available under 47 U.S.C. § 502 require a willful and knowing violation by a licensee.

(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 one 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 be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidate in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U.S.C. 315 (a)); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed.Reg. 10415.

(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 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 subsection 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.

The full-text of the Commission's amendment to the rules issued on August 9, 1967 follows:

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks 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 (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

Note: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed.Reg. 10415.

The full text of the Commission's amendment to the rules issued on March 29, 1968 follows:

(b) The provisisons of paragraph (a) of this section shall not be appli-

cable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign; and (iii) 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) shall be applicable to editorials of the licensee).

Note: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

An Emerging First Amendment Right of Access to the Media?*

JEROME A. BARRON**

[The pervasive social and political changes which have characterized this decade have resulted more than anything else from the newly articulated, although long justified, demands of minority groups for social and legal justice. The dissenters, however, often have turned to unorthodox means to voice their protest—often utilizing passive civil disobedience and even violence. Indeed, the tendency to resort to violent protest appears to be increasing. This tendency no doubt has been stimulated, at least in part, by the failure of traditional notions of first amendment guarantees to provide viable avenues for expression of social protest. The concentration of ownership of the mass media in a relatively few hands, resulting in a form of private censorship, and the changed physical characteristics of our population —changed in its composition, location and habits—have frustrated adequate presentation of the voices of dissent. Modern realities have demonstrated that the goals of the first amendment can be fully achieved only by imposing an affirmative duty on the owners of the media and government to provide access for protest. This article will examine the propriety of such an affirmative duty in the various media, with particular attention to the role which government should assume in promoting access in each area.—Ed.]

* This article is based on a paper prepared for and discussed at the 1968 (June 20-25) American Civil Liberties Union Biennial Conference at the University of Michigan, Ann Arbor, Michigan on "The Affirmative Obligations of Government in the First Amendment Area."

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The Right of Access to Public Facilities and the Press

Government and the Right of Access

Since *Access to the Press—A New First Amendment Right*[1] was published, there have been some encouraging signs that a new approach to the first amendment indeed is emerging. Something of the relationship between a stable and vital political order and adequate access for protest to the significant means of communication is at last being understood. In *Adderley v. Florida*[2] Mr. Justice Douglas gave some expression to this idea when, joined by three other Justices, he dissented from Mr. Justice Black's opinion for the Court that using the jailhouse as a forum for protest was not a constitutionally protected practice. Mr. Justice Douglas viewed the issue as essentially a problem in the search for access for protest:

> Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable . . . .[3]

Particularly in the lower federal courts, the importance of access to a forum increasingly is being emphasized. An illustrative recent case is *Kissinger v. New York City Transit Authority*.[4] The Students for a Democratic Society sought to advertise in New York City subway stations through posters opposing United States participation in the Vietnam War. The New York City Transit Authority and the New York Subways Advertising Co., Inc., which had contractual responsibility for advertisements in the subways, refused to accept the advertisement although the students were willing to pay the regular advertising rate. The advertising company gave two reasons for declining the advertisement: space limitations, and the constitutionally significant reason that the posters were too controversial.[5] The Transit Authority claimed that the advertisements did not come

1. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). The article examined whether governmental means are constitutionally available to restrict the opportunities which the privately owned mass media presently have for private, and presumably constitutional, censorship. The importance of re-thinking the constitutional status of the privately-owned opinion-making machinery, closely concentrated in relatively few hands, should not, however, divert attention from the new law of access which appears to be arising with regard to public facilities as a medium for civil rights protest. It is in this area that the affirmative role of government in the first amendment area is coming to be most visibly evident.
2. 385 U.S. 39 (1966).
3. *Id.* at 50-51.
4. 274 F. Supp. 438 (S.D.N.Y. 1967).
5. In addition the copy submitted is entirely too controversial to be posted on the stations publicly owned by the New York City Transit System. Our policy has always been to refrain from accepting business, the display of which would be objectionable to large segments of our population. *Id.* at 441.

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6. *Id.* at 442 & n.2.
7. *Id.* at 443, *quoting* Cantwe
8. 337 U.S. 1 (1948).
9. 274 F. Supp. at 443 n.4.

within established categories for advertising and also that the posters were provocative and would cause disturbances and vandalism.

The court denied the Authority's motion for summary judgment, holding that the Authority and the advertising company could not accept some posters and refuse others. Judge Bonsal pointed out that posters involving ideological matters had previously been accepted, for example "Radio Free Europe—She can't come to you for the truth" and "Read Muhammed Speaks newspaper."[6] Judge Bonsal quoted statements of the Supreme Court that the guise of "conserving desirable conditions" could not be used to "unduly suppress free communication of views."[7] Quoting from *Terminiello v. Chicago*,[8] he emphasized the Supreme Court's insistence there that "a function of free speech * * * is to invite dispute."[9]

There are some significant aspects to *Kissinger*. For one thing, if the New York Advertising Company is a private company, then it is the first time in American law where a court has suggested that a private organization has a constitutional duty not to deny freedom of expression to those with whom it deals. To be sure, the advertising company is viewed in the decision as a delegate or agent for the Transit Authority, providing the requisite "state action" under the fourteenth amendment; nevertheless, it is significant that the private advertising company as well as the public Transit Authority was a party defendant.

Another aspect of *Kissinger* has significance for the emergent right of access: In these situations is it not really very easy for the controller of the medium in question to free himself from any obligation to satisfy an affirmative conception of the first amendment? Isn't the solution, practically speaking, for the advertising company never to reject advertising as "too controversial" but rather on the more innocent ground that "space will not permit?" Similarly, aren't the first amendment considerations in these cases really equal protection arguments? For example, in *Kissinger* the Black Muslims were allowed to advertise, so why not the Students for a Democratic Society? But suppose the subway were to ban *all* political advertisements? Presumably in such a case there would be neither a first amendment nor an equal protection argument.

A similar problem arises in the context of broadcasting's "fairness" doctrine. The extent of the licensee's affirmative obligations actually is dictated by the licensee's own past performance. If he indulges in personal attack or in one-sided presentations of controversial issues,

6. *Id.* at 442 & n.2.
7. *Id.* at 443, *quoting* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).
8. 337 U.S. 1 (1948).
9. 274 F. Supp. at 443 n.4.

then he has created the measure of his own obligation. The argument often has been made that this approach leads to less rather than more discussion, for if the price of airing controversy is that one must provide still more time for controversy, the common-sense solution is to present as little controversy as possible. Particularly is this the case when the station may have broadcast the reply without payment for the time. In broadcasting this problem theoretically is relieved, however, because broadcast licenses must be renewed every three years. Since the test of renewal is performance in the "public interest," and since even-handed presentation of controversial public issues can be a criterion of operation in the public interest, extended evasion of public issue programming is within the reach of sanctions. Similarly, the significance of *Kissinger* is the court's indication that merely abandoning controversy might not satisfy the subway's constitutional obligation; the court raised without deciding the question of whether public entities such as the Transit Authority have an affirmative obligation to facilitate presentation of controversial public issues.[10]

In another federal case in New York, *Wolin v. Port of New York Authority*,[11] two anti-Vietnam War organizations were denied permission to distribute leaflets in the main concourse and passageways of the Port of New York Authority Terminal Building. The district court held that the organizations were entitled to distribute anti-war leaflets in the terminal so long as they did not substantially or unduly impede traffic.[12] Without speaking of the positive role of government in securing the first amendment goals, the court held that if property is dedicated to public use, it is also dedicated to the exercise by the public of constitutional rights such as freedom of expression. This awareness that public facilities have a role to play in stimulating the communication of ideas in addition to the activity to which the facilities are presumably directed is a most creative one. The court also noted that historically the streets have always played a part in the freedom of expression, with the implication that perhaps quasi-public facilities such as the New York City bus terminal, through which hundreds of thousands of people pass every day, occupy the place the streets may once have enjoyed. This approach recognizes that the scope of permissible uses of governmentally controlled facilities for the expression of opinions must be broadened if the first amendment is to be relevant to the mass transportation realities of urban life. The emergence of a first amendment right of access to public facilities is also encouraging because it rejects the alternative means approach in the context of access to the public forum. In this regard, Judge Mansfield in *Wolin* said quite simply: "Nor does the fact a person might impart his ideas effectively in another place provide any reason for denying a person's right to manifest his views in a spot of his

10. *Id.* at 442.
11. 268 F. Supp. 855 (S.D.N.Y. 1967), *aff'd*, 392 F.2d 83 (2d Cir. 1968).
12. 268 F. Supp. at 862.

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13. *Id.* at 863.
14. 392 F.2d at 88-91.
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On appeal, the Court of Appeals for the Second Circuit held that a bus terminal is an appropriate place for distributing leaflets, carrying placards and in general acquainting passers-by, especially servicemen, with the anti-war views of the protestors.[14] The perplexing question of the necessary degree of intimacy between the forum selected for protest and the object of the protest was squarely before the court. The issue is one which the Supreme Court has yet to amplify clearly, and yet cases like *Wolin* continue to raise it. Judge Kaufman's response to this problem, in his opinion for the court, was that sometimes the forum selected for protest is the object of the protest, and at other times it is selected because that is "where the relevant audience may be found."[15] Apparently the court views an use of the public forum for either purpose as entirely consistent with first amendment objectives.

The Second Circuit's concern that dissent or protest have an audience is an important and novel development in first amendment case law. Certainly it must be recognized that a constitutional breakthrough has occurred when the Second Circuit declares that an anti-war group has "a constitutionally cognizable interest in reaching a broad audience."[16] Creating a constitutionally cognizable right to access certainly is a more sensitive response to first amendment problems that the *laissez-faire* "market place of ideas" concept, which assumed that if the dissenter could speak or write somewhere, society at large somehow would find the message and respond to it. Of course, Judge Kaufman was writing in the context of a public forum rather than a private one, but the concern for access, once it is recognized, surely cannot stop there. Judge Kaufman indicated an awareness of the relationship between a multiplicity of forums and a stable and healthy public order. The momentum of this new awareness must

13. *Id.* at 863.
14. 392 F.2d at 88-91.
15. *Id.* at 90.
16. *Id.* at 94. On the Supreme Court level, the importance of access for ideas as a central, if not the central, factor in first amendment litigation was given expression by Justice Harlan's concurrence in the draft card burning case. United States v. O'Brien, 391 U.S. 367 (1968). The Court had said that a governmental regulation could withstand first amendment attack if the governmental interest served was not directed at suppression of free expression and if the resulting restriction on freedom of expression was no greater than that necessary to secure the governmental objective. Mr. Justice Harlan wrote a special concurrence, however, to make clear his view that this holding did not preclude first amendment defenses where the restraint upon expression has the "effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate." *Id.* at 388-89. This recognition in Mr. Justice Harlan's concurrence of a constitutional right to an audience for unpopular social and political protest is a most significant observation and is entirely consistent with Judge Kaufman's opinion in *Wolin*.

certainly reach all the mass media. The influence of the privately-owned mass media on the information and opinion process is too great for an access-oriented first amendment theory to be halted in its tracks because the monopoly newspaper, for example, is privately rather than publically owned.

This emerging right of access to public facilities is, of course, not yet fully developed. In two recent cases the Supreme Court divided over what kinds of public buildings could be used for social and political protest. The Court held that a library[17] could be so used but that a jail[18] exists for security purposes alone. Mr. Justice Douglas and three other Justices disagreed. For him, apparently, public buildings are less restrictedly available for political protest.[19]

A more recent case which suggests a real recognition of the pivotal nature of access in terms of making the first amendment operational is *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[20] which involved informational picketing in a privately-owned shopping center. A state court enjoined the picketing on the ground that private property could not be used for such a purpose contrary to the wishes of its owners. The United States Supreme Court held that such picketing could not be enjoined; the fact of private ownership was not itself a bar to the exercise of first amendment rights. The Court stressed the quasi-public aspect of the shopping center, relying on *Marsh v. Alabama*,[21] where the Court had held that a company town was sufficiently public in nature that the exercise of first amendment rights could not be abridged, despite the claim of private ownership. The Court conceded that the situation before it was different from *Marsh* in the sense that total denial of access to the community was not present as it had been in *Marsh*. But because the shopping center serves as the community business block, the Court held that the state should not permit its trespass laws to be used against "those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."[22] The Court's theory appears to be the "dedication to a public use" approach found in the public facilities cases in the lower federal courts. What is novel about the approach is that it is being used in the context of what is, after all, private rather than public property.

The Court in *Logan Valley* paid the conventional deference to the alternative means test, *i.e.*, whether there are equivalent opportunities for expression available, and resolved the question in the negative. If the state court order were obeyed, the Court reasoned, the picketers would be confined to the paths adjoining the shopping center. But since the picketers were trying to bring home to the customers of a

17. Brown v. Louisiana, 383 U.S. 113, 142 (1965).
18. Adderley v. Florida, 385 U.S. 39, 41 (1966).
19. *Id.* at 49.
20. 391 U.S. 308 (1968).
21. 326 U.S. 501 (1946).
22. 391 U.S. at 319-20.

particular store in the shopping center that its employees were non-union, the Court apparently considered ease of access to that audience as crucial. The Court pointed out that if the pickets were kept away from the shopping center their placards would be at such great distances from the store that they would be unreadable.

What is truly significant about *Logan Valley* is that it represents a confrontation between modern land use and the first amendment. The Court states its awareness of the historic role that access to public places such as sidewalks, streets and parks has played in the enjoyment of freedom of expresion in the United States. Moreover, we have examined the manner in which the lower federal courts have broadened the kinds of public facilities where such access must be permitted. What *Logan Valley* does is to forge a similar extension at the Supreme Court level as a result of the Court's awareness of changes in residential patterns. Just as in *Wolin* and *Kissinger* the courts were anxious to point out that access to the bus terminal and the subway may be as important as access to the public street, in *Logan Valley* the Court attempts to point out the significance which the shopping center has acquired in American life. The Court reasoned that in the automobile-centered suburb, the shopping center is a focal point for the community, so that access to its parking lot may be indispensable to secure access to that community. The Court qualified the sweep of this observation, however, by remarking that the store being picketed was located in the shopping center at issue and that the message in controversy was related to the operations of that particular store. The Court said it was not necessary to decide whether the shopping center's property rights could, under the first amendment, prevent picketing unrelated to the uses of the shopping center. But the implication seems clear that even unrelated picketing would be viewed sympathetically by the *Logan Valley* majority when conducted in a shopping center which is the only quasi-public facility in a community.

Particularly intriguing, and signifying a major step in the development of an access-oriented approach to the first amendment, is the Court's comparative indifference to whether the facilities in question are publically or privately owned. Mr. Justice Marshall's somewhat deprecatory remark on this point was that "Naked title is essentially all that is at issue."[23] The rise of a first amendment perspective indifferent to whether the source of restraint on freedom of expression is public or private is of course what rouses Mr. Justice Black to dissent. In retrospect, his dissent is rather ironic, in that the majority in *Logan Valley* relied so heavily on *Marsh*, an opinion written by Mr.

23. *Id.* at 324.

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Justice Black. For him, however, *Marsh* is really a sport among the cases for it is that rare case where all the attributes of a town are in private hands. It appears that so long as anything less than a total deprivation of first amendment rights is involved, Mr. Justice Black would not make any new inroads on property rights. But whatever the misgivings of Mr. Justice Black and the other dissenters on the point, the majority of the Court now appears ready to expand the opportunities for access to a wider class of forums than ever before. The test of such access, however, apparently is not going to proceed on any simplistic private-public dichotomy but rather on the following inquiry: how crucial to the communication at issue is access to the forum in question?

A vital question is whether or not the protest must be somewhat related to the function of the public facility which is being used. In *Wolin* the fact that the bus terminal was primarily designed for large crowds was, in the court's view, just what made it an appropriate place for communicating political views.[24] Apparently the court held that wherever there are public facilities through which large numbers of people can be easily reached, there is a right of access to those facilities by groups interested in using them for purposes of political expression. This is not true, of course, where the expression might injure the primary purpose for which the facility exists. This approach may well become, if in view of *Logan Valley* it is not already, the constitutional law of access to public facilities for purposes of political and social protest.

The implications of these developments are quite significant. If public use of government facilities imposes on government a duty to permit use of the facilities for the communication of ideas, the significance of this development for privately-run facilities is fairly clear. If such facilities, even though privately sponsored, are also "dedicated to a public use," then presumably the same affirmative obligations are placed on those facilities. The blurring of what is "private" and what is "public," which has come to characterize so much of our life, eventually may create an access-oriented approach to first amendment values which will endow any natural or obvious forum in our society with responsibilities for stimulating the communication of ideas. To be sure, the new concern with the public forum is a form of judicial response to the constitutionally sanctioned irresponsibility of the privately controlled mass communication system. To the extent that responsibilities are placed on the latter, and to the extent that they are voluntarily assumed, the pressure on the public facility to serve as an arena for protest in default may be lessened, but it should not be relieved entirely. An access-oriented approach to the first amendment implies affirmative obligation on government as well as the private sector and its concerns.

24. 392 F.2d at 90.

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25. 378 U.S. 184, 1
26. Lockhart & Mc
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The Pragmatics of a Right of Access to the Press

Government as well as the private sector must begin to assume the burden of stimulating the communication of ideas just as it has done with the most obvious sources of the communications of ideas—radio, television and the press. The affirmative obligation of the press and of government facilities to be sensitive to their responsibility to adequately present the contemporary life of ideas is, outside the electronic media, best secured for the moment through the courts. The courts need not be powerless to prevent public facilities and the press from taking refuge in an anemic approach to affirmative duty by dodging attacks in order to avoid the duty to provide expression for counterattack. Entry to the press, like entry to circulate leaflets in a bus terminal, can be judicially evaluated in terms of the public use and public need. It is, after all, no more complex a judicial task than is presently involved in analyzing the puzzles of apportionment, school desegregation and obscenity. However, more extended oversight—oversight in forums other than the judiciary at least for the foreseeable future—should be given the most cautious study. Licensing of the press has the least honorable history of any enduring constitutional problem in the history of Anglo-American law. The structure of broadcasting, the weaker legal claims to a property right, the mesmerizing capacity of the electronic media themselves, make its regulatory pattern tolerable, even desirable, but not necessarily transplantable to the press.

That an emerging right of access can, at least to begin with, best be handled in the courts is supported by analogues in other sensitive constitutional areas. For example, in *Jacobellis v. Ohio*[25] the Supreme Court squarely held that the question of what is "obscenity" is a constitutional question to be decided by judges rather than government administrators or juries. Relying on Lockhart and McClure's observation that judges have no special qualities which entitle them to choose which "movies are good or bad for local communities," the Court nevertheless supported the following conclusion about judges:

> But they [the judges] do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.[26]

25. 378 U.S. 184, 188 (1964).
26. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 119 (1960).

In holding in *Jacobellis* that obscenity is a question of constitutional law of the highest order, the Court really accepted the views on this point which had been argued by Mr. Justice Harlan in *Roth v. United States*:[27]

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards.[28]

If the suppression of a communication on grounds of obscenity is a question of such constitutional significance that it insists on judicial treatment, then certainly the issue of whether a particular group ought to be permitted an opportunity for expression—for participation in the life of ideas—is also a question solvable by judges. It is by the judicial process that we shall establish the contours for answers to questions which a working right of access obviously presents. What is a minority point of view? When and where shall such opinions be heard? Has some significant space already been given to the particular controversy? Must every issue of the publication contain a reference to a particular controversy? Isn't it possible to reach saturation of a given subject? When is the decision not to publish on a particular issue a "news" decision and when is it a decision based upon an effort to obstruct the opinion process? Surely resolving these problems is no less baffling than deciding when a book is "without redeeming social importance" or when it is marketed against a "background of commercial exploitation." But which judicial task accomodates itself more easily to the basic theory of the first amendment? A task which winnows out that which is to be suppressed, or a task whose point of inquiry is whether the communications media have been in default and whether a particular point of view has been suppressed?

The procedure recommended here is already asserting itself in the decisions. In *Wolin* and *Kissinger*, the courts engaged in an inquiry into the reason for suppression and the need for access which should be far more widely undertaken. That such a procedure will not render the work of the communications industry unduly miserable is demonstrated by another recent case, *Avins v. Rutgers University*.[29] Plaintiff sued Rutgers University for declaratory and injunctive relief, alleging that the Rutgers University Law Review had refused to publish an article he had written in which he argued for an emphasis upon the primacy of the legislative history of the fourteenth amendment in interpreting that amendment. He complained that the liberal ideology of the law review staff was hostile to such an approach and that they rejected his article for that reason. Plaintiff used essentially the argument that a state university law review is a public instru-

27. 354 U.S. 476 (1957).
28. *Id.* at 497.
29. 385 F.2d 151 (3d Cir. 1967).

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mentality, in the columns of which all must be allowed to present their ideas. In declining relief the court pointed out that the author himself had said that he had been published in other reviews and would eventually be able to publish the article involved here.[30] What the court's ruling in essence amounts to is that editorial discretion is not threatened by a public instrumentality concept for ideas. Moreover, the court apparently concluded that the case was not a true access problem since the author had himself acknowledged the inevitability of publication.

The inquiry concerning when there is need to require publication may turn upon whether a restraint on expression actually is present. In *Avins*, as in *Ginzburg v. United States*,[31] an important issue was motivation. In *Ginzburg* the question was whether "pandering" was the motivation for the offending publication. Similarly, in an access situation an important question is whether ideological considerations were the dominant reason for refusal to publish. The court's response to that question in *Avins* is illustrative:

> The plaintiff's contention that the student editors of the Rutgers Law Review have been so indoctrinated in a liberal ideology by the faculty of the law school as to be unable to evaluate his article objectively is so frivolous as to require no discussion.[32]

But even a showing of an ideological reason for refusal to publish is, of course, not sufficient; it must be coupled with a showing of need for access. Since the law review audience is a national one, unlike, for example, that of a monopoly newspaper in a single city, the showing of a need for access in such a context ought to be far more demanding.

It might be concluded from the foregoing that if this is all that is advocated, then it is not, in terms of immediate consequences, such a large step. And that is true. The larger step would be a utilization of an over-all approach to first amendment problems regardless of the immediate beneficial results. Yet, beneficial results from a constitutionally-based doctrine of press responsibility will be created by voluntary utilization of right to access principles as well as by the purely legal advantage of being able on occasion to demand access to the printed media. Managers of publicly sponsored facilities are now able to tell offended superiors what newspaper editors would then be able to tell offended advertisers—that they have no choice and that they must take the offending advertisement. Indeed, the pangs of conscience about the present status of the newspaper as a "privileged industry" are already exhibited in the best section of the American press. After *Access to the Press—A New First Amendment Right*[33]

30. *Id.* at 153.
31. 383 U.S. 463 (1966).
32. 385 F.2d at 154.
33. Barron, *supra* note 1.

was first published, the *St. Louis Post-Dispatch* commented on it in the following editorial:

> The newspaper (which is in no way licensed by the Government as a broadcasting station) has an obligation to the community in which it is published to present fairly unpopular as well as popular sides of a question. *Enforcing such a dictum by law is constitutionally impossible, and should be.* As a practical matter, a newspaper which consistently refuses to give expression to viewpoints with which it differs is not likely to succeed, and doesn't deserve to.[34]

Whether it is true, as the *Post-Dispatch* suggests, that the wicked do not prosper, it has been the effort of this article to not take the chance that they might and to show that a right of access is both constitutionally possible and practicably workable.

The Right of Access to the Electronic Media

A Right of Access and Broadcast Regulation

With regard to the printed media, the emphasis was on utilization of the judicial process to resolve the problem of access along the well-traveled paths established by other first amendment problems such as obscenity and libel. Concerning the electronic media, positive direction to first amendment theory can best be achieved by emphasizing the desirability of approaching the existing structure of broadcast regulation with a realistic rather than romantic view of first amendment purposes. The relationship of the "fairness" and "equal time" concepts to the first amendment objective of the widest possible dissemination of controversial ideas has been insufficiently appreciated. The merit of programming standards should not depend upon whether radio is no longer a limited access medium or whether television still is.[35] Diversity of ideas, not multiplicity of forums, is the primary objective of the first amendment. To be sure, it is hoped that a greater number of forums will create a more diverse opinion process. A flick of the radio dial should be sufficient to dispel that illusion, however. Since the sameness of programming has come to be the dominant characteristic of American radio, the mere abundance of radio stations should not be sufficient for first amendment compliance. An abundance of radio stations no more guarantees diversity of opinion than the scarcity of television stations assures one-sidedness.

A positive approach to free expression in broadcasting requires less new legal architecture than is the case with the printed media. Some affirmative obligations already exist—for example, the "equal time rule" and the "fairness" doctrine, both found in section 315 of the Federal Communications Act.[36] To be sure, since their inception these

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34. St. Louis Post-Dispatch, Aug. 24, 1967, at 2E, cols. 2-3 (emphasis added).
35. *See* ACLU Staff Paper, Affirmative Obligation of Government to Implement the Exercise of the First Amendment 10.
36. 47 U.S.C. § 315 (1964).

efforts to assure debate have been unceasingly attacked by the industry and their allies in the press who realize that their own lack of legally imposed responsibility to the communications process stands in direct contrast to the situation in broadcasting. What is needed is not more legislation, but a wider appreciation of the relationship of the section 315 responsibilities to basic first amendment goals. If meaningful interchange of ideas is to be anything but an oratorical term, the constitutional underpinning—the decisiveness of opportunity of access to the public—must be stressed in order to obtain wider industry understanding and cooperation. As it is, the communications industry, by creating in the public's mind an identity between itself and the first amendment, has achieved the public relations triumph of the twentieth century over the eighteenth.

Some background on the development of the "fairness" doctrine is useful in order to understand the controversy which has arisen concerning it and broadcast regulations generally. The language of section 315 defines the basic outline of the doctrine: Broadcast licensees are required "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[37] It is instructive to note that the language of the statute itself goes a long way toward the goal of imposing an affirmative duty of access for controversial issues. Of course, it has not been so broadly interpreted. Rather, it has been viewed by the FCC as merely giving statutory force to the "fairness" doctrine. The FCC administratively promulgated the doctrine in 1949, and it imposed upon station licensees an affirmative obligation to provide an opportunity for counter-attack on controversial public issues—assuming, of course, that one side of the controversy has already been presented by the station licensee.

It would seem, however, that a statutory duty "to afford reasonable opportunity for the discussion of conflicting views" is a command to do more than merely provide an opportunity for response once the station has decided to give time to a particular issue. If the statute were administered to require licensees to provide access for significant public issues, one of the most important means for evasion of the "fairness" principle would be weakened. At the present time, dislike of a particular side of an issue or unwillingness to be required to give free time for reply are frequently sufficient reason for a licensee to decide to avoid a particular issue altogether. An access approach to the language of section 315 would make the road to evasion of the fairness doctrine a little steeper. If section 315 were read as a command requiring access for controversial public issues as well as a

37. *Id.* § 315(a).

restatement of the "fairness" principle, then we would have a structure to stimulate access to ideas in broadcasting similar to that advocated above for the press.

In broadcasting, however, access would necessarily have more teeth. The fact that station licenses must be renewed every three years means, at least in theory, that the extent of a licensee's performance in the public interest is evaluated by the FCC when it decides whether to renew the license for another term. If persistent evasion of the principles of access and fairness has been a routine feature of a licensee's programming, then there is no reason why another applicant should not be licensed in its stead. But the remedy need not be that drastic. Informal agency rulings, cease and desist orders, and renewals for one year terms rather that the normal three year term are all milder ways of dealing with the problem of enforcement.

What this illustrates is that the existing structure of broadcast regulation permits an understanding of the problem of access which can be inclusive enough to reach failure to recognize or seek out dominant public issues. These issues, of intense concern to the vitality and stability of the public order, are given minimal attention in broadcasting as a routine matter. The area of race relations is a prime example of an issue where access is not so much denied as underplayed.

The portrayal of the races on the mass media effectively illustrates the defects of an approach to freedom of expression which is entirely concerned with protecting expression only after it has satisfied admission criteria formulated by managers of the mass media with no analysis of how these criteria work. A solution to the problem of access in terms of black-white relationships is more subtle and intractable than merely structuring the law so that if a Negro group seeks a reply to an anti-Negro or anti-civil rights editorial, or wishes space for a political advertisement, the mass media will have an obligation to take it. Moreover, the underrepresentation of the Negro as a normal citizen on television and in the daily press is more than an access problem. The mass media not unsurprisingly reflect the society which they mirror. It is no accident that one of the most distinguished Negro novels is called the *Invisible Man*. That certainly is the image of the Negro in mass communications. Until recently, the Negro simply did not exist in the world of television advertising, and he is only barely present now. Political and constitutional theorists have speculated over definitions of speech—speech which is protected and speech which is unprotected—but every communication, whatever its primary purpose, also doubles as an idea. Professor Charles Black has explained that commercial advertising itself, with its insistence on acquisitiveness, is an idea from which he at least would like to shield his children.[38] Similarly, the white world of television

38. Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960, 969 n.18 (1953), in THE OCCASIONS OF JUSTICE 125 n.18 (1963).

advertising reflects the idea that normality is white—the reality of twenty million Negroes simply is not visible in mass communications as a matter of routine presentation. It is, of course, true that the Negro is presented, but most often he is presented as a social irritant and disturber of the peace.

How can a more representative presentation of the Negro be secured? Presumably as a response to the death of Martin Luther King and also to deal with the problem of understating or ignoring the Negro in broadcasting, a questionnaire recently was circulated by FCC Commissioners Kenneth Cox and Nicholas Johnson. This action is extremely instructive in terms of illustrating what can be done under existing authority. The inquiry was directed to broadcasters in a single state, Oklahoma, and asked how many members of minority groups the broadcasters employed in their stations and how much programming they devoted to problems of the Negro community and to problems of race relations generally.[39] Such inquiries have more potential, at least in the long run, than elaborate procedures for governing television or radio during riots. Certainly the dilemma of the electronic media in a time of violence is how to inform the public without inflaming it.[40] But, as noted in the Kerner Commission chapter on mass media, the failure of the mass media is not in riot reporting but in the day-to-day portrayal or nonportrayal of Negro life:

> [T]he communications media, ironically, have failed to communicate. They have not communicated to the majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of living in the ghetto. They have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of—and thus, have not communicated—a sense of Negro culture, thought, or history.
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> The absence of Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in the newspapers or sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American. By failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country.[41]

Commissioners Cox and Johnson have been attacked within the broadcasting industry merely for inquiring into the number of Negro personnel employed by broadcasters and the amount of race-con-

39. *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).
40. Laurent, *Riots Demand Responsible Coverage*, Wash. Post, Apr. 8, 1968, at B-8, col. 1.
41. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 383 (Bantam ed. 1968).

nected programming performed by them in a single state. The industry's attack is based on allegations of restraint upon freedom of expression.[42] But would a requirement that the conventional means of communication give some coverage to the nation's largest racial minority as a part of their day-to-day programming thwart the industry's effort to secure freedom of expression? Of course, the first amendment shields the communications industry and all others from government censorship. But is this in any way inconsistent with requiring the industry as a matter of its internal practice to make some attempt to represent the major social components in our national life, particularly when dialogue between the races is so urgently needed?

The "Fairness" Doctrine and the First Amendment: The Significance of the Constitutional Question

What I have called the public relations triumph, the exploitation of a romantic theory of the first amendment for completely commercial and non-ideological ends, is presently being utilized in a renewed attack on the "fairness" doctrine—particularly the so-called "personal attack" provision.[43] In July 1967 the FCC adopted a provision which requires that when licensees attack the "honesty, character, integrity or like personal qualities" of a person or group, the licensee must furnish a tape or script to whomever is attacked and offer him—free of charge in most cases—air time for reply. The Commission defended its rule on the ground that it embodied the first amendment goal stated in *New York Times v. Sullivan* that "debate on public issues should be uninhibited, robust, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[44]

Recently, in the context of the libel field, the Supreme Court in an 8-1 decision has emphasized the wide ranging scope afforded to newspapers to make "unpleasantly sharp attacks."[45] But the Court has yet to focus on the most important aspect of the constitutional principle enunciated in *New York Times v. Sullivan*—that the underlying goal is debate. Affording newspapers relative immunity from libel actions without imposing some obligation that they provide space for reply is not constitutionally encouraged debate but judicially supported monologue or, worse, harangue. The application of the "fairness" principle to the "personal attack" situation in broadcasting is a well considered response to the first amendment goals stated by the Supreme Court and stands in sharp contrast to judicial silence on the affirmative obligation of newspapers to allow their quarry some

42. *See* Laurent, *Censorship or Responsibility at FCC?*, Wash. Post, Apr. 19, 1968, at C-9, col. 5.
43. For a discussion of this attack on the "fairness" doctrine, see Green, *The Troubled Air: Which Way Fairness?*, Wall Street Journal, Apr. 23, 1968, at 18, col. 3.
44. 376 U.S. 254, 270 (1964).
45. St. Amant v. Thompson, 390 U.S. 727 (1968).

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measure of response.

The FCC's performance in the "fairness" area has always been fairly uneven. One reason is that the broadcasting industry has exhibited a tendency to overreact to the "fairness" principles. Moreover, until quite recently the constitutional position of the "fairness" doctrine really had not received direct judicial consideration. Recently, however, the Court of Appeals for the District of Columbia, in *Red Lion Broadcasting Co. v. FCC*,[46] squarely upheld the constitutionality of the "fairness" doctrine as entirely consistent with the first amendment.

The Supreme Court accepted review in *Red Lion* but deferred decision until resolution of a similar case in the Seventh Circuit that has just recently been decided.[47] In considering the personal attack and political editorial rules issued by the FCC subsequent to *Red Lion*, which presented issues similar to those in *Red Lion*, the Seventh Circuit disagreed with the District of Columbia Circuit. Although it did not consider the constitutionality of the "fairness" doctrine, the court held that "In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment."[48]

The facts of *Red Lion* are illustrative both of the operation of the "personal attack" aspect of the "fairness" doctrine and of the manner in which the "fairness" doctrine implements debate instead of retarding the objectives of free expression. In November 1964 a Pennsylvania broadcaster carried a program by the Rev. Billy James Hargis, who attacked a book by Fred Cook which had been critical of Barry Goldwater, the Republican candidate for President. Cook requested an opportunity to reply to Hargis, but the radio station said that the "personal attack" aspect of the "fairness" doctrine required it to supply free time for reply only if no paid sponsorship could be found. The station wished Cook to affirm that he could not obtain such sponsorship. Cook complained to the FCC, which replied essentially that the station had the duty to make reply time available, paid or not. The FCC stated that it was not necessary for Cook to show that he could neither afford nor find sponsored time before the station's duty to provide reply time went into effect. The Commission reasoned that the public interest required that the public be given an opportunity to learn the other side and that this duty stood even if

46. 381 F.2d 908 (D.C. Cir. 1967).
47. Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968).
48. *Id.* at 1020.

the expense of the reply time had to be sustained by the station. A formal order to that effect was entered and the station appealed to the United States court of appeals.

Judge Tamm for the court of appeals pointed out that federal courts have continuously held that regulatory action by the FCC does not violate the first amendment because broadcasting is a limited access medium.[49] He reasoned that fairness does not restrict "free speech" but implements it:

> After having independently selected the controversial issue and having selected the spokesman for the presentation of the issue in accord with their unrestricted programming, the Doctrine, rather than limiting the petitioners' right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast.[50]

Judge Tamm approved the FCC's use of the limited access idea to justify fairness by holding that the purpose of the Federal Communications Act is to permit the Government to license frequencies without interfering with free speech—licensing which is, after all, supposed to be in the public interest. However, the irony of allowing such licensees to "themselves make radio unavailable as a medium of free speech"[51] was at last pointed out by a court. Hopefully, this kind of analysis will be extended as a matter of constitutional doctrine to all components of the communications industry. The economic interdependence of the media and the fact that the one or two newspapers which presently exist in our large cities usually also own one of the important radio and television stations in the community give the media enormous power for private censorship. What is necessary is not to point to the lack of a "fairness" principle with regard to the legal responsibilities of newspapers but rather to point to the "fairness" principle as a standard which should have some analogue in the press as well.

Another useful perspective on this problem arises from Judge Tamm's refusal to hold that the "fairness" principle infringes upon the political rights of the people, justifying the Commission's rule that when a licensee has chosen to sponsor a program which presents one side of an issue and has been unable to obtain "paid sponsorship for the appropriate presentations of the contrasting 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."[52] Again, for government to require some observance to the informing function of the first amendment seems entirely in order. The broadcasters contended that the "fairness" doctrine operated as a prior restraint, *i.e.*, that they were forced to become the "first censors" of all public interest broadcasting because if a licensee might have to broadcast

49. 381 F.2d at 923.
50. *Id.* at 924.
51. *Id.*, *quoting In re* Editorializing by Broadcast Licencees, 13 F.C.C. 1246, 1248 (1949).
52. *Id.* at 926, *quoting* Cullman Broadcasting Co., 25 P & F Radio Reg. 895, 897 (FCC 1963).

an opposing view, indeed give free time to it, it might not broadcast the particular matter at all.[53] Judge Tamm rejected this argument:

> I do not find in the operation of the Fairness Doctrine any restriction upon the rights of the people to engage in political activities . . . . Broadcasters alone determine the programs they will carry, the format to be followed, and the personnel to be utilized in these broadcasts.[54]

Moreover, he pointed out that no broadcast material is required to be first submitted to the FCC, and that the licensees' latitude "in the selection of program material, program substance, and identity of program personnel is bounded only by their own determination of the

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53. In *Radio Television News Directors Ass'n* the Seventh Circuit found a similar argument to be convincing.

> [T]he Commission's rules are too vague because they lack standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. When a licensee considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing.

400 F.2d at 1016.

In Banzhaf v. FCC, No. 21,285 (D.C. Cir. Nov. 21, 1968), the Court of Appeals for the District of Columbia distinguished *Radio Television News Directors Ass'n* and at the same time suggested that access to broadcasting could be required as a first amendment matter even apart from the "fairness" doctrine The *Banzhaf* court affirmed an FCC ruling requiring radio and television stations which carry cigarette advertising to "devote a significant amount of broadcast time to presenting the case against cigarette smoking." Slip opinion at 4. The court attempted to distinguish *Radio Television News Directors Ass'n* by saying that if the "fairness" doctrine is ultimately held to be unconstitutional it would be because its attempt to assure balanced presentation of controversial issues may result in no presentation of such issues at all. In the cigarette advertising situation, on the other hand, the court said the first amendment interest is furthered by the Commission's ruling:

> But where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.

Slip opinion at 36-37.

Even that most venerable constitutional cliché, the marketplace of ideas concept of the first amendment, received a candid reappraisal from Judge Bazelon in his opinion for the court in *Banzhaf*:

> A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance. That policy has been pursued by a general hostility toward any deterrents to free expression. The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often.

Slip opinion at 36 (footnote omitted). This and similar statements in the court's opinion reflect a newly emerging and more realistic awareness of the positive dimension of the first amendment than has characterized the law in this area in the past. Finally, it should be noted that if the access-oriented approach to § 315, urged in this article, is adopted, the criticism of the courts in both *Radio News* and *Banzhaf* that the "fairness" doctrine might muzzle rather than stimulate debate would be met.

54. 381 F.2d at 926.

public interest of their end product."[55] To the spectre the industry is fond of raising that the FCC's disapproval of a licensee's responsiveness to the "fairness" doctrine may result in loss of the license at renewal time, Judge Tamm observed that the Commission had made it clear that no sanction would be invoked "against any broadcaster for an honest mistake in judgment."[56]

Judge Tamm has taken what may be called a "problem-solving" approach to constitutional law and the first amendment; he has given some consideration to making the first amendment work, to analyzing its practice as well as stating its theory. He concluded:

> there is no abrogation of the petitioners' free speech right. On the contrary, I find that the conduct of the petitioners absent the remedial procedures afforded the complainant Cook would, in fact, constitute a serious abridgment of his free speech rights. I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by the use of modern technology the "free and general discussion of public matters [which] seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[57]

The *Red Lion* determination that the duty of the broadcaster to furnish an unpaid reply to a personal attack was not violative of the first amendment is an important step in the evolution of a constitutional theory that will be sensitive to the unanticipated power which the marriage of technology and capital has placed in the relatively few hands which dominate mass communications. *Red Lion* suggests the method by which to build a constitutionally rooted opinion-making structure. If the Supreme Court affirms *Red Lion*, it will augur well for the beginnings of a first amendment theory which will have contemporary relevance. Otherwise the prospects for constructing a public forum model, within the context of privately owned mass media, will be quite dim. And so, ironically, will be the entire future of private broadcasting. Oddly enough, the ultimate role of public television is to a considerable extent contingent upon whether private broadcasting legally can be required to assume some measure of public and social responsibility. Perhaps when *Red Lion* is finally reviewed by the Supreme Court the centrality of the concept of access to the problem of protecting freedom of expression will be considered. The presentation of such an issue could not help but expose the incomplete nature of the present law in the area where the law of libel and the first amendment intersect. Hopefully, the Court will reflect on the new reading of section 315 suggested earlier insofar as it reveals the necessity to promote access for ideas as well as protection of ideas once they have been admitted to the forum.

In conclusion, *Red Lion* is a critical case in many ways. The importance the broadcasting industry attaches to the case is illustrated by the substantial briefs amici curiae filed by the major networks in

55. *Id.*
56. *Id.* at 929.
57. *Id.* at 929-30, *quoting* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

support of the station and against the "fairness" doctrine. The case may settle the future of program regulation generally, not merely for public issue programming. At the least, it raises the question of whether the first amendment should receive a different interpretation when the new mass media, radio and television, rather than the press, is involved. Another and broader approach would be to review the impact of the new technology on all the media when viewed against a background of economic combinations continuously concentrating the ownership of the media. Such a review by the Supreme Court might result in an urgently needed inquiry into whether traditional first amendment theory should be rethought so that it can meet the challenge posed by the alliance of modern capital and technology.

The previous defense of "fairness" is undertaken without being unmindful of the problems in the enforcement of the "fairness" doctrine. Of course these problems exist, but seen from a constitutional perspective, many of these difficulties are soluble. Recently a group attacked the free use of broadcast time to advertise the Peace Corps. Should this and similar problems be solved by hunting about for some group opposed to the purposes of the Peace Corps and giving that group free time? Or is it wiser to keep government out of the business of propoganda? For broadcasting to identify with and echo governmentally-sponsored positions would be most unfortunate. This is particularly so since the executive branch often holds a single view on a variety of controversial issues and is in a strong position to exert pressure both on the FCC and on the licensed station holders.

The experience of the mass media in totalitarian countries, as well as the experience of French television in a presumably democratic country, illustrates the dangers to free discussion of controversial issues inherent in a close connection between the media and government. An illustration of this danger is provided by a recent case in which a student newspaper editor at a state university refused to follow a college rule that the paper could print praise of the state government but not criticism. The college expelled the editor. A federal court reinstated him,[58] and the case is now on appeal. There is an important and fundamental difference—a difference which must be stressed—between a positive role for the first amendment which is achieved through a governmentally-sponsored *process* for stimulating the interchange of ideas and a positive role for the first amendment in which the government contributes substantively to the information process in any institutionalized way. If the new experiment in public television[59] can be sufficiently separated from direct political

58. Dickey v. Board of Educ., 273 F. Supp. 613 (M.D. Ala. 1967).
59. *See* Public Broadcasting Act of 1967, 47 U.S.C. §§ 390-99 (Supp. III, 1965-67).

pressures so that it is a governmentally-sponsored structure for infusing a new and non-commercial approach to programming, it will be successful. But at all costs broadcasting, whether private or public, must be prevented from becoming a mere conduit for the views espoused by the particular political administration in power.

"Equal Time" and the McCarthy Case: A Problem of Access

Reference to another recent case illustrates both the limitations of the present approach to the affirmative obligations of broadcasting and at the same time indicates that the constitutional dimension of the problem is at last being dimly perceived. The case, *McCarthy v. FCC*,[60] involves the request of Senator Eugene McCarthy for "equal time" to answer the hour-long interview of President Johnson carried by the three major television networks on December 19, 1967. Senator McCarthy contended that President Johnson was a "legally qualified candidate" within the meaning of section 315 of the Communications Act. The FCC denied the Senator's request on the ground that section 315 only applies to legally qualified persons who, among other things, had previously announced their candidacies, and that Lyndon Johnson had not announced his candidacy. As it turned out, the FCC was a reasonably good prophet, but at the time it did not seem so. Moreover, the FCC refused even to give Senator McCarthy a chance to show that President Johnson was acting as a candidate in fact. But suppose an incumbent President did not announce his candidacy until his party's national convention? Would section 315 be unavailable to provide "equal time" for announced candidates in the President's party to answer the incumbent President's "non-political" speeches? What of the opposition candidates? Is it not difficult to think of a more efficient way to maximize the already significant institutional aura of an incumbent President and to further minimize the chances for unseating him?

The court of appeals did give a little encouragement to those who think that political change can be achieved through conventional means of communications, however. The court indicated that the question of the right to "equal time" is a sensitive problem which requires more than a simple-minded inquiry into whether the previous speaker is an "announced" candidate. The court therefore suggested that the approach to the problem could not be mechanical. Moreover, the court provided some guide to a definition: "program content, and perhaps other criteria, may provide a guide to reality where a public figure allowed television or radio time has not announced for public office."[61]

But the court nevertheless declared, in an understatement which is perhaps a disservice to the gravity of the problem, that "no rule in this sensitive area can be applied mechanically without, in some in-

60. 390 F.2d 471 (D.C. Cir. 1968).
61. *Id.* at 474.

stances at least, resulting in unfairness and possible constitutional implications."[62] This use of governmentally licensed facilities to aid an incumbent President suggests a kind of media-government alliance or implicit endorsement which seems contrary to the basic purposes of the first amendment. If the central meaning of the first amendment is to allow criticism of government, as some have said, then unimpeded praise of the government would itself seem to present a first amendment violation. But the constitutional dimension of the problem of access to the major communications media is just beginning to be understood.

Conclusion

It would be misleading to ask what the affirmative role of government should be in implementation of first amendment goals if that suggests that the halo which private managers of the media have long assumed is now, somewhat threadbare, to be placed intact on government. What must be emphasized is the positive dimension of the first amendment: The first amendment must be read to require opportunity for expression as well as protection for expression once secured. Provision of opportunity for expression is, under an affirmative approach to the first amendment, the responsibility of both governmentally-controlled as well as privately-controlled means of communication. No illusions are entertained about government power as compared with private power. The need is to build counterbalances into each sector to stimulate them to develop a responsiveness to the longing for an information process which is truly participatory. Moreover, any dichotomy which suggests that government is the ally or that private power is the enemy, or vice versa, of contemporary civil liberties is overly simplistic, particularly when the determination of what is public and what is private becomes an increasingly difficult task.

In the area of communications we are on the verge of a more comprehensive and sensitive idea of what freedom of expression should mean in a technological age. The rise of an affirmative approach in broadcasting indicates that the eighteenth century associations which still insulate the press are not present in broadcasting, making possible a more realistic appraisal of the electronic media. But there is a need for such an appraisal of other forums as well—forums such as the press and public facilities, whose capacities for censorship have received little attention until recently. Similarly, attempts to identify procedures created to assure debate with the suppression of ideas must be understood for what they are: the unreflecting use of hallowed symbols for purposes which are antithetical to debate and discussion.

62. *Id.*

.106 reads as follows: "No license shall be network organization, or to any person directly controlled by or under common control with any network organization, for more than one standard station where one of the stations covers the service area of the other station, or for a second broadcast station in any locality where the number of standard broadcast stations are so few or of such unsatisfactory character (in terms of coverage, power, frequency or other related matters) that competition would be unduly restrained by such licensing."

3.107—Dual network operation. This regulation provides that: "No license shall be issued to a broadcast station affiliated with a network organization which maintains more than one network: Provided, that this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the broadcasting stations comprising each such network." In its Report of October 11, 1941, the Commission announced the indefinite suspension of this regulation. There is no occasion here to consider the validity of 3.107, since there is no immediate threat of its enforcement by the Commission.

3.108—Control by networks of station rates. The Commission found that NBC's affiliation contracts contained a provision empowering the network to reduce the station's network rate, and thereby to reduce the compensation received by the station, if the station set a lower rate for network national advertising than the rate specified in the contract for the network programs. In the absence of such a provision the station could not sell time to a national advertiser for less than it would cost the advertiser to purchase the time from NBC. In the words of the Commission, "This means simply that a national advertiser could pay the same price for the station

whether he buys it through one source or another source. It means that we do not believe that our stations should go into competition with ourselves." (Report, p. 73.)

The Commission concluded that "it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers." (Report, p. 75.) Accordingly, the Commission adopted Regulation 3.108, which provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the Commission to exercise the

power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

Federal regulation of radio [3] begins with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, which forbade any steamer carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator. The enforcement of this legislation was entrusted to the Secretary of Commerce and Labor, who was in charge of the administration of the marine navigation laws. But it was not until 1912, when the United States ratified the first international radio treaty, 37 Stat. 1565, that the need for general regulation of radio communication became urgent. In order to fulfill our obligations under the treaty, Congress enacted the Radio Act of August 13, 1912, 37 Stat. 302. This statute forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor; it also allocated certain frequencies for the use of the Government, and imposed restrictions upon the character of wave emissions, the transmission of distress signals, and the like.

The enforcement of the Radio Act of 1912 presented no serious problems prior to the World War. Questions of interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations

[3] The history of federal regulation of radio communication is summarized in Herring and Gross, Telecommunications (1936) 239–86; Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Part 3, dealing with the Federal Communications Commission, pp. 82–84; 1 Socolow, Law of Radio Broadcasting (1939) 38–61; Donovan, Origin and Development of Radio Law (1930).

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were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The Act of 1912 had not set aside any particular frequencies for the use of private broadcast stations; consequently, the Secretary of Commerce selected two frequencies, 750 and 833 kilocycles, and licensed all stations to operate upon one or the other of these channels. The number of stations increased so rapidly, however, and the situation became so chaotic, that the Secretary, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and 1924, established a policy of assigning specified frequencies to particular stations. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service. The frequencies ranging from 550 to 1500 kilocycles (96 channels in all, since the channels were separated from each other by 10 kilocycles) were assigned to the standard broadcast stations. But the problems created by the enormously rapid development of radio were far from solved. The increase in the number of channels was not enough to take care of the constantly growing number of stations. Since there were more stations than available frequencies, the Secretary of Commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. The number of stations multiplied so rapidly, however, that by November, 1925, there were almost 600 stations in the country, and there were 175 applications for new stations. Every channel in the standard broadcast band was, by that time, already occupied by at least one station, and many by several. The new stations could be accommodated only by extending the standard broadcast band, at the expense of the other types of services, or by imposing still greater limitations upon time and power. The National Radio Conference which met in November, 1925,

opposed both of these methods and called upon Congress to remedy the situation through legislation.

The Secretary of Commerce was powerless to deal with the situation. It had been held that he could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or Government stations. *Hoover* v. *Intercity Radio Co.*, 52 App. D. C. 339, 286 F. 1003. And on April 16, 1926, an Illinois district court held that the Secretary had no power to impose restrictions as to frequency, power, and hours of operation, and that a station's use of a frequency not assigned to it was not a violation of the Radio Act of 1912. *United States* v. *Zenith Radio Corp.*, 12 F. 2d 614. This was followed on July 8, 1926, by an opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power, under the Radio Act of 1912, to regulate the power, frequency or hours of operation of stations. 35 Ops. Atty. Gen. 126. The next day the Secretary of Commerce issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation.

But the plea of the Secretary went unheeded. From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies 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. The situation became so intolerable that the President in his message of December 7, 1926, appealed to Congress to enact a comprehensive radio law:

"Due to the decisions of the courts, the authority of the department [of Commerce] under the law of 1912 has broken down; many more stations have been operat-

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ing than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocations set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted." (H. Doc. 483, 69th Cong., 2d Sess., p. 10.)

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.[4] Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, the legislation immediately before us. As we noted in *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137,

[4] See Morecroft, Principles of Radio Communication (3d ed. 1933) 355–402; Terman, Radio Engineering (2d ed. 1937) 593–645.

"In its essentials the Communications Act of 1934 [so far as its provisions relating to radio are concerned] derives from the Federal Radio Act of 1927. . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927."

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

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radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

. . . . .

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . .;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

. . . . .

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

. . . . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ."

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity." §§ 307 (a) (d), 309 (a), 310, 312. In addition, § 307 (b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Com-

mission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . ." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." § 303 (g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission

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choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." See *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 n. 2.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303 (g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But

the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices." (Report, pp. 81, 82.)

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the

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Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting." § 303 (g) (i).

Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that

experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

For the cramping construction of the Act pressed upon us, support cannot be found in its legislative history. The principal argument is that § 303 (i), empowering the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," intended to restrict the scope of the Commission's powers to the technical and engineering aspects of chain broadcasting. This provision comes from § 4 (h) of the Radio Act of 1927. It was introduced into the legislation as a Senate committee amendment to the House bill (H. R. 9971, 69th Cong., 1st Sess.) This amendment originally read as follows:

"(C) The commission, from time to time, as public convenience, interest, or necessity requires, shall—

. . . . . .

(j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

The report of the Senate Committee on Interstate Commerce, which submitted this amendment, stated that under the bill the Commission was given "complete authority . . . to control chain broadcasting." Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 3. The bill as thus amended was passed by the Senate, and then sent to conference. The bill that emerged from the conference committee, and which became the Radio Act of 1927, phrased the amendment in the general terms now contained in § 303 (i) of the 1934 Act: the Commission was authorized "to make special regulations applicable to radio stations

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engaged in chain broadcasting." The conference reports do not give any explanation of this particular change in phrasing, but they do state that the jurisdiction conferred upon the Commission by the conference bill was substantially identical with that conferred by the bill passed by the Senate. See Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. 1886, 69th Cong., 2d Sess., p. 17. We agree with the District Court that in view of this legislative history, § 303 (i) cannot be construed as no broader than the first clause of the Senate amendment, which limited the Commission's authority to the technical and engineering phases of chain broadcasting. There is no basis for assuming that the conference intended to preserve the first clause, which was of limited scope, and abandon the second clause, which was of general scope, by agreeing upon a provision which was broader and more comprehensive than those it supplanted.[5]

[5] In the course of the Senate debates on the conference report upon the bill that became the Radio Act of 1927, Senator Dill, who was in charge of the bill, said: "While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked. . . . In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection. I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power must be lodged somewhere, and I myself am unwilling

A totally different source of attack upon the Regulations is found in § 311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the anti-trust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted of monopoly or other restraints of trade, and second, that, in any event, the Commission misconceived the scope of its powers under § 311 in issuing the Regulations. Both of these contentions are unfounded. Section 311 derives from § 13 of the Radio Act of 1927, which expressly commanded, rather than merely authorized, the Commission to refuse a license to any person judicially found guilty of having violated the anti-trust laws. The change in the 1934 Act was made, in the words of Senator Dill, the manager of the legislation in the Senate, because "it seemed fair to the committee to do that." 78 Cong. Rec. 8825. The Commission was thus permitted to exercise its judgment as to whether violation of the anti-trust laws disqualified an applicant from operating a station in the "public interest." We agree with the District Court that "The necessary implication from this [amendment in 1934] was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." 47 F. Supp. 940, 944.

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render

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irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity." A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest," merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.

Alternatively, it is urged that the Regulations constitute an *ultra vires* attempt by the Commission to enforce the anti-trust laws, and that the enforcement of the anti-trust laws is the province not of the Commission but of the Attorney General and the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the anti-trust laws:

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our func-

tion to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest." (Report, pp. 46, 83, 83 n. 3.)

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade* v. *United States*, 314 U. S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

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It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest." The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24–25, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the

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words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." *Ibid.* See *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–38. Compare *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428; *Intermountain Rate Cases*, 234 U. S. 476, 486–89; *United States* v. *Lowden*, 308 U. S. 225.

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of

i.e., since not everyone can have a license, one can be taken away w/o violating F.A.

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If that be so, it would follow that every application for a license to operate a sta- by the Commission is thereby denied his ght of free speech. Freedom of utterance many who wish to use the limited facilities ke other modes of expression, radio inher- ilable to all. That is its unique character- is why, unlike other modes of expression, it vernmental regulation. Because it cannot some who wish to use it must be denied. id not authorize the Commission to choose nts upon the basis of their political, eco- views, or upon any other capricious basis. he Commission by these Regulations pro- among applicants upon some such basis, e us would be wholly different. The ques- ply whether the Commission, by announc- refuse licenses to persons who engage in rk practices (a basis for choice which we hended within the statutory criterion of

"public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros.* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

MR. JUSTICE MURPHY, dissenting:

I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the

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July 29, 1960

COMMISSION POLICY)
ON PROGRAMMING)

[¶10:307, ¶10:326, ¶53:24] Commission programming policy.

The communication of ideas by means of radio and television is a form of expression entitled to protection against abridgement by the First Amendment. The fact that one may not engage in broadcasting without first obtaining a license does not mean that the terms of such a license may be so framed as to unreasonably abridge the free speech protection of the First Amendment. While the Commission must determine whether the total program service of broadcasters is reasonably responsive to the needs and interests of the public they serve, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program. Responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee. However, since broadcasters are required to program their stations in the public interest, convenience and necessity, the broadcaster's freedom to program is not absolute. The Commission may not grant, modify or renew a broadcast station license without finding that the operation of the station is in the public interest. A significant element of the public interest is the broadcaster's service to the community, and programming is of the essence of radio service. The licensee must make a diligent, positive and continuing effort to discover and fulfill the tastes, needs and desires of the service area. The licensee must also assume responsibility for all material broadcast through the facilities of the station, including advertising material, and must take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses of over-commercialization. This duty may not be delegated.

[¶51:304, ¶53:24] Programming information required of applicants.

The Commission recognizes as major elements of broadcast programming, which must be considered in determining whether operation of a broadcast station serves the public interest, (1) opportunity for local self-expression, (2) development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs

programs, (7) editorializing, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups and (14) entertainment. These categories are not intended as a rigid mold or fixed formula for station operation, but the principal ingredient of the licensee's obligation to operate his station in the public interest is a diligent, positive and continuing effort to discover and fulfill the tastes, needs and desires of the community or service area. Licensees and applicants will be required, in the future, to furnish a detailed statement with each application for new facilities, modification or renewal as to the measures taken and the efforts made to determine the tastes, needs and desires of the community or service area, and the manner in which the applicant proposes to meet those needs and desires. The applicant must show that he has made a canvass of the listening public and that he has consulted with leaders in the community life, professional and eleemosynary organizations, etc.

+(15) children's programs

[¶53:24] Commercial vs. sustaining programs.

There is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance. However, the licensee must retain the flexibility to accommodate public needs.

REPORT AND STATEMENT OF POLICY RE: COMMISSION EN BANC PROGRAMMING INQUIRY *

The Commission en banc, by Commissioners Ford (Chairman), Bartley, Lee, Craven and Cross, with Commissioner Hyde dissenting and Commissioner King not participating, adopted the following statement on July 27:

On October 3, 1957 the Commission's Network Study Staff submitted its report on network broadcasting. While the scope and breadth of the network study as set forth in Order Number 1 issued November 21, 1955 encompassed a comprehensive study of programming, it soon became apparent that due to factors not within the control of the staff or the committee consideration of programming would be subject to substantial delay making it impracticable that the target dates for the over-all report could be met in the program area. The principal reasons were: (a) the refusal of certain program distributors and producers to provide the committee's staff with certain information which necessitated protracted negotiations and ultimately legal action (FCC v. Ralph Cohn, et al., 154 F. Supp. 899 [15 RR 2085]); and (b) the fact that a coincidental and collateral investigation into certain practices was instituted by the Department of Justice. Accordingly the network study staff report recommended that the study of programming be continued and completed. The Director of the Network Study in his memorandum of transmittal of the Network Study Report stated:

* 25 F.R. 7291, August 3, 1960.

> "The staff regrets that it was unable to include in the report its findings and conclusions in its study of programming. It is estimated that more than one-fourth of the time of the staff was expended in this area. However, the extended negotiations and litigation with some non-network program producers relative to supplying financial data necessary to this aspect of the study made it impossible to obtain this information from a sufficient number of these program producers to draw definitive conclusions on all the programming issues. Now that the Commission's right to obtain this information has been sustained, it is the hope of the staff that this aspect of the study will be completed and the results included in a supplement to the report. Unless the study of programming is completed, the benefit of much labor on this subject will have been substantially lost."

As a result on February 26, 1959, the Commission issued its "Order for Investigatory Proceeding," Docket No. 12782. That Order stated that during the course of the Network Study and otherwise, the Commission had obtained information and data regarding the acquisition, production, ownership, distribution, sale, licensing and exhibition of programs for television broadcasting. Also, that that information and data had been augmented from other sources including hearings before Committee of Congress and from the Department of Justice, and that the Commission had determined that an overall inquiry should be made to determine the facts with respect to the television network program selection process. On November 9, 1959, the proceeding instituted by the Commission's Order of February 26, 1959 was amended and enlarged to include a general inquiry with respect to programming to determine, among other things, whether the general standards heretofore laid down by the Commission for the guidance of broadcast licensees in the selection of programs and other material intended for broadcast are currently adequate; whether the Commission should, by the exercise of its rule-making power, set out more detailed and precise standards for such broadcasters; whether the Commission's present review and consideration in the field of programming and advertising are adequate, under present conditions in the broadcast industry; and whether the Commission's authority under the Communications Act of 1934, as amended, is adequate, or whether legislation should be recommended to Congress.

This inquiry was heard by the Commission en banc between December 7, 1959, and February 1, 1960, and consumed 19 days in actual hearings. Over 90 witnesses testified relative to the problems involved, made suggestions and otherwise contributed from their background and experience to the solution of these problems. Several additional statements were submitted. The record in the en banc portion of the inquiry consisted of 3,775 pages of transcript plus 1,000 pages of exhibits. The Interim Report of the staff of the Office of Network Study was submitted to the Commission for consideration on June 15, 1960.

The Commission will make every effort to expedite its consideration of the entire docket proceeding and will take such definitive action as the Commission determines to be warranted. However, the Commission feels that a general statement of policy responsive to the issues in the en banc inquiry is warranted at this time.

Prior to the en banc hearing, the Commission had made its position clear that, in fulfilling its obligation to operate in the public interest, a broadcast station is expected to exercise reasonable care and prudence with respect to its broadcast material in order to assure that no matter is broadcast which will deceive or mislead the public. In view of the extent of the problem existing with respect to a number of licensees involving such practices as deceptive quiz shows and payola which had become apparent, the Commission concluded that certain proposed amendments to our Rules as well as proposed legislation would provide a basis for substantial improvements. Accordingly, on February 5, 1960 we adopted a Notice of Proposed Rule Making to deal with fixed quiz and other non-bona fide contest programs involving intellectual skill. These rules would prohibit the broadcasting of such programming unless accompanied by an announcement which would in all cases describe the nature of the program in a manner to sufficiently apprise the audience that the events in question are not in fact spontaneous or actual measures of knowledge or intellectual skill. Announcements would be made at the beginning and end of each program. Moreover, the proposed rules would require a station, if it obtained such a program from networks, to be assured similarly that the network program has an accompanying announcement of this nature. This, we believe, would go a long way toward preventing any recurrence of problems such as those encountered in the recent quiz show programs.

We have also felt that this sort of conduct should be prohibited by statute. Accordingly, we suggested legislation designed to make it a crime for anyone to wilfully and knowingly participate or cause another to participate in or cause to be broadcast a program of intellectual skill or knowledge where the outcome thereof is prearranged or predetermined. Without the above-described amendment, the Commission's regulatory authority is limited to its licensing function. The Commission cannot reach networks directly or advertisers, producers, sponsors and others who, in one capacity or another, are associated with the presentation of radio and television programs which may deceive the listening or viewing public. It is our view that this proposed legislation will help to assure that every contest of intellectual skill or knowledge that is broadcast will be in fact a bona fide contest. Under this proposal, all those persons responsible in any way for the broadcast of a deceptive program of this type would be penalized. Because of the far reaching effects of radio and television, we believe such sanctions to be desirable.

The Commission proposed on February 5, 1960 that a new section be added to the Commission's rules which would require the licensee of radio broadcast stations to adopt appropriate procedures to prevent the practice of payola amongst his employees. Here again the standard of due diligence would have to be met by the licensee. We have also approved on February 11 the language of proposed legislation which would impose criminal penalties for failure to announce sponsored programs, such as payola and others, involving hidden payments or other considerations. This proposal looks toward amending the United States Code to provide fines up to $5,000 or imprisonment up to one year or both, for violators. It would prohibit the payment to any person or the receipt of payment by any person for the purpose of having as a part of the broadcast program any material or either a radio or television show unless an announcement is made as a part of the program that such material has been paid for or furnished. The Commission now has no direct jurisdiction over the employees of a broadcast station with respect to this type of activity. The imposition of a criminal penalty appears to us to be an effective manner for

dealing with this practice. In addition, the Commission has made related legislative proposals with respect to fines, temporary suspension of licenses and temporary restraining orders.

In view of our mutual interest with the Federal Trade Commission and in order to avoid duplication of effort, we have arrived at an arrangement whereby any information obtained by the FCC which might be of interest to FTC will be called to that Commission's attention by our staff. Similarly, FTC will advise our Commission of any information or data which it acquires in the course of its investigations which might be pertinent to matters under jurisdiction of the FCC. This is an understanding supplemental to earlier liaison arrangements between FCC and FTC.

Certain legislative proposals recently made by the Commission are related to the instant inquiry have been mentioned. It is appropriate now to consider whether the statutory authority of the Commission with respect to programming and program practices is, in other respects, adequate.

In considering the extent of the Commission's authority in the area of programming it is essential first to examine the limitations imposed upon it by the First Amendment to the Constitution and Section 326 of the Communications Act.

The First Amendment to the United States Constitution reads as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 326 of the Communications Act of 1934, as amended, provides that:

> "Nothing in this chapter [Act] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

The communication of ideas by means of radio and television is a form of expression entitled to protection against abridgement by the First Amendment to the Constitution. In United States v. Paramount Pictures, 334 U.S. 131, 166 (1948) the Supreme Court stated:

> "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

As recently as 1954 in Superior Films v. Department of Education, 346 U.S. 587, Justice Douglas in a concurring opinion stated:

> "Motion pictures are, of course, a different medium of expression than the radio, the stage, the novel or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas."

Moreover, the free speech protection of the First Amendment is not confined solely to the exposition of ideas nor is it required that the subject matter of the communication be possessed of some value to society. In Winters v. New York, 333 U.S. 507, 510 (1948) the Supreme Court reversed a conviction based upon a violation of an ordinance of the City of New York which made it punishable to distribute printed matter devoted to the publication of accounts of criminal deeds and pictures of bloodshed, lust or crime. In this connection the Court said:

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right . . . Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

Notwithstanding the foregoing authorities, the right to the use of the airwaves is conditioned upon the issuance of a license under a statutory scheme established by Congress in the Communications Act in the proper exercise of its power over commerce. 1/ The question therefore arises as to whether because of the characteristics peculiar to broadcasting which justifies the government in regulating its operation through a licensing system, there exists the basis for a distinction as regards other media of mass communication with respect to application of the free speech provisions of the First Amendment? In other words, does it follow that because one may not engage in broadcasting without first obtaining a license, the terms thereof may be so framed as to unreasonably abridge the free speech protection of the First Amendment?

We recognize that the broadcasting medium presents problems peculiar to itself which are not necessarily subject to the same rules governing other media of communication. As we stated in our Petition in Grove Press, Inc. and Readers Subscription, Inc. v. Robert K. Christenberry (Case No. 25,861) filed in the U.S. Court of Appeals for the Second Circuit, "radio and TV programs enter the home and are readily available not only to the average normal adult but also to children and to the emotionally immature . . . Thus, for example, while a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. §1464 . . . Similarly, regardless of whether the 'four-letter words' and sexual description, set forth in 'Lady Chatterley's Lover,' (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and Section 1464 questions." Nevertheless it is essential to keep in mind that "the basic principles of freedom of speech and the press like the First Amendment's command do not vary." 2/

1/ NBC v. United States, 319 U.S. 190 (1943)

2/ Burstyn v. Wilson, 343 U.S. 495, 503 (1952)

PROGRAMMING POLICY

Although the Commission must determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program. To do so would "lay a forbidden burden upon the exercise of liberty protected by the Constitution." 3/ The Chairman of the Commission during the course of his testimony recently given before the Senate Independent Offices Subcommittee of the Committee on Appropriations expressed the point as follows:

> "Mr. Ford. When it comes to questions of taste, unless it is downright profanity or obscenity, I do not think that the Commission has any part in it.
>
> "I don't see how we could possibly go out and say this program is good and that program is bad. That would be a direct violation of the law." 4/

In a similar vein Mr. Whitney North Seymour, President-elect of the American Bar Association, stated during the course of this proceeding that while the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear. 5/

Nevertheless, several witnesses in this proceeding have advanced persuasive arguments urging us to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than tend to abridge it. With respect to this proposition we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise. The First Amendment "while regarding freedom in religion, in speech and printing and in assembling and petitioning the government for redress of grievances as fundamental and precious to all, seeks only to forbid that Congress should meddle therein." (Powe v. United States, 109 F. (2d) 147).

As recently as 1959 in Farmers Educational and Cooperative Union of America v. WDAY, Inc. 360 U.S. 525, the Supreme Court succinctly stated:

> ". . . expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication."

3/ Cantwell v. Connecticut, 310 U.S. 926, 307.

4/ Hearings before the Subcommittee of the Committee on Appropriations United States Senate, 86th Congress, 2nd Session on H.R. 11776 at page 775.

5/ Memorandum of Mr. Whitney North Seymour, Special Counsel to the National Association of Broadcasters at page 7.

An examination of the foregoing authorities serves to explain why the day-to-day operation of a broadcast station is primarily the responsibility of the individual station licensee. Indeed, Congress provided in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. Hence, the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment. Accordingly, the Communications Act "does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy . . . Congress intended to leave competition in the business of broadcasting where it found it . . . " 6/ The regulatory responsibility of the Commission in the broadcast field essentially involves the maintenance of a balance between the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard provided in the Communications Act, on the other.

In addition, there appears a second problem quite unrelated to the question of censorship that would enter into the Commission's assumption of supervision over program content. The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision. In this connection we think the words of Justice Douglas are particularly appropriate.

> "The music selected by one bureaucrat may be as offensive to some as it is soothing to others. The news commentator chosen to report on the events of the day may give overtones to the news that pleases the bureaucrat but which rile the . . . audience. The political philosophy which one radio sponsor exudes may be thought by the official who makes up the programs as the best for the welfare of the people. But the man who listens to it . . . may think it marks the destruction of the Republic . . . Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant, political or religious group. . . . Once a man is forced to submit to one type of program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program . . . The strength of our system is in the dignity, resourcefulness and the intelligence of our people. Our confidence is in their ability to make the wisest choice. That system cannot flourish if regimentation takes hold." 7/

Having discussed the limitations upon the Commission in the consideration of programming, there remains for discussion the exceptions to those limitations and the area of affirmative responsibility which the Commission may appropriately exercise under its statutory obligation to find that the public interest, convenience and necessity will be served by the granting of a license to broadcast.

6/ FCC v. Sanders Brothers, 309 U.S. 470, 475 (1940)

7/ Public Utilities Commission v. Pollak, 343 U.S. 451, 468, Dissenting Opinion.

In view of the fact that a broadcaster is required to program his station in the public interest, convenience and necessity, it follows despite the limitations of the First Amendment and Section 326 of the Act, that his freedom to program is not absolute. The Commission does not conceive that it is barred by the Constitution or by statute from exercising any responsibility with respect to programming. It does conceive that the manner or extent of the exercise of such responsibility can introduce constitutional or statutory questions. It readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply: for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, etc. These exceptions, in part, are written into the United States Code and, in part, are recognized in judicial decision. See Sections 1304, 1343 and 1464 of Title 18 of the United States Code (lotteries, fraud by radio, utterance of obscene, indecent or profane language by radio). It must be added that such traditional or legislative exceptions to a strict application of the freedom of speech requirements of the United States Constituion may very well also convey wider scope in judicial interpretation as applied to licensed radio than they have had or would have as applied to other communications media. The Commission's petition in the Greve case, supra, urged the court not unnecessarily to refer to broadcasting, in its opinion, as had the District Court. Such reference subsequently was not made though it must be pointed out there is no evidence that the motion made by the FCC was a contributing factor. It must nonetheless be observed that this Commission conscientiously believes that it should make no policy or take any action which would violate the letter or the spirit of the censorship prohibitions of Section 326 of the Communications Act.

As stated by the Supreme Court of the United States in Joseph Burstyne, Inc. v. Wilson, supra:

> " . . . Nor does it follow that motion pictures are necessarily subject to the precise rule governing any other particular method of expression. Each method tends to present its own peculiar problem. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule."

A review of the Communications Act as a whole clearly reveals that the foundation of the Commission's authority rests upon the public interest, convenience and necessity. 8/ The Commission may not grant, modify or renew a broadcast station license without finding that the operation of such station is in the public interest. Thus, faithful discharge of its statutory responsibilities is absolutely necessary in connection with the implacable requirement that the Commission approve no such application for license unless it finds that "public interest, convenience and necessity would be served." While the public interest standard does not provide a blueprint of all of the situations to which it may apply, it does contain a sufficiently precise definition of authority so as to enable the Commission to properly deal with the many and varied occasions which may give rise to its application. A significant element of the public

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8/ Sections 307(d), 308, 309, inter alia

interest is the broadcaster's service to the community. In the case of NBC v. United States, 319 U.S. 190, the Supreme Court described this aspect of the public interest as follows:

> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by broadcasts . . . The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience or necessity.'"

Moreover, apart from this broad standard which we will further discuss in a moment, there are certain other statutory indications.

It is generally recognized that programming is of the essence of radio service. Section 307(b) of the Communications Act requires the Commission to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same." Under this section the Commission has consistently licensed stations with the end objective of either providing new or additional programming service to a community, area or state, or of providing a new or additional "outlet" for broadcasting from a community, area or state. Implicit in the former alternative is increased radio reception; implicit in the latter alternative is increased radio transmission and, in this connection, appropriate attention to local live programming is required.

Formerly by reason of administrative policy, and since September 14, 1959, by necessary implication from the amended language of Section 315 of the Communications Act, the Commission has had the responsibility for determinig whether licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." This responsibility usually is of the generic kind and thus, in the absence of unusual circumstances, is not exercised with regard to particular situations but rather in terms of operating policies of stations as viewed over a reasonable period of time. This, in the past, has meant a review, usually in terms of filed complaints, in connection with the applications made each three year period for renewal of station licenses. However, that has been a practice largely traceable to workload necessities, and therefore not so limited by law. Indeed the Commission recently has expressed its views to the Congress that it would be desirable to exercise a greater discretion with respect to the length of licensing periods within the maximum three year license period provided by Section 307(d). It has also initiated rulemaking to this end.

The foundation of the American system of broadcasting was laid in the Radio Act of 1927 when Congress placed the basic responsibility for all matter broadcast to the public at the grass roots level in the hands of the station licensee. That obligation was carried forward into the Communications Act of 1934, and

remains unaltered and undivided. The licensee, is, in effect, a "trustee" in the sense that his license to operate his station imposes upon him a non-delegable duty to serve the public interest in the community he had chosen to represent as a broadcaster.

Great confidence and trust are placed in the citizens who have qualified as broadcasters. The primary duty and privilege to select the material to be broadcast to his audience and the operation of his component of this powerful medium of communication is left in his hands. As was stated by the Chairman in behalf of this Commission in recent testimony before a Congressional Committee: 9/

> "Thus far Congress has not imposed by law an affirmative programming requirement on broadcast licenses. Rather, it has heretofore given licensees a broad discretion in the selection of programs. In recognition of this principle, Congress provided in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. To this end the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee and that the fulfillment of such responsibility requires the free exercise of his independent judgment."

As indicated by former President Hoover, then Secretary of Commerce, in the Radio Conference of 1922-25:

> "The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, country wide in distribution. There is no proper line of conflict between the broadcaster and listener, nor would I attempt to array one against the other. Their interests are mutual, for without the one the other could not exist.
>
> "There have been few developments in industrial history to equal the speed and efficiency with which genius and capital have joined to meet radio needs. The great majority of station owners today recognize the burden of service and gladly assume it. Whatever other motive may exist for broadcasting, the pleasing of the listener is always the primary purpose . . . . .
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> "The greatest public interest must be the deciding factor. I presume that few will dissent as to the correctness of this principle, for all will agree that public good must ever balance private desire, but its acceptance leads to important and far-reaching practical effects, as to which there may not be the same unanimity, but from which, nevertheless, there is no logical escape."

9/ Testimony of Frederick W. Ford, May 16, 1960 before the Subcommittee on Communications of the Committee on Interstate & Foreign Commerce, United States Senate.

The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." 10/ The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility. It is the duty of the Commission, in the first instance, to select persons as licensees who meet the qualifications laid down in the Act, and on a continuing basis to review the operations of such licensees from time to time to provide reasonable assurance to the public that the broadcast service it receives is such as its direct and justifiable interest requires.

Historically it is interesting to note that in its review of station performance the Federal Radio Commission sought to extract the general principles of broadcast service which should (1) guide the licensee in his determination of the public interest and (2) be employed by the Commission as an "index" or general frame of reference in evaluating the licensee's discharge of his public duty. The Commission attempted no precise definition of the components of the public interest but left the discernment of its limit to the practical operation of broadcast regulation. It required existing stations to report the types of service which had been provided and called on the public to express its views and preferences as to programs and other broadcast services. It sought information from as many sources as were available in its quest of a fair and equitable basis for the selection of those who might wish to become licensees and the supervision of those who already engaged in broadcasting.

The spirit in which the Radio Commission approached its unprecedented task was to seek to chart a course between the need of arriving at a workable concept of the public interest in station operation, on the one hand, and the prohibition laid on it by the First Amendment to the Constitution of the United States and by Congress in Section 29 of the Federal Radio Act against censorship and interference with free speech, on the other. The Standards or guidelines which evolved from that process, in their essentials, were adopted by the Federal Communications Commission and have remained as the basis for evaluation of broadcast service. They have in the main, been incorporated into various codes and manuals of network and station operation.

It is emphasized, that these standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcast service in the public interest. Rather, they should be considered as indicia of the types and areas of service which, on the basis of experience, have usually been accepted by the broadcasters as more or less included in the practical definition of community needs and interests.

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses

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10/ Cf. Communications Act of 1934, as amended, inter alia, Secs. 307, 309.

with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others.

Although the individual station licensee continues to bear legal responsibility for all matter broadcast over his facilities, the structure of broadcasting, as developed in practical operation, is such - especially in television - that, in reality, the station licensee has little part in the creation, production, selection and control of network program offerings. Licensees place "practical reliance" on networks for the selection and supervision of network programs which, of course, are the principal broadcast fare of the vast majority of television stations throughout the country. 11/

In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can. He should reasonably attempt to meet all such needs and interests on an equitable basis. Particular areas of interest and types of appropriate service may, of course, differ from community to community, and from time to time. However, the Commission does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests.

The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming.

The elements set out above are neither all-embracing nor constant. We reemphasize that they do not serve and have never been intended as a rigid mold or fixed formula for station operation. The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for

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11/ The Commission, in recognition of this problem as it affects the licensees, has recently recommended to the Congress enactment of legislation providing for direct regulation of networks in certain respects.

the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee.

The programs provided first by "chains" of stations and then by networks have always been recognized by this Commission as of great value to the station licensee in providing a well-rounded community service. The importance of network programs need not be re-emphasized as they have constituted an integral part of the well-rounded program service provided by the broadcast business in most communities.

Our own observations and the testimony in this inquiry have persuaded us that there is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance. However, this does not relieve the station from responsibility for retaining the flexibility to accommodate public needs.

Sponsorship of public affairs, and other similar programs may very well encourage broadcasters to greater efforts in these vital areas. This is borne out by statements made in this proceeding in which it was pointed out that under modern conditions sponsorship fosters rather than diminishes the availability of important public affairs and "cultural" broadcast programming. There is some convincing evidence, for instance, that at the network level there is a direct relation between commercial sponsorship and "clearance" of public affairs and other "cultural" programs. Agency executives have testified that there is unused advertising support for public affairs type programming. The networks and some stations have scheduled these types of programs during "prime time."

The Communications Act 12/ provides that the Commission may grant construction permits and station licenses, or modifications or renewals thereof, "only upon written application" setting forth the information required by the Act and the Commission's Rules and Regulations. If, upon examination of any such application, the Commission shall find the public interest, convenience and necessity would be served by the granting thereof, it shall grant said application. If it does not so find, it shall so advise the applicant and other known parties in interest of all objections to the application and the applicant shall then be given an opportunity to supply additional information. If the Commission cannot then make the necessary finding, the application is designated for hearing and the applicant bears the burden of providing proof of the public interest.

During our hearings there seemed to be some misunderstanding as to the nature and use of the "statistical" data regarding programming and advertising required by our application forms. We wish to stress that no one may be summarily judged as to the service he has performed on the basis of the information contained in his application. As we said long ago:

12/ Section 308(a).

"It should be emphasized that the statistical data before the Commission constitute an index only of the manner of operation of the stations and are not considered by the Commission as conclusive of the over-all operation of the stations in question.

"Licensees will have an opportunity to show the nature of their program service and to introduce other relevant evidence which would demonstrate that in actual operation the program service of the station is, in fact, a well rounded program service and is in conformity with the promises and representations previously made in prior applications to the Commission." 13/

As we have said above, the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his community or service area, for broadcast service.

To enable the Commission in its licensing functions to make the necessary public interest finding, we intend to revise Part IV of our application forms to require a statement by the applicant, whether for new facilities, renewal or modification, as to: (1) the measures he has taken and the effort he has made to determine the tastes, needs and desires of his community or service area, and (2) the manner in which he proposes to meet those needs and desires.

Thus we do not intend to guide the licensee along the path of programming; on the contrary the licensee must find his own path with the guidance of those whom his signal is to serve. We will thus steer clear of the bans of censorship without disregarding the public's vital interest. What we propose will not be served by pre-planned program format submissions accompanied by complimentary references from local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life — public officials, educators, religious, the entertainment media, agriculture, business, labor — professional and eleemosynary organizations, and others who bespeak the interests which make up the community.

By the care spent in obtaining and reflecting the views thus obtained, which clearly cannot be accepted without attention to the business judgment of the licensee if his station is to be an operating success, will the standard of programming in the public interest be best fulfilled. This would not ordinarily be the case if program formats have been decided upon by the licensee before he undertakes his planning and consultation, for the result would show little stimulation on the part of the two local groups above referenced. And it is the composite of their contributive planning, led and sifted by the expert judgment of the licensee, which will assure to the station the appropriate attention to the public interest which will permit the Commission to find that a license may issue. By his narrative development, in his application, of the planning,

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13/ Public Notice (98501), September 20, 1946, "Status of Standard Broadcast Applications"

consulting, shaping, revising, creating, discarding and evaluation of programming thus conceived or discussed, the licensee discharges the public interest facet of his business calling without Government dictation or supervision and permits the Commission to discharge its responsibility to the public without invasion of spheres of freedom properly denied to it. By the practicality and specificity of his narrative the licensee facilitates the application of expert judgment by the Commission. Thus, if a particular kind of educational program could not be feasibly assisted (by funds or service) by educators for more than a few time periods, it would be idle for program composition to place it in weekly focus. Private ingenuity and educational interest should look further toward implemental suggestions of practical yet constructive value. The broadcaster's license is not intended to convert his business into "an instrumentality of the federal government"; 4/ neither, on the other hand, may he ignore the public interest which his application for a license should thus define and his operations thereafter reasonably observe.

Numbers of suggestions were made during the en banc hearings concerning possible uses by the Commission of codes of broadcast practices adopted by segments of the industry as part of a process of self-regulation. While the Commission has not endorsed any specific code of broadcast practices, we consider the efforts of the industry to maintain high standards of conduct to be highly commendable and urge that the industry persevere in these efforts.

The Commission recognizes that submissions, by applicants, concerning their past and future programming policies and performance provide one important basis for deciding whether — in so far as broadcast services are concerned — we may properly make the public interest finding requisite to the grant of an application for a standard, FM or television broadcast station. The particular manner in which applicants are required to depict their proposed or past broadcast policies and services (including the broadcasting of commercial announcements) may therefore, have significant bearing upon the Commission's ability to discharge its statutory duties in the matter. Conscious of the importance of reporting requirements, the Commission on November 24, 1958 initiated proceedings (Docket No. 12673) to consider revisions to the rules prescribing the form and content of reports on broadcast programming.

Aided by numerous helpful suggestions offered by witnesses in the recent en banc hearings on broadcast programming, the Commission is at present engaged in a thorough study of this subject. Upon completion of that study we will announce, for comment by all interested parties, such further revisions to the present reporting requirements as we think will best conduce to an awareness, by broadcasters, of their responsibilities to the public and to effective, efficient processing by the Commission, of applications for broadcast licenses and renewals.

To this end, we will initiate further rule making on the subject at the earliest practicable date.

Adopted: July 27, 1960

4/ "The defendant is not an instrumentality of the federal government but a privately owned corporation." McIntire v. Wm. Penn Broadcasting Co., 151 F. (2d) 597, 600.

SEPARATE STATEMENT OF COMMISSIONER HYDE

I believe that the Commission's "Interim Report and Statement of Policy" in Docket No. 12782 misses the central point of the hearing conducted by the Commission en banc, December 7, 1959, to February 1, 1960.

It reiterates the legal position which was taken by the Federal Radio Commission in 1927, and which has been adhered to by the Federal Communications Commission since it was organized in 1934. This viewpoint was accepted by the executives of the leading networks and by most other units of the broadcasting industry as well as the National Association of Broadcasters. The main concern requiring a fresh approach is what to do in the light of the law and the matters presented by many witnesses in the hearings. This, I understand, is to be the subject of a rule-making proceeding still to be initiated. I urged the preparation of an appropriate rule-making notice prior to the preparation of the instant statement.

I also disagree with the decision of the Commission to release the document captioned "Interim Report by the Office of Network Study, Responsibility for Broadcast Matter, Docket No. 12782." Since it deals in part with a hearing in which the Commission itself sat en banc, I feel that it does not have the character of a separate staff-study type of document, and that its release with the Commission policy statement will create confusion. Moreover, a substantial portion of the document is concerned with matter still under investigation process in Docket 12782. I think issuance of comment on these matters under the circumstances is premature and inappropriate.

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rial advertisement, the recovery of compensatory and punitive damages for refusal to publish the advertisement, the entry of a declaratory judgment and that the publishers be permanently enjoined from refusing to publish such lawful advertisements. The United States District Court for the Northern District of Illinois, Eastern Division, Abraham L. Marovitz, J., granted summary judgment, and the plaintiff appealed. The Court of Appeals, Castle, Senior Circuit Judge held, inter alia, that publishers' rejections of labor union's editorial advertisement did not involve state action so as to give court jurisdiction of union's complaint because of jury service exemption to newspaper employees, the receipt of revenue from publishing legal notices, election notices and ordinances, the use tax exemption on purchases of newsprint and ink under Illinois law, the ordinance restricting sidewalk newsstand vendors to sale of local newspapers and presence of press facilities in public buildings.

Affirmed.

1. Courts ⇐282.2(8)

Newspaper publishers' rejections of labor union's editorial advertisement did not involve state action so as to give court jurisdiction of union's complaint because of jury service exemption to newspaper employees, the receipt of revenue from publishing legal notices, election notices and ordinances, the use tax exemption on purchases of newsprint and ink under Illinois law, the ordinance restricting sidewalk newsstand vendors to sale of local newspapers and presence of press facilities in public buildings. U.S.C.A.Const. Amends. 1, 14; 28 U.S.C.A. §§ 1331, 1343(3); S.H.A.Ill. ch. 7½, § 2 et seq.; ch. 24, § 1–2–4; ch. 78, § 4; ch. 110, § 14; ch. 120, §§ 439.2, 439.32, 440.

2. Courts ⇐282.2(8)

Use tax exemption, which newspapers share in common with magazines and periodicals, represents a "state involvement" in limited sense that any tax exemption does, but not to a degree which constitutes state participation in conduct or action of the enterprise granted the exemption within purview of restrictions imposed by First and Fourteenth Amendments. U.S.C.A.Const. Amends. 1, 14; 28 U.S.C.A. §§ 1331, 1343(3); S.H.A.Ill. ch. 7½, § 2 et seq.; ch. 24, § 1–2–4; ch. 78, § 4; ch. 110, § 14; ch. 120, §§ 439.2, 439.32, 440.

3. Constitutional Law ⇐90

Privilege of First Amendment protection afforded a newpaper does not carry with it a reciprocal obligation to serve as a public forum, so as to require newspaper publishers to publish labor union's editorial advertisement setting forth the union's basis for its opposition to sale of imported foreign-made clothing because newspaper had accepted department store's advertisements of such clothing since the union's right to free speech did not give it the right to make use of the publishers' printing presses and distribution systems without their consent. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐90

Labor union was not entitled to compel newspaper publishers to accept union's editorial advertisement setting forth the union's basis for its opposition to sale of imported foreign-made clothing on theory that in context of the labor dispute private business rights of a neutral third party may be affected with a public interest which requires that the business be opened up to the labor organization for free speech purposes. U.S.C.A. Const. Amend. 1.

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Sherman Carmell, Marshall Patner, David Goldberger, Sheldon M. Charone, Frances Sebastian, Chicago, Ill., amicus curiae; Carmell & Charone, Richard Stillerman, Chicago, Ill., of counsel.

A. Daniel Feldman, Robert B. Wilcox, David L. Lange, Linda R. Hirshman, Chicago, Ill., for Field Enterprises, Inc.;

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Isham, Lincoln & Beale, Chicago, Ill., of counsel.

Don H. Reuben, Lawrence Gunnels, Chicago, Ill., for defendants-appellees Chicago Tribune Co. and Chicago American Pub. Co.; Kirkland, Ellis, Hodson, Chaffetz & Masters, Chicago, Ill., of counsel.

Before CASTLE, Senior Circuit Judge, and KILEY and CUMMINGS, Circuit Judges.

CASTLE, Senior Circuit Judge.

Plaintiff-appellant, Chicago Joint Board, Amalgamated Clothing Workers of America, AFL–CIO, prosecutes this appeal from the order of the District Court granting summary judgment to the defendants-appellees, Chicago Tribune Company, Chicago American Publishing Company, and Field Enterprises, Inc., in the Union's action against said defendant newspaper publishers. The Union's complaint, as amended, seeks injunctive relief to compel the defendants to publish an editorial advertisement tendered by the Union; the recovery of compensatory and punitive damages for defendants' refusals to publish such advertisement; the entry of a declaratory judgment declaring that defendants may not arbitrarily refuse to publish advertisements expressing ideas, opinions or facts on political or social issues and that defendants may not refuse to publish such advertisements if they are lawful and the party submitting the advertisement is willing to pay the usual rate and there is no technical or mechanical reason why the advertisement cannot be published; and that defendants be permanently enjoined from refusing to publish such lawful advertisements. Count I of the complaint, which seeks injunctive relief to compel publication of the specific advertisement tendered by the Union, and Count IV which seeks declaratory relief, assert a right in the Union [1] under the First and Fourteenth Amendments to compel the defendant newspaper publishers to accept its lawful editorial advertisements for publication at the usual rates for such advertisements. Counts II and III assert, respectively, alleged breach of contract and the Union's justifiable reliance upon the defendants' representations.

The District Court in granting defendants' motions for summary judgment found no genuine material issue of fact presented by the pleadings, affidavits, depositions and other materials before the court for consideration in connection with the motions, and concluded that absence of state action deprived the court of jurisdiction and no other claim is stated upon which relief might be granted. The appeal herein is grounded on the assertion that the court erred in its conclusion that defendants' refusals to publish the advertisement did not involve state action.

The Union is a Chicago labor union which represents clothing and garment workers. It has conducted a campaign to limit the importation of foreign-made clothing into the United States on the grounds that the importation and sale of such clothing reduces the number of jobs available to its members. The campaign included picketing directed against Marshall Field & Co., the operator of a large Chicago department store which retails imported clothing and utilizes the advertising columns of the defendants' newspapers to advertise such merchandise.

The defendants Chicago Tribune Company and Chicago American Publishing Company each publish a Chicago newspaper: The Chicago Tribune and Chicago Today, respectively. The defendant Field Enterprises, Inc. is the publisher of The Chicago Sun-Times and The Chicago Daily News. There are no newspapers with general circulation throughout the Chicago metropolitan area other than the four newspapers owned and published by the defendants.

The Union, in an attempt to communicate its position to the general public in the Chicago metropolitan area and to the same readers who are exposed to Mar-

1. And in all others similarly situated on whose behalf it also sues under Count IV.

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shall Field & Co.'s advertisements, submitted to each of the defendants' four newspapers a full page advertisement which depicted a picket line beneath a representation of the Marshall Field's clock (an identifying feature of the Chicago department store), explained why the Union was picketing the Marshall Field & Co. store, and set forth the Union's basis for its opposition to the sale of imported foreign-made clothing. Each of the newspapers refused to publish the advertisement. Each reserves the right to reject any advertisement.[2]

The Union recognizes that with respect to the claims it asserts in Counts II and III of its compiaint it must rely wholly on the doctrine of pendent jurisdiction, that these counts afford no independent basis for federal jurisdiction, and their justiciability in a federal court action depends upon whether Counts I and IV state a federal claim.

The Union contends that Counts I and IV of its complaint allege facts which establish a violation of rights guaranteed it by the First and Fourteenth Amendments, and therefore state a federal claim cognizable by the District Court in the exercise of that court's jurisdiction conferred by 28 U.S.C.A. §§ 1331 and 1343(3), because the factual allegations require a conclusion that the defendants' rejections of its editorial advertisement involved state action. In this connection the Union points to what it characterizes as a special relationship between the defendants' newspapers and the State arising from Illinois statutory provisions exempting newspaper employees from jury service;[3] requiring newspaper publication of certain legal notices,[4] notices of election[5] and municipal ordinances;[6] and excluding the purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news from the incidence of retailers' occupation, use and service use taxes;[7] from the Chicago city ordinance restricting newsstands permitted on public streets to the sale of daily newspapers printed and published in the city;[8] and from the custom of providing a designated space in public buildings for the news-gathering use of representatives of the press and other news media. It is urged that because the defendants, taken together, comprise the entire newspaper publishing industry with newspapers of general circulation throughout the Chicago metropolitan area, and are the recipients of economic benefit and favored treatment flowing from public sources as the result of the statutes, ordinance and custom above mentioned, their relationship to the State is such that there is "state involvement" in the operation of defendants' newspapers under the rationale relied upon by the Supreme Court of the United States to make conduct of a private business or enterprise subject to Fourteenth Amendment or other constitutional restrictions directed to state action. Cases cited as expressing that rationale include Marsh v. Alabama, 326

2. The Field Enterprises, Inc. newspapers gave as a reason for its refusal a policy not to print advertisements naming others unless they consent to being named. The Chicago Tribune and Chicago Today stated its refusal was based on its conclusion the tendered advertisement failed to meet standards prescribed in the newspapers' Advertising Acceptability Guide which provide for the rejection of an advertisement which in the newspapers' judgment "reflects unfavorably on competitive organizations, institutions or individuals" or is "misleading", but further "reserves the right to reject any advertising which in its opinion, is unacceptable". The policy and the standards alluded to apparently provide norms for the rejection of specific types of advertising but they in no manner negate the reservation made by each defendant to reject any advertisement.

3. Ill.Rev.Stat.1969, ch. 78, § 4.

4. Ill.Rev.Stat.1969, ch. 110, § 14.

5. Ill.Rev.Stat.1969, ch. 105, § 2–12; ch. 7½, § 2 and others.

6. Ill.Rev.Stat.1969, ch. 24, § 1–2–4.

7. Ill.Rev.Stat.1969, ch. 120, § 440, § 439.2 and § 439.32.

8. Municipal Code of the City of Chicago, § 34–12.

U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265; Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152; Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 and Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603. And, Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc. (D.C.D.C. 1969) 302 F.Supp. 459 is pointed to as a recent application of such rationale.

But analysis of the foregoing argument on the basis of the controlling facts here involved reveals that the premises upon which it is constructed are unsound; that the conclusion drawn that there is "state involvement" in the operation of defendants' newspapers, or in the formulation or application of defendants' policies with respect to the acceptance or rejection of editorial advertising, is wholly unwarranted; and that the decisions cited in support thereof are inapposite.

And, this appears to be especially so when the relevance of the argument advanced is viewed and measured against the background of the traditional concept of the role of the press in our society. In this latter connection the District Court in the memorandum opinion it filed aptly observed:

> "Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. 'The right of free public discussion of the stewardship of public officials was * * *, in Madison's view, a fundamental principle of the American form of government.' New York Times Co. v. Sullivan, 376 U.S. 254, 275 [, 84 S.Ct. 710, 11 L.Ed.2d 686] (1964). So it is that the national policy favoring full and frank exercise of the press' freedom 'may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.' *Id.* at 270 [, 84 S.Ct. at 710.] See Chafee, Free Speech in the United States 19, 21–22, 29 (1954).
>
> In sum, the function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of dissociation."

With this in mind, we turn to consideration of the decisions which are cited to us as enunciating the standards which are to be applied for the purpose of determining whether there is such state involvement in a private business or enterprise that the latter's action becomes state action within the purview of the restrictions imposed by the First and Fourteenth Amendments.

In Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, it was held that a "company town" which had assumed a role virtually indistinguishable from any other publicly-incorporated municipality of the state also acquired the state's obligation to allow reasonable access to its streets for the free expression of thought. The Court reasoned (326 U.S. at 506–507, 66 S.Ct. at 278):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.
>
> * * * * * *
>
> Whether a corporation or a municipality owns or possesses the town the public has an identical interest in the functioning of the community in such manner that the channels of communication remain free."

and hold that the company's refusal to permit the use of its streets for the distribution of religious literature violated the Fourteenth Amendment.

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More recently, in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603, the rationale of *Marsh* was extended to a privately-owned shopping plaza which had assumed the status ordinarily associated with a city's central business district. The shopping plaza was held subject to the requirement that its sidewalks and parking area roadways, to which the general public had unrestricted access, be made available to pickets as in the case of other essentially public sidewalks and roadways.

The sidewalks and streets of a company town or a shopping center bear little analogy to the printing press, its product, and the distribution system of a newspaper publisher. Unlike the company town or the shopping center, none of the defendants has consented to unrestricted access by the general public to its advertising columns or pages. Such access is a matter of private contract. Nor in the publication of its newspapers has any of the defendants assumed the performance of a public function which carries with it a concomitant obligation to each member of the general public.

Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, involved the refusal of a private political association to permit otherwise qualified Negroes to participate in private elections which action, for all practical purposes, deprived them of effective participation in a public election. The candidate who won in the privately conducted primary filed as a candidate in the subsequent primary of the dominant political party and invariably won there and in the general election. The Court in holding the action of the private political association, the Jaybird Party, violated the Fifteenth Amendment, pointed out (345 U.S. at 469, 476 and 477, 73 S.Ct. at 817):

> "The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.
>
> * * * * * *
>
> The exclusion of Negroes from meaningful participation in the only primary scheme set up by the State was not an accidental, unsought consequence of the exercise of civic rights by voters to make their common viewpoint count. It was the design, the very purpose of this arrangement that the Jaybird primary in May exclude Negro participation in July. That it was the action in part of the election officials charged by Texas law with the fair administration of the primaries, brings it within the reach of the law. The officials made themselves party to means whereby the machinery with which they are entrusted does not discharge the functions for which it was designed.
>
> * * * * * *
>
> The evil here is that the State, through the action and abdication of those whom it has clothed with authority, has permitted white voters to go through a procedure which predetermines the legally designed primary."

We perceive no relevance of *Terry* to the facts here involved. There is no claim or indication that there is present any intermeshing of action or non-action by public officials with the action of the defendants in rejecting the tendered advertisement pursuant to a design or purpose to frustrate any First or Fourteenth Amendment right of the Union.

In Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, a municipal parking authority created as an agency of the State of Delaware leased a portion of its parking facility building to a restaurant concessionaire. The restaurant refused to serve Negroes. In holding that such discrimination violated the Fourteenth Amendment, the Court took occasion to observe (365 U.S. at 722, 81 S.Ct. at 860):

> "* * * [T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible

task' which 'This Court has never attempted.' Kotch v. Board of River Port Pilot Com'rs, 330 U.S. 552, 556, 67 S.Ct. 910, 912, 91 L.Ed. 1093. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

But the Court then pointed to numerous direct ties and relationships between the state agency and its concessionaire-lessee. The Court noted that the land and building were publicly owned and under the enactment providing for the creation of the Authority the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions"; that the commercially leased areas constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate the project as a self-sustaining unit; that upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds; and that guests of the restaurant are afforded a convenient place to park their automobiles, and, similarly, patrons of the parking facility are provided with a convenient place to dine. The Court concluded (365 U.S. at 724–725, 81 S.Ct. at 861) that:

> "Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.
>
> * * * * * *
>
> The State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."

It is obvious from the facts involved in the instant case that there is no direct tie between any of the defendants and the State or any of its agencies either in the operation of the defendants' newspapers or in the refusals of the newspapers to publish the advertisement the Union proffered. And there is no relationship between the defendant newspaper publishers and the State comparable with that which was found in *Burton* to be a joint participation in the challenged activity and state involvement to a degree which amounted to state action.

In Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc., D.C. Cir., 432 F.2d 650 the District Court had held that a regional educational association responsible for the accreditation of colleges and secondary schools, which the court found to be acting "in a quasi-governmental capacity by virtue of its role in the distribution of Federal funds under the 'aid to education statutes'" was subject to constitutional restraints in the performance of its accreditation function and was precluded from denying accreditation to a proprietary school solely because the school was not a non-profit institution (302 F.Supp. 459, 469–471). The Court of Appeals in reversing the District Court on the ground that, *inter alia*, the conduct of the association satisfied constitutional requirements, stated (432 F.2d 650, 658):

> "We may assume, without deciding, that either the nature of appellant's activities or the federal recognition which they are awarded renders them state action subject to the limitations of the Fifth Amendment."

But the defendant newspaper publishers clearly are not engaged in the exercise of any governmental function, nor do they possess or exercise any delegated power of a governmental nature.

The Union, however, points to language used by the District Court in *Marjorie Webster* which the Union takes as characterizing the association there in-

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volved as one which "enjoys monopoly power in an area of vital public concern" (302 F.Supp. 459, 469) [9] and contends that this expression recognizes the existence of an additional standard which is to be equated with state action as a basis for subjecting private conduct to restraints imposed by the First and Fourteenth Amendments. But the context from which the Union borrows the expression indicates that it was used with reference to common-law justification for judicial intervention in the internal affairs of a private voluntary association, rather than as a recognition of an independent basis for subjecting private conduct to federal constitutional limitations. Apart from the question of the appropriateness of the use of such a standard for the latter purpose if the monopoly is not one conferred by the State or does not involve the exercise of a quasi-governmental function, a question we need not here decide, it has no application in the instant case. Neither Field Enterprises, Inc. nor the Chicago Tribune Company [10] enjoys a monopoly in the relevant market area, *i. e.*, the Chicago metropolitan area. The circulation figures for each of the four newspapers published by the defendants (each publishes two newspapers) are set forth in the Union's complaint. The figures clearly establish that neither of these defendant publishers approaches a monopoly position. The figures reflect a relatively high degree of competition between the defendants rather than monopoly control by one of them. And there is no allegation, nor is there any indication in the record, that there was any concert of action between these competitors in the refusal of each of them to accept the Union's advertisement for publication. There was no individual "monopoly power", and there was no exercise of monopoly power by means of combination.

[1] The cases relied upon by the Union have no meaningful application to the facts and circumstances here involved. And they reflect no rationale which would afford a basis for concluding that the jury service exemption; the receipt of revenue from publishing legal notices, election notices, and ordinances; the use tax exemption on purchases of newsprint and ink; the ordinance restricting sidewalk newsstand vendors to the sale of local newspapers; and the presence of press facilities in public buildings, either singly or collectively represent that state participation or state involvement which serves to color private conduct with the hue of state action.

[2] The use tax exemption, which newspapers share in common with magazines and periodicals (Time, Inc. v. Hallman, 31 Ill.2d 344, 201 N.E.2d 374), does represent a "state involvement" in the limited sense that any tax exemption does, but not to a degree which constitutes state participation in the conduct or action of the enterprise granted the exemption. Cf. Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L.Ed.2d 697.

None of the other factors mentioned in any manner approaches either state involvement or state participation. The jury service exemption runs to the individual newspaper employee.[11] If he chooses to assert the exemption there may be some indirect incidental benefit to his employer, the publisher, in that any operating inconvenience the employee's absence might occasion is avoid-

9. Admittedly, the context from which the Union borrows the expression concerned an "area of vital public concern", the accreditation of educational institutions, and the association was the sole accrediting agency for the colleges and secondary schools of the region.

10. It appears that American Publishing Company, the additional defendant and publisher of Chicago Today, is a wholly owned subsidiary of the Chicago Tribune Company. For the purpose of this part of our opinion we treat these two companies as one publisher.

11. Ill.Rev.Stat.1969, ch. 78, § 4 exempts from jury service, among others, "persons actively employed upon the editorial or mechanical staffs and departments of any newspaper of general circulation printed and published in this state".

ed. But its impact ends there. It imparts no gloss of state involvement in the publisher's business or participation in the publisher's conduct. Likewise, revenue derived from publication of notices and ordinances, even if substantial, evidences no such effect. The State has no stake in the publisher's profit or lack thereof. The regulatory ordinance confining sidewalk newsstand vendors to the sale of local newspapers has no direct application to the defendants. It regulates the use of streets and sidewalks by vendors for the convenience of the public. It accommodates a primary interest of the public by providing convenient and ready access to a service—the supplying of local newspapers—without burdening the streets and sidewalks with vending stands offering other newspapers and periodicals for which there is less demand. The ordinance is of direct benefit to the public. It balances control of the streets and sidewalks for their primary use with a limited other use thereof in serving a public interest. If the restrictions of the ordinance are of any real benefit to the defendants it is merely incidental and, in our opinion, beside the point. The custom of providing space in public buildings for the news-gathering media is, likewise, an accommodation made to serve public convenience—not the newspapers—so that the government's activities can be freely and quickly reported with a minimum of interference with or disruption of the public's business.

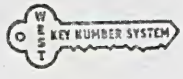
We conclude that the Union's contentions are without merit.

[3] The additional arguments advanced by *amici curiae* are equally unconvincing. It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all—they need not be purchased at the price *amici* would exact. The Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent.

[4] The other contention advanced by *amici* is that in the context of the labor dispute private business rights of a neutral third party may be affected with a public interest which requires that the business (here the newspapers' advertising pages) be opened up to the labor organization for First Amendment purposes. We glean nothing from the constitutional guarantees, or from the decisions expository thereof, which suggests that the advertising pages of a privately published newspaper may so be pressed into service against the publisher's will either in the context of a labor dispute to which the publisher is not a party or otherwise.

The judgment order appealed from is affirmed.

Affirmed.



The UNITED STATES of America, Appellee,

v.

Russell DeCICCO, Rene DeCicco, Louis Markus and Gregory Parness, Appellants.

Nos. 761, 762, and 763, Dockets 34011, 34096, and 34097.

United States Court of Appeals, Second Circuit.

Argued May 7, 1970.
Decided Nov. 16, 1970.

Defendants were convicted before the United States District Court for the Western District of New York, John O. Henderson, Chief Judge, of conspiring

FCC 67-1029
5063
32 FR 13162

In the Matter of	)	
	)	
Television Station WCBS-TV	)	RM-1170
New York, New York	)	
	)	
Applicability of the	)	
Fairness Doctrine to	)	
Cigarette Advertising	)	

Adopted: September 8, 1967
Released: September 13, 1967

[¶10:315] Effective date of fairness doctrine ruling on cigarette advertisements.

The Fairness Doctrine ruling on cigarette advertisements is effective on September 15, 1967 (date of publication in the Federal Register). Conduct of licensees prior thereto will not be considered in connection with applications for renewal of license; conduct subsequent to that date will receive consideration in specific rulings or at license renewal time. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315] Constitutionality of Fairness Doctrine.

The Fairness Doctrine does not violate the First or Fifth Amendments. The Commission's power to regulate advertising by radio may actually be broader than it is with respect to programming. As to the cigarette advertisements ruling and due process, the Commission's extensive consideration of the pleadings since the ruling meets the requirements of due process. Conduct of licensees prior to publication of the instant memorandum opinion and order will not be considered adversely at renewal of license time. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315, ¶10:317] Scope of Fairness Doctrine.

The Fairness Doctrine applies to advertising. Absence of a specific reference to the Doctrine in Section 317 of the Act does not show a lack of Commission authority under the general provisions of the Act. The licensee's statutory obligation to operate in the public interest includes the duty to

make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising. This duty extends to cigarette advertising which encourages the public to use a product that is habit forming and in normal use may be hazardous to health, and the licensee's compliance with this duty may be examined at renewal time. The public interest standard and the Fairness Doctrine embodied this principle from their inception. Assuming the contrary, the Commission clearly has statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315] Compatibility with Cigarette Labeling Act.

The Commission's ruling that broadcast licensees presenting cigarette advertising must otherwise inform the public as to the potential health hazard is not precluded by the Cigarette Labeling Act and is entirely consistent with the Congressional decision to promote extensive smoking education campaigns. The requirement of the Labeling Act that "no statement relating to smoking and health shall be required in the advertising of any cigarette the packages of which are labeled in conformity with the provisions of this Act" does not mean that the FCC or the FTC cannot regulate in other respects concerning smoking and health. The Commission's ruling does not require a health warning in or adjacent to cigarette advertising, does not preclude or curtail presentation of cigarette advertising, and implements the Congressional policy. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315] Cigarette advertising – requirements of Fairness Doctrine.

The Fairness Doctrine ruling with respect to cigarette advertising does not require that the time afforded for the opposing viewpoint be "roughly approximate" to that devoted to the advertising. The Doctrine does not require "equal time" and such a requirement would be inconsistent with the Congressional direction in the field provided in the Cigarette Labeling Act. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315] Fairness Doctrine - cigarette advertising.

Contention that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission invalidly made a blanket ruling that any cigarette advertising per se presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose, is rejected. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose. The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claim made in opposition to cigarette commercials. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315] Cigarette advertising - Time for opposing viewpoint.

Where the controversial issue posed is one of a health hazard and the repeated and continuous broadcasts of the cigarette advertisement may be a contributing factor to adoption of a habit which may lead to untimely death, the licensee is under a higher duty than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard. The frequency of the presentation of the one side and the nature of the potential hazard necessitates presentation of the opposing viewpoint on a regular basis, e.g., each week. A licensee is not required to treat the issue through presentation of spot messages. The type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. The carriage of the normally substantial amount of weekly cigarette commercials requires more than an occasional program a few times a year or announcements once or twice a week giving the opposing viewpoint. A significant amount of time each week must be allocated to presentation of the opposing viewpoint. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315] Effect of ruling on products other than cigarettes.

The Commission's ruling on cigarette advertising applies only to such advertising and imposes no Fairness Doctrine obligation on licensees with respect to other product advertising. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315] Adverse impact on broadcasting and tobacco industries.

The Commission will tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry. It is not realistic to assume that the requirement will cause cigarette advertisers and manufacturers to turn to other advertising media. The cigarette advertising ruling does not preclude or curtail the ability of cigarette manufacturers to obtain advertising time on broadcast media. Licensees remain free to present such cigarette advertising as they choose. Station WCBS-TV, 11 RR 2d 1901 [1967].

[¶10:315] Procedures on adoption of cigarette advertising ruling.

In view of the extensive consideration given to arguments against the Fairness Doctrine ruling on cigarette advertising, and the fact that the ruling is not effective as to any broadcast licensee until publication of the instant opinion in the Federal Register, petitioners (three television networks, numerous individual licensees, the NAB, and representatives of the advertising and tobacco industries) have been adequately heard and have suffered no prejudice by virtue of not having been accorded an opportunity to be heard prior to the ruling. Station WCBS-TV, 11 RR 2d 1901 [1967].

MEMORANDUM OPINION AND ORDER

By the Commission: (Commissioners Loevinger and Johnson concurring and issuing statements; Commissioner Wadsworth absent).

1. The Commission has before it for consideration: a "Petition for Rule-making" and a "Petition for Stay of Effectiveness of Application of Fairness Doctrine to Cigarette Advertising," filed on June 20, 1967 by the law firm of Smith, Pepper, Shack and L'Heureux on behalf of various broadcast clients;

a letter, dated June 23, 1967, from Columbia Broadcasting System, Inc. (CBS), requesting reconsideration of a ruling in the Commission's letter of June 2, 1967 [9 RR 2d 1423] to television station WCBS-TV; a "Petition for Reconsideration" and a "Petition for Immediate Stay of Effectiveness Pending Reconsideration by the Commission," filed on July 3, 1967 by the National Association of Broadcasters (NAB); a letter from Association of National Advertisers, Inc., dated June 29, 1967, requesting reconsideration of the ruling; petitions for reconsideration, incorporating requests for stay, filed by The Tobacco Institute, Inc., et al., and WGN Continental Broadcasting Co., et al. on June 30, 1967 and July 3, 1967, respectively; and petitions or requests for reconsideration filed on July 3 and 5, 1967 by American Broadcasting Companies, Inc. (ABC), National Broadcasting Company, Inc. (NBC), Storer Broadcasting Company, Griffin-Leake TV, Inc., et al., the law firm of Dow, Lohnes and Albertson on behalf of 17 broadcast licensees, and the law firm of Pierson, Ball & Dowd on behalf of the licensees of 61 radio and television stations. A petition for reconsideration was filed on August 1, 1967 by the Maryland/District of Columbia/Delaware Broadcasters' Association; and a "Statement of Position by Federal Communications Bar Association" on July 27, 1967. 1/ Requests for reconsideration have also been received from several Congressional sources. A pleading in support of the Commission's ruling has been filed by the complainant, John F. Banzhaf III; his pleading challenges the standing of the petitioners and many of the arguments advanced, and urges denial of the relief sought. 2/ Petitioners seek rule making on, and reconsideration and rescission of, a ruling in the Commission's letter of June 2, 1967 to television Station WCBS-TV, New York City, that the Fairness Doctrine is applicable to cigarette advertising (FCC 67-641), and a stay of the effectiveness of the ruling pending action on their petitions.

2. Our ruling (FCC 67-641) was made on a complaint against Station WCBS-TV, New York, by Mr. John F. Banzhaf III, who asserted that this station, after having aired numerous commercial advertisements for cigarette manufacturers, had not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking." Specifically, he noted three cigarette advertisements broadcast on November 24, 1966 over WCBS-TV which presented smoking as "socially acceptable and desirable, manly, and a necessary part of a rich full life." Attached to the complaint was a letter by Mr. Banzhaf to the station requesting that free time be made available to "responsible groups" roughly approximate to that spent on the promotion of the "virtues and values of smoking." There was also attached a reply to Mr. Banzhaf by WCBS-TV

1/ In addition, the Commission has received various resolutions from state associations of broadcasters and numerous letters from the public.

2/ We do not find the arguments raised as to petitioners' standing persuasive.

setting forth the programs which it had broadcast on the effect of smoking on health, taking the position that these programs provided contrasting viewpoints on this issue, and stating its view that the Fairness Doctrine may be inapplicable to commercial announcements solely aimed at selling products. In Mr. Banzhaf's complaint, he asserted that the WCBS-TV showing of compliance with the Fairness Doctrine was insufficient to offset the effects of advertisements broadcast daily for a total of five to ten minutes each broadcast day.

3. The Commission ruled that the Fairness Doctrine is applicable to cigarette advertisements, but rejected Mr. Banzhaf's claim that the time to be afforded roughly approximate that devoted to cigarette commercials. We held that a station which carries commercials promoting the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of this controversial issue of public importance – i.e., that however enjoyable, such smoking may be a hazard to the smoker's health. We stated that here, as in other areas under the Fairness Doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the facts of his situation; and that accordingly the initial judgment as to whether sufficient time is being allocated each week in this area by WCBS-TV is one for the licensee.

4. By a letter to the Commission dated June 23, 1967, CBS requests that the contents of its letter be treated as the comments of WCBS-TV on the complaint and that the Commission reconsider its ruling on the basis of these comments. CBS does not request a stay of the effectiveness of the ruling, but does challenge the merits of the ruling.

5. In support of their requests for relief, other petitioners urge that the ruling has broad implications and will affect all licensees carrying cigarette advertising though they did not have an opportunity to be heard prior to its adoption. It is asserted that substantial doubts as to the validity of the ruling are presented by the various requests for reconsideration and other relief, and that licensees will not dare risk non-compliance pending action on these pleadings lest their non-compliance be raised at license renewal time. It is further asserted that licensees would suffer irreparable damage in the interim by temporarily adhering to the ruling because they would risk loss of substantial amounts of advertising revenue and compliance would disrupt station advertising policies as well as give rise to scheduling and production problems. Consequently, petitioners state, fairness and an equitable administration of the Fairness Doctrine call for a suspension of the effectiveness of the ruling pending action on the petitions for reconsideration and rule making.

6. We agree that the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS-TV and may necessitate a change in the operations of some. In view of the widespread interest in the ruling by persons who have not hitherto been heard, and since stay relief has been requested, we have decided to give expeditious consideration to the arguments made in all of the pleadings before us to determine whether anything has been advanced on the merits which would warrant reconsideration of our ruling, a stay of its effectiveness, or rule making in this area. The positions of the

parties appear to be amply set forth in the pleadings on file, and we have given thorough consideration to the arguments made in reaching our decision. For the reasons set forth below, it is the conclusion of this Commission that nothing has been advanced which would warrant reconsideration or a stay of our ruling or rule making. However, in the circumstances, we have decided for reasons of equity that the conduct of licensees (including WCBS-TV) in applying the Fairness Doctrine to cigarette advertising prior to the publication date of this Memorandum Opinion and Order (which we shall also mail to all broadcast licensees) will not be considered in connection with their applications for renewal of license; conduct subsequent to that date will receive consideration, in specific rulings where appropriate or at license renewal time.

I. PETITIONERS' ARGUMENTS ON THE MERITS

7. The principal contentions presented on the merits of the ruling are: (A) that the Fairness Doctrine is itself violative of the First and Fifth Amendments to the United States Constitution and hence cannot properly serve as a basis for delineating licensee responsibilities under the Communications Act; (B) that the Fairness Doctrine, even if constitutional, applies only to programming in the nature of news, commentary on public issues or editorial opinion, and does not extend to advertising; (C) that the Commission is precluded from applying the Fairness Doctrine to cigarette advertising because Congress has preempted the field and the Commission's ruling is contrary to Congressional policy; (D) that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement per se presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose; (E) that the requirement that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by smoking and the suggestion that a licensee might, inter alia, present a number of public service announcements of the American Cancer Society of the Department of Health, Education and Welfare, will cause a debasement of the Fairness Doctrine generally and substitute Commission fiat for licensee judgment; (F) that the ruling cannot logically be limited to cigarette advertising alone; (G) that the ruling will have an adverse financial effect upon broadcast licensees by causing the cigarette industry to turn to other advertising media and will also have an adverse effect on the sale of cigarettes; and (H) that the ruling is in any event procedurally invalid for failure to accord interested persons an opportunity to be heard prior to the issuance of a novel and unprecedented policy determination. We shall carefully examine each of these contentions below and set forth in full our reasons for concluding that they lack merit.

A. Constitutionality of Fairness Doctrine

8. Those parties claiming that the Fairness Doctrine is violative of the First and Fifth Amendments to the Constitution incorporate by reference their comments to this effect in Docket No. 16574, In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or

Where a Station Editorializes as to Political Candidates.3/ By a Memorandum Opinion and Order [10 RR 2d 1901] released on July 10, 1967 in that docket (FCC 67-795), the Commission rejected the contention as to the First Amendment. For the reasons and authorities there set forth, we adhere to that determination here. 4/ The Fifth Amendment challenge was also rejected in Red Lion Broadcasting Co. v. FCC [10 RR 2d 2001], Case No. 19,938 (CA DC, decided June 13, 1967), and we see no valid distinction in the circumstances of this matter. 5/

B. Scope of Fairness Doctrine

9. In contending that the Fairness Doctrine does not apply to advertising, the parties argue that the doctrine had its genesis in the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 FCC 1246 [25 RR 1901], which was meant to apply only to dissemination of news, commentary on public issues, and editorial opinion because it contains no reference to advertising. It is further urged that no mention of advertising was made in the 1964 Fairness Primer, 29 FR 10415 [2 RR 2d 1901], and that the Commission has never interpreted the doctrine as applying to advertising. In addition, it is asserted that Congress, in giving specific approval to the Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting in the 1959 amendment of Section 315 a) of the Communications Act, 73 Stat. 557, 47 USC §315(a), limited the scope of the doctrine to programming of that nature since it did not amend Section 317 of the Act to incorporate a similar provision. It follows, the parties state, that the present

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3/ This contention is made by the NAB, the law firm of Pierson, Ball and Dowd, and WGN Continental Broadcasting Co., et al. The petition for rule making filed by Smith & Pepper states that it does not address itself to the question of whether Red Lion Broadcasting Co. v. FCC, Case No. 19,938 (CA DC, June 13, 1967), is good law.

4/ Since advertising, although not wholly beyond the First Amendment, enjoys less protection than other speech (See Murdock v. Pennsylvania, 319 US 105, 110-111; Valentine v. Chrestenson, 316 US 52, 54; Martin v. Struthers, 319 US 141, 142, note 1; Beard v. Alexandria, 341 US 622, 641-643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to programming. See Head v. Board of Examiners, 374 US 424, 430-431, 437-441 (advertising), and cf. Farmers Union v. WDAY, 360 US 525, 529-530 [18 RR 2135] (political broadcasts); Henry v. FCC, 302 F2d 191, 194 [23 RR 2016] (CA DC), cert. den. 371 US 821 (entertainment).

5/ Insofar as it is asserted that due process has not been accorded, we believe that our extensive consideration of the pleadings filed since the ruling meets the requirements of due process in view of the nature of the issue and the arguments relating thereto (see paragraphs 55-58, infra). The conduct of licensees prior to the publication of this Memorandum Opinion and Order will not be considered adversely when the question of renewal of license arises.

ruling is an unprecedented extension of the Fairness Doctrine which is beyond the Commission's discretion or statutory authority.

10. We do not find these arguments persuasive. The Fairness Doctrine has its foundation in the obligation imposed on licensees by the Communications Act to operate in the public interest (see discussion, infra, paragraph 64), which includes the "basic policy of the 'standard of fairness'" and the "broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." H. Report No. 1069, 86th Congress, 1st Session, page 5; S. Report No. 562, 86th Congress, 1st Session, page 13; Section 315(a); 1949 Report on Editorializing, 13 FCC 1246, 1248-1249. That "one of the basic elements of any such operation" (13 FCC at 1248) is a recognition by the licensee of "the right of the public to be informed" (13 FCC at 1249) as to "opposing positions on the public issues of interest and importance in the community" (13 FCC at 1258) when the licensee is presenting programming in the nature of news, commentary on public issues or editorial opinion, does not mean that the licensee is relieved of his statutory responsibility for advertising broadcast over his facilities or his over-all duty to operate in the public interest and to make a fair presentation of controversial issues of public importance in whatever context they may arise. Section 315(a); 1949 Report on Editorializing, 13 FCC at 1257-1258. Moreover, the circumstance that Congress specifically incorporated in the Fairness Doctrine into the 1959 amendment to Section 315 to make it "crystal clear" that the programming exemptions from the equal time requirement of that section did not exempt licensees "from objective presentation thereof in the public interest" does "not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy." S. Report No. 562, 86th Congress, 1st Session, page 13; 105 Congressional Record 14439. 6/ Most important, the amendment refers to the obligation imposed upon broadcast licensees". . . under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (emphasis supplied).

11. The Commission's present ruling that advertising falls within the public interest responsibilities of a licensee is not a novel or unprecedented policy determination. See concurring opinion of Mr. Justice Brennan in Head v.

6/ Given the background to the 1959 amendments (see Red Lion Broadcasting Company v. FCC, supra), we are unable to see any significance in the fact that Congress did not also amend Section 317 to incorporate the Fairness Doctrine expressly. In any event, as stated, the absence of a specific reference to the Fairness Doctrine in Section 317 does not show a lack of Commission authority under the general provisions of the Act.

Board of Examiners, 374 US 424, 437-441 [25 RR 2087]. This opinion sets out in detail the administrative and other pertinent history establishing the pattern of Commission regulation in this area. See paragraph 13, infra.

12. The Commission has always directed itself particularly to programming and advertising which bears upon public health and safety. The Federal Radio Commission denied a renewal of license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given in letters from listeners, and which received a rebate on each prescription sold. KFKB Broadcasting Association v. FRC, 47 F2d 670, 671 (CA DC). The Radio Commission held, with judicial approval, that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." Id., at 671-672. The Communications Commission has similarly condemned advertising of alleged medical prescriptions and quack remedies which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. Farmers and Bankers Life Insurance Co., 2 FCC 455, 457-459. The Commission stated that "[a] broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." 2 FCC at 458. See also WSBC, Inc., 2 FCC 293, 294-296, and Oak Leaves Broadcasting Station, Inc., 2 FCC 298 (both involving advertising of quack medicines by one not licensed to practice medicine). The Commission has also applied the Fairness Doctrine to products such as Krebiozen and to the health issues involved in Carlton Fredericks program, "Living Should be Fun." See 33 FCC 101, 107 [23 RR 1599] (1962). 7/

13. Mr. Justice Brennan, in his concurring opinion in the Head case, 374 US at 439, noted that

> ". . . As early as 1928, for example, the General Counsel of the Radio Commission held that abuses in network cigarette advertising – while not a sufficient basis for revocation proceedings against an individual licensee – might on renewal militate against the requisite finding of broadcasting in the 'public interest.'"

The opinion also notes (note 15) that

> "Shortly after the issuance of the General Counsel's opinion, the Chairman of the Federal Radio Commission was asked by Senator

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7/ As further administrative background in this area, see In re petition of Sam Morris, 11 FCC 197 [3 RR 154] (1946), where the Commission indicated the applicability of the Fairness Doctrine to advertising in certain situations.

> Dill during his appearance before the Senate Commerce Committee whether he thought the Commission had sufficient power 'through its power of regulation and its determination of public interest to handle objectionable advertising?' The Chairman replied, 'I think so, Senator Dill, because we have had little trouble about it, even without direct power. . . .'" Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Congress, 1st Session, part 6, page 230.

See also Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Congress, 1st and 2d Sessions, pages 88-89. The particular complaint leading to the General Counsel's opinion charged, inter alia, that "the object of this broadcasting is to transform 20,000,000 adolescent boys and girls into confirmed cigarette addicts by creating a vast child market for cigarettes in the United States," that "10,000,000 boys throughout the country are being viciously and deliberately misled by paid testimonials, secured from professional athletes, football coaches and others, definitely suggesting the use of cigarettes as an aid to physical prowess," that "the medical opinion of the country is being continuously misrepresented to support the health and medical claims made for cigarettes," that the specific claims made for a particular brand of cigarette advertised on the air are overwhelmingly opposed by established health and medical facts," and that "Such radio activities, the petitioner maintains, are clearly contrary to public interest, public welfare and public health." Opinion No. 32, 1928-1929 Opinions of the General Counsel, Federal Radio Commission, 77, at 78 (April 15, 1929). General Counsel Bethuel M. Webster, Jr. concluded that the "Commission may find, in view of this showing, that public interest, convenience, and necessity will not be served by further renewal of the licenses in question, in which case the matter will be set for hearing pursuant to Section 11, and petitioner's prayer for general relief will be granted." Id., at 82.

14. In short, we believe that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and Governmental reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined at license renewal time (see 1960 Programming Policy Statement, 20 Pike and Fischer, Radio Regulation 1901, 1912-1913). It is our belief that the public interest standard and Fairness Doctrine embodied this principle from their inception. In any event, even assuming the contrary, we think that the Commission clearly has the statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time. While the agency's position as to what the obligation to operate in the public interest requires for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette Labeling and Advertising Act (Public Law 89-92, 15 USC §1331 et

seq.) in 1965, and the recent Reports to Congress by the Federal Trade Commission and the Department of Health, Education and Welfare pursuant to that Act, it is not an abuse of discretion for the Commission to decide now that a licensee who presents programming and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation adequately to inform the public as to the possible hazard. 8/ See infra, paragraphs 30-32. Nothing that is presented in the extensive pleadings filed in this matter convinces us that petitioners should prevail on their position to the contrary.

C. Compatibility with the Cigarette Labeling Act

15. Petitioners further urge that Congress in the Cigarette Labeling and Advertising Act of 1965 (Public Law 89-92, 15 USC §1331 et seq.) preempted Federal, State and local activity to compel health warnings in cigarette advertising, and that the Commission's ruling is not only inconsistent with that policy but lies also in an area where Congress has withdrawn authority. On the basis of our analysis of the provisions of the Labeling Act and its legislative history, we agree that no Federal or State body could legally adopt regulatory measures which would require either a cessation of cigarette advertising or the inclusion of a health warning in the advertisement itself. We nevertheless believe, for the reasons set forth below, that our ruling that broadcast licensees presenting cigarette advertising must otherwise inform the public as to the potential health hazard, is not precluded by the Labeling Act and is entirely consistent with the Congressional decision to promote extensive smoking education campaigns.

16. The Cigarette Labeling Act states that:

> "It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby –
>
> > (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
> >
> > (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and

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8/ It has long been recognized, of course, that "the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes." Pinellas Broadcasting Co. v. FCC, 230 F2d 204, 206 [13 RR 2058] (CA DC), cert. den., 350 US 1007.

> advertising regulations with respect to any relationship between smoking and health."

The Act thus requires the labeling of cigarette packages with the statement: "Caution: Cigarette Smoking may be Hazardous to Your Health." The Act also does the following: (1) makes it unlawful for any person to manufacture, import, or package for sale within the United States any cigarettes which do not bear the above-mentioned statement on the package. Violation of this requirement is made a misdemeanor subject to a fine of not more than $10,000. (Sections 4, 6); (2) prohibits the requirement of any other cautionary statement on the labeling of cigarettes under laws administered by any Federal, State or local authority (Section 5(a)), and prohibits, for three years, any requirement by any Federal, State, or local authority that cigarette advertising include a statement relating to smoking and health (Section 5(b)); (3) states that the Federal Trade Commission has no authority to require any cautionary statement in any advertisement of cigarettes labeled in conformity with the Act but otherwise neither limits nor expands the authority of the FTC with respect to the dissemination of false or misleading advertisements of cigarettes (Section 5(c)); (4) permits injunctions to be obtained to restrain violations of the Act, and provides an exemption for cigarettes marufactured for export from the United States (Sections 7 and 8); and (5) requires two Federal agencies to transmit reports to Congress before July 1, 1967 and annually thereafter: (a) the Secretary of Health, Education, and Welfare concerning current information on the health consequences of smoking and recommendations for legislation and (b) the Federal Trade Commission concerning the effectiveness of cigarette advertising, current practices and methods of cigarette advertising and promotion, and recommendations for legislation.

16a. Section 5 – the portion pre-empting Federal, State and local activity to compel health warnings in cigarette labeling and advertising – provides in subsection (b):

> "No statement relating to smoking and health shall be required in the advertising of any cigarette the packages of which are labeled in conformity with the provisions of this Act."

It is clear from the wording of this section that neither the FCC nor the FTC could require cigarette advertisements to contain statements of health warnings. However, this does not mean that the FCC or the FTC cannot regulate in other respects concerning smoking and health. The section does not read, as petitioners would have it, that no statement by others interested in informing the public of the potential hazard from smoking may be required "because of the advertising of any cigarette" – i.e., not in or adjacent to the advertising but at some other time period, by others or the licensee, because the advertising has presented but one face of this important issue to the public. Moreover, although the Senate debate on the Labeling Act is not wholly clear in this respect, 9/ the House debate indicates that the FTC is still free to

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9/ 111 Cong. Rec. 15597-15598 (1965).

regulate with respect to misleading or deceptive advertising concerning smoking and health under Section 5 of the Federal Trade Commission Act. 10/ For example, if an advertisement said that cigarette smoking was not a health hazard, the FTC could act to prevent such advertising. The Chairman of the House Commerce Committee explained that the Labeling Act did not purport to change the present authority of the FTC, only to limit that authority with respect to compulsory inclusion of statements concerning smoking and health in cigarette labels and advertising. 11/ See Section 5(c) of the Act. The FCC's regulatory authority was not discussed in the committee reports on the proposed legislation or in the legislative debates. Nevertheless the background and legislative history of the Labeling Act furnish some basis for judging what impact, if any, that Act has on the FCC's authority in this field, particularly under the Fairness Doctrine.

Legislative History

17. The pertinent background to the 1965 Act is set out in Appendix A. We turn here to the relevant legislative history. Prior to 1964 a number of bills had been introduced without enactment by Congress in an effort to compel cigarette manufacturers to acquaint the public in various fashions with the health hazards of smoking. With the Advisory Committee's Report as a catalyst, many bills were introduced during the Second Session of the 88th Congress embodying several approaches to acquaint the public with the hazards of smoking: (1) to require that cigarettes sold in interstate commerce be labeled with a health warning, and/or with a disclosure of nicotine and tar content (H.R. 4168; H.R. 7476; H.R. 9693); (2) to confer on the FTC the power and duty to regulate advertising and labeling of cigarettes (H.R. 9655; H.R. 9657, H.R. 9808, S. 2429); (3) to amend the Federal Food, Drug and Cosmetic Act so as to make that Act applicable to smoking (H.R. 5973; H.R. 9512); (4) to provide for informational and educational campaigns by HEW to acquaint the public with the health hazards involved in the use of cigarettes and to provide for continued research in this field (H.R. 9668; S. 2430); and (5) to enjoin all Government agencies, etc., from taking any action or pursuing any policy which encourages or promotes the public to buy or use cigarettes (S. 2430).

18. As a result of the submission of these bills, Chairman Harris conducted hearings from June 23, 1964 through July 1, 1964 before the House Commerce Committee concerning possible action by Congress. The purposes of the hearings were to review the scientific evidence of the causal link between smoking and cancer and, if Federal action was found to be required in the interest of public health, to determine what approach would be most desirable. Chairman Harris commented later that the closing days of that session of

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10/ 111 Cong. Rec. 16541-16544 (1965).

11/ Remarks of Chairman Harris, 111 Cong. Rec. page 16544 (1965).

Congress had not permitted sufficient time for further hearings and for the preparation and consideration of carefully drawn legislation in this field. These hearings before the House Commerce Committee were the only hearings conducted on the subject of cigarette labeling and advertising by either side of Congress during the second session of the 88th Congress.

19. Legislative activity resumed in the first session of the 89th Congress with consideration of bills taking three basic approaches to the smoking health hazard problem: (1) to amend the Federal Food, Drug and Cosmetic Act to regulate smoking products (H.R. 2248); (2) to provide for a health warning and/or nicotine and tar content on the label of cigarette packages (S. 559; H.R. 3014; H.R. 4007; H.R. 7051; H.R. 4244); and (3) to give the FTC the power and duty to regulate advertising and labeling of cigarettes (S. 547). Both the Senate and the House Commerce Committees undertook hearings to determine the state of the medical evidence for and against the causal link between smoking and disease and to determine what Federal action, if any, should be required in the public interest. With regard to these questions, the Senate Committee concluded (S. Report No. 195, 89th Congress, 1st Session, page 3):

> "While there remain a substantial number of individual physicians and scientists – the Commerce Committee received testimony from 39 of them – who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.
>
> "The Commerce Committee, therefore, concurs in the judgment that 'appropriate remedial action. is warranted."

The House Committee was unwilling to conclude for or against the medical opinions embodied in the Advisory Committee's Report or the medical evidence elicited by its own hearings. However, it did conclude that Congressional action should be taken with regard to the relationship of smoking and health. H. Report No. 449, 89th Congress, 1st Session, page 3.

20. As petitioners point out, Congress in enacting the Cigarette Labeling Act was concerned about possible economic impact on the tobacco and broadcasting industries, as well as the potential health hazard to the public. The House Report states (id., at page 3):

> "The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by Congress after considering all facets of the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products are involved. Some proposals have been made

in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States."

21. The compromise evolved by Congress was to require a health warning in labeling, but not in advertising, for an interim period pending a further Congressional determination as to whether extensive smoking education campaigns and industry self-discipline would render such a drastic step unnecessary. The Senate Report states (S. Report No. 195, 89th Congress, 1st Session, page 5):

"Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package, which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking."

The House Report similarly states that the Cigarette Advertising Code and the educational and informational programs of HEW in combination with the Labeling Act made it unnecessary to insert health warnings in cigarette advertising as proposed by the FTC (H. Report No. 449, 89th Congress, 1st Session, pages 4, 5). The Labeling Act provides that the provisions which affect the regulation of advertising shall terminate on July 1, 1969 (Section 10). The reason for specifying this termination date was the expectation of Congress that before that date, on the basis of all available information, including that contained in the reports to be submitted by HEW and FTC, it would re-examine the subject matter of the Labeling Act.

Conclusion

22. In light of the foregoing, it is our view that Section 5 of the Labeling Act was meant to preclude any requirement of a health warning in the advertising itself, as proposed by the FTC rule (see paragraph 7, Appendix A), but there was no legislative intent otherwise to foreclose the use of radio, along with other educational media, as an effective means of informing the public to the potential hazard of smoking. The Fairness Doctrine has its reason for being in (1949 Report on Editorializing, 13 FCC at 1249):

". . . 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 controverisal 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." [Footnote omitted.]

We also cannot believe that Congress would have overturned so basic a tenet of communications law and policy in this area or that it would have withdrawn so fundamental a responsibility of the Commission without some express indication and explanation. See paragraph 30, infra. On the contrary we believe that for reasons developed below, our action is entirely consistent with the "comprehensive Federal program. . ." (Section 2, Cigarette Labeling Act), since it will promote the "extensive education campaigns," which Congress noted and relied upon in reaching the policy judgment embodied in the Act (see paragraph 21, supra).

23. As stated, our ruling accords with and is tailored to the legislative policy embodied in the Labeling Act. In the first place, the ruling does not require a health warning in or adjacent to cigarette advertising – a matter coming within Section 5(b) of the "pre-emption" portion of the Act. Rather it leaves to the good faith, reasonable judgment of the licensee – upon the facts of his situation – the matters of the type of programming, the nature of the time to be afforded for the opposing viewpoint, and the amount of time to be allocated on a regular basis.

24. Second, our ruling does not preclude or curtail presentation by stations of cigarette advertising which they choose to carry (see also, paragraphs 48-54, infra). We rejected Mr. Banzhaf's claim that the time afforded for the opposing viewpoint should "roughly approximate" that devoted to cigarette advertising, not only because the Fairness Doctrine does not require "equal time" but also in the belief that this would be inconsistent with the Congressional direction in this field provided in the Labeling Act. For, we recognized that the "practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising." We stressed that our action would be tailored so as to carry out the Congressional purpose, and we shall of course adhere to that guideline in implementation of the ruling.

25. Most important, we think that our ruling implements the smoking education campaigns referred to as a basis for Congressional action in the Labeling Act (supra, paragraph 21). Congress itself has affirmatively promoted such educational efforts by appropriating $2 million for use by HEW in this direction. Public Law 89-156, Title II, Public Health Services, Chronic Diseases and Health of the Aged. As a consequence, HEW has established the National Clearinghouse for Smoking and Health. Its purposes are to collect, organize and disseminate information on smoking and health, to provide encouragement and support for state and local educational activities, and to conduct research into the behavioral nature of the smoking habit. The Public Health Service and others have acted to inform the public on smoking and health directly by sending lecturers across the United States to address local groups, distributing printed information to the public, and furnishing the broadcast media with spot announcements on smoking and health. The Public Health Service reported in January 1967 that it has distributed spot announcements to over 900 radio stations and is at present approaching individual television stations to obtain further coverage for its messages. The American Cancer Society reports that it has received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health.

26. The Public Health Service has also worked through local organizations to warn the public of the health hazards of smoking. It is in direct contact with a number of regional, state, or local inter-agency advisory committees on smoking and health, which have worked to stimulate community interest in thirty-five states. As a result of this stimulus and others, the medical societies of at least 18 states have made statements linking cigarette smoking with lung cancer and other health hazards and, in some cases, have undertaken organized activity to publicize the relationship of smoking and health. For example, the California Medical Association has recently undertaken a program urging individual doctors to acquaint their patients with the health hazards of smoking. Local and statewide civic groups have also started public education efforts.

27. The Public Health Service and the United States Children's Bureau have directed a special education campaign aimed at school age children. To date, school programs on smoking and health reach about 70 per cent of the school children in the United States. Forty states have developed materials on smoking and health for children or plan to do so, and twenty-seven states have either held conferences on smoking and health or intend to do so. In September 1966 a nation-wide program to discourage smoking among 7th and 8th graders was launched by the National Congress of Parents and Teachers. This plan is being supported by the Public Health Service and is operating in 21 states.

28. The affected industries have renewed their efforts at self-regulation since the enactment of the Labeling Act. While there has been no change in the Cigarette Advertising Code of the cigarette manufacturers, they have sought and obtained FTC approval to make factual advertising statements about tar and nicotine content. On March 25, 1966, the FTC determined that a factual statement of the tar and nicotine content of the mainstream smoke from a cigarette would not be in violation of that Commission's 1955 Cigarette Advertising Guides or of any provision of the law administered by the Commission. However, no collateral statements (other than the factual statement of tar and nicotine content of cigarettes) suggesting the reduction or elimination of health hazards in smoking are allowed, and all these factual statements must be based upon a standardized testing technique. 12/

29. In October 1966 the Code Authority for the NAB issued the Cigarette Advertising Guidelines which they had announced during the 1965 Senate hearings would be forthcoming. 13/ The main objectives of the guidelines are to

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12/ New York Times, March 29, 1966, 53:6.

13/ Text of the New Cigarette Advertising Guidelines

Athletic Activity: A person who is or has been a prominent athlete shall not be used in a cigarette commercial. Cigarette commercials shall not depict persons participating in, or appearing to be participants in, sports or athletic activity requiring physical exertion.

[Footnote continued on following page].

restrict advertising appeals to youth and statements concerning the health benefits of smoking. In January 1967, the Code Authority announced in a news release a slight change in the Television Code to strengthen its position as to appeals to youth. The Television Code, Section IX, General Advertising Standards, Paragraph 7, now reads:

> "The advertising of cigaretts shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to youth that the use of cigarettes contributes to individual achievement, personal acceptance or is a habit worthy of imitation."

30. Considering these affirmative efforts by Congress, federal, state and local public and private agencies, and the affected industries to educate the public as to the smoking health hazard and, particularly, to discourage youth from forming the habit, we are not persuaded by petitioners' argument that HEW and FTC have primary jurisdiction in this matter and that this Commission alone is precluded from following its traditional method of assuring that the public is adequately informed as to both sides of this controversial issue of public importance. Significantly, Congress was at pains to spell out what was preempted (Sections 5(a) and (b), and specifically stated that except as is otherwise provided in subsections (a) and (b), "nothing in this Act shall be

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13/ [Footnote continued from preceding page].

Tar and Nicotine Statements: Factual statements of tar and nicotine content of cigarettes are subject to proper documentation. No statements or claims regarding benefits to health and well-being are acceptable.

Filters: Cigarette advertising shall not state that because of the presence of the filter or its construction the cigarette is beneficial to the health or well-being of the smoker.

Uniformed Individuals: Individuals in certain types of uniforms have a special appeal to youth. Therefore, such uniformed individuals as commercial pilots, firemen, the military and police officers shall not be used in cigarette advertising.

Premiums: Cigarette advertising shall not include references to offers of premiums which are primarily designed for youth.

Portrayal of Youth: Children or youth shall not appear in cigarette commercials in any manner, even though they are merely bystanders or part of the background. Cigarette advertising shall use individuals who both are and appear to be adults and who are shown in settings associated with adults.

construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes. . . ". Similarly, we believe that there was no preclusion of FCC action, so long as such action is consonant with the "comprehensive Federal Program. . . " (Section 2). As set forth in the prior discussion, we think that our responsibilities and policies under the Communications Act and our ruling herein are entirely consonant with the Congressional objectives in this area. Indeed, it is our belief that the Commission could not properly follow any other course in this matter. For this Commission, like other administrative agencies, was "not commissioned to effectuate the policies" of the Communications Act "so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." Southern S.S. Co. v. Labor Board, 316 US 31, 47.

31. One further contention of petitioners on this aspect warrants discussion. It is asserted that we are precluded from issuing our ruling because the Commission declined to make any recommendation to Congress in connection with the Labeling Act legislation on the ground that it had not yet studied the matter, and because the Commission still has not conducted any study or proceeding on the smoking hazard issue. The circumstances giving rise to the contention are as follows: Prior to the issuance of the Advisory Committee Report, the Commission stated in a "by direction" letter, concerning possible rule making with regard to advertising, promoting or encouraging cigarette smoking among young people, that action would be inappropriate before the Advisory Committee's Report was available and (Letter to Senator Magnuson, FCC 63-1033):

> "The Commission's concern is limited, of course, to advertising in the broadcast field. Other agencies may have authority to take comprehensive and effective action, if necessary or appropriate. It is, we think, obviously more desirable to treat such an important matter, if possible, on a broad, across-the-board basis rather than in piecemeal fashion."

When the Advisory Committee's Report was issued and the FTC had announced its rule making proceeding concerning cigarette labeling and advertising (see Appendix A), the Commission on January 1964 initiated plans to coordinate its efforts with the comprehensive regulation which the FTC had proposed and with activities of other interested agencies. FCC Letter to FTC Chairman Dixon, FCC 64-29 (January 15, 1964). On February 7, 1964, in "by direction" letters to Congressman Leonard Farbstein (FCC 64-100) and his constituent, Mr. Sidney Katz (FCC 64-99), then Chairman Henry answered a request to institute rule making proceedings to ban cigarette advertising by reiterating the policy statement quoted above and noting that the Commission would await the results of the FTC rule making proceeding before acting in this area. When asked to comment on S. 2429, 88th Congress, and S. 547 and S. 559, 89th Congress, the Commission reiterated its policy that it favored "across-the-board treatment of the matter of regulating cigarette advertising and that since the FTC had undertaken a comprehensive remedial regulatory plan, the

FCC had not held proceedings or undertaken studies to evaluate the various factors and considerations in this area. Comments on S. 2429, 88th Congress, FCC 64-730; Comments on S. 559 and S. 547, FCC 65-96.

32. We do not believe that these facts preclude us, as a matter of law or of policy, from issuing our ruling in the present circumstances. First, as shown above, circumstances have changed. The FTC, while proceeding in other respects consistent with the 1965 Act, is not, of course, undertaking its comprehensive regulatory plan to require a health hazard announcement to accompany each cigarette commercial. Second, as also shown above, our ruling is consistent with and particularly suited to promoting the "across-the-board" objective of Congress to treat this matter through extensive campaigns to educate the public as to the hazards of smoking. Third, we did not defer to the FTC as a matter of legal authority but rather of policy. The Commission is not precluded from changing its policies so long as any new policy adopted is, like our ruling, reasonable in the circumstances. See supra, paragraph 14 and footnote 8. And, finally, studies by this Commission are clearly not required to evaluate the various factors and public interest considerations posed by the issue of smoking and health, particularly since Congress declared and pursued its policy of promoting smoking education campaigns. In this connection, see also the discussion below (paragraphs 33-34 and 60-62).

33. On July 12 1967, HEW submitted its Report to Congress, which includes the Surgeon General's Report on Current Information on the Health Consequences of Smoking. Upon the basis of more than 2000 research studies that have been completed and reported in the biomedical literature throughout the world in the intervening three and one-half years since the Advisory Committee's Report, the Surgeon General states that there is no evidence calling into question the conclusions of the 1964 Report and, on the contrary, the research studies published since 1964 have strengthened those conclusions. The Surgeon General summarizes the present state of knowledge of these health consequences, in the judgment of the Public Health Service, as follows (Surgeon General's Report on the Health Consequences of Smoking – 1967, page 2):

> "1. Cigrette smokers have substantially higher death rates and disability than their non-smoking counterparts in the population. This means that cigarette smokers tend to die at earlier ages and experience more days of disability than comparable non-smokers.
>
> "2. A substantial portion of earlier deaths and excess disability would not have occurred if those affected had never smoked.
>
> "3. If it were not for cigarette smoking, practically none of the earlier deaths from lung cancer would have occurred; nor a substantial portion of the earlier deaths from chronic bronchopulmonary diseases (commonly diagnosed as chronic bronchitis or pulmonary emphysema or both); nor a portion of the earlier deaths of cardiovascular origin. Excess disability from chronic pulmonary and cardiovascular diseases would also be less.
>
> "4. Cessation or appreciable reduction of cigarette smoking could delay or avert a substantial portion of deaths which occur from

lung cancer, a substantial portion of the earlier deaths and excess disability from chronic bronchopulmonary diseases, and a portion of the earlier deaths and excess disability of cardiovascular origin."

In releasing the Report, HEW Secretary John W. Gardner stated (HEW Press Release for July 13, 1967):

> "The relationship between smoking and health has obvious and serious implications for individuals who now smoke and for young people who may be thinking of starting to smoke. From the standpoint of public policy and social concern, this association constitutes one of the most critical health problems today.
>
> "It is perfectly obvious that if we are going to reduce the unnecessary death and illness now caused by cigarette smoking, three things must take place: There must be a reduction in the number of people who smoke, a number which now constitutes 42 per cent of our population. We must do everything we can to encourage young people not to start smoking; at present, half of our young people are cigarette smokers by the time they are 18. And finally, we must work toward the development of a less hazardous cigarette and, concurrently, help develop a climate of opinion which will encourage acceptance if such a cigarette is developed."

34. The June 30, 1967 Report of the FTC to Congress pursuant to the Labeling Act stressed the importance of educating teenagers before they start smoking since the use of cigarettes is so strongly habit forming (Report, page 8). The FTC Report states (page 13) that whether intentional or fortuitous, teenagers appear to be a prime target for televised cigarette advertising and that the "average American teenager sees more cigarette commercials on network television than does the average American" (page 25): "'87.9% of teenage boys' and '89.5% of teenage girls hear radio on the average day'" (page 13). The Report comments (page 24):

> "In making a decision on whether to start smoking, youngsters especially have a right to know that once they start, they may never be able to stop. A viewer of cigarette commercials and advertisements would never hear of this aspect of smoking."

The concluding paragraph of the FTC Report states (page 29):

> "Cigarette commercials continue to appeal to youth and continue to blot out any consciousness of the health hazards. Cigarette advertisements continue to appear on programs watched and heard repeatedly by million (sic) of teenagers. Today, teenagers are constantly exposed to an endless barrage of subtle messages that cigarette smoking increases popularity, makes one more masculine or attractive to the opposite sex, enhances one's social poise, etc. To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story."

35. This Commission agrees. Considering all of the foregoing, we believe that our ruling is within our statutory authority and not precluded by the Congressional policy embodied in the Labeling Act – that rather it implements that policy. We also think it is imperative in the public interest that we exercise our discretion now without delay for further studies.

D. The Argument as to Blanket Ruling

36. Petitioners further contend that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement per se presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. But this argument misconceives the nature of the controversial issue. Mr. Banzhaf's complaint was that the cigarette commercials over WCBS-TV presented the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life." Our ruling points out that:

> "The advertisements in question clearly promote the use of the particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. But we believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance – that however enjoyable, such smoking may be a hazard to the smoker's health."

Petitioners point to no example of a cigarette commercial that does not portray the use of a particular cigarette as attractive and enjoyable as well as encourage people to smoke, and we find it difficult to conceive of one.

37. Further, we are unable to accept the argument that in the absence of any express health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. The June 30, 1967 FTC Report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964 – a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pages 15-16). The FTC states that desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk (ibid.). 14/ The Report supports this conclusion, more than adequately in our view, by a comprehensive review and analysis of the advertising submitted by a large number of cigarette companies and monitored by the Commission (FTC Report, pages 15-23).

14/ The FTC Report states (page 17) that an estimated 58% of the public feel that current cigarette advertising leaves the impression that smoking is a healthy thing to do.

Numerous examples are given of the "satisfaction" theme (pages 15-16); 15/ the "associative" theme (pages 16-17); 16/ "appeals directed to vanity" (pages 17-18); 17/ subtle methods of "assuaging anxiety" about any health

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15/ The Report states that portrayal of satisfaction, particularly oral satisfaction, continues to be an important element of cigarette advertising. Taste or flavor of cigarettes is most often described in terms of "mildness" (Tareyton filters, Montclair menthols, Camel regulars, Carlton filters, Lucky Strike filters, Pall Mall filters, and Chesterfield kings); "smoothness" (Tareyton filters, Pall Mall kings, Newport menthols, and Lucky Strike menthols); "real", "true", "rich" or "great" tobacco flavor or taste (Raleigh filters, Newport menthols, Viceroy filters, Salem menthols, and Philip Morris filters). Invariably, the taste of menthol cigarettes is either cool, fresh and/or refreshing ("coolest flavor," Lucky Strike Green; "forest-fresh taste. . .cooler tasting," Pall Mall; "as fresh as you like it," Philip Morris; "most refreshing coolness." Kool; "fresher," Newport; "fresh menthol flavor," Camel; "Springtime fresh" and "refreshes your taste," Salem; "a full, fresh taste," Chesterfield). The FTC comments (page 16): "The impression forms that "menthol taste" relieves smoking irritation, albeit 'smoking irritation' is never expressly stated."

16/ The Report states (page 16) that associating cigarette smoking with persons, activities, places and things likely to be admired, respected or emulated, i.e., endowing cigarette smoking with a positive associative image, continues unabated in current advertising. For example, outdoor activity of an athletic nature such as sailboating "suggests that the smoking depicted in the foreground, if not conducive to rousingly good health, is certainly not incompatible with it" (FTC Report, page 17). In addition, social events abound in which the viewer is brought into the "wholesome, jolly company of cigarette smokers" (ibid.). E.g., "singing aboard the old paddle wheel steamer (with Pall Mall kings); . . .picnicking (with Camel filters); and coffee klatching (with Winston filters)."

17/ The Report gives as examples of appeals to vanity (pages 17-18):

"Be discriminating: 'Particular about taste. . .I'm particular' (Pall Mall kings); 'They like the style of this cigarette' (Parliament filters). Be exclusive: . . .'exclusive plastic pack' (Philip Morris filters and menthols); 'There's no other cigarette' (Lark filters). . . . 'the smokers who know' (Camel filters). Be a success: 'tastes rich, good, rewarding' (Viceroy filters); 'This man was born rich' (Camel filters). Be a social success: 'Come up to the taste of Kool' (Kool menthols); 'find something better' (Old Gold filters). Be independent: 'break away from the crowd. . .the cigarette for independent people' (Old Gold filters); 'stands out from the crowd' (Salem menthols). Associate with important people: 'Chairmen are never bored with them' (Benson & Hedges filters); the charter boat skipper who has 'got a good ship, a good crew and a good breeze' (Camel regulars)."

hazard (pages 19-21); 18/ the "loyalty" theme (pages 15-16); 19/ and the "bonus" theme, which includes promoting longer cigarettes at popular prices as well as coupon promotions (pages 22-23). 20/ We note also the FTC's comment 21/ (Report, page 18):

> "There is in all of the array of positive images an element of escape from actuality. Some cigarette advertising transcends mere image association and projects its own separate and unique world. Examples include 'Salem Country,' a land in which romantic couples romp and preen through shifting, sylvan settings; the 'Night People,' whose post evening encounters can lead to smoking Parliament filters; and 'Marlboro Country,' where there daily unfolds the simple male heroic virtues of the 'Old West.' Worry over health has been vanished from these shangri-las."

18/ The Report states that as a result of extensive promotion during 1957-1959, the belief appears to be widely held that filter cigarettes are less hazardous to health than regular cigarettes (page 19). Comparatively overt attempts to allay health anxieties have been made by manufacturers of charcoal filter cigarettes by pictorial details of filters creating the impression that they prevent passage of tars and gaseous effusions (Tareyton, Lucky Strike, Tennyson, Cold Harbor, King Sano, Tempo, Duke and Lark). Report, page 20. Other "very low key" advertising enhances the impression of relative safety by adding suitable adjectives to the word "filter": "recessed filters" (Benson & Hedges and Parliaments), "white filters" (Yorks), "menthol filters" (Springs) and "filters with coconut shell charcoal" (Philip Morris). Ibid.

19/ See Report (page 22). Underlying these "loyalty" theme examples is, of course, the promise that the particular cigarette gives great satisfaction (e.g., "Change to Winston and change for good").

20/ The Report states (page 23): "The purchase of Raleigh cigarettes has long been rewarded with coupons redeemable for goods. Today, Belair menthols, Old Gold filters, York filters, Spring menthols, and Domino filters also carry coupons redeemable for goods. Menthol and filter Chesterfields and Philip Morrises carry coupons redeemable for more cigarettes." The Report also gives examples of 100 millimeter cigarette advertising (Benson & Hedges, Lucky Strike, Winston, and Pall Mall), and states (ibid.): "With a definite relationship having been established between amount of cigarette smoking and incidence of lung cancer and other diseases, a fitting motto for the 100 millimeter cigarette campaign might be 'extra health hazard at no extra cost'" (footnotes omitted).

21/ While we have, as petitioners point out, distinguished between explicit and implicit raising of controversial issues in broadcast material where health was not involved (e.g., atheists and agnostics versus the broadcast of religious services), we do not regard those cases as pertinent here in view of the nature of the controversial issue.

38. It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose. We see no inequity in the circumstance that cigarette advertisers are precluded by various codes from making affirmative health claims in the advertising programming. 22/ The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials. And, finally, we fail to see any merit in the argument that no controversial issue of public importance can be presented where a lawful business is advertising a lawful product. 23/ While an unlawful business advertising an unlawful product over the air waves might well raise some controversial issue of public importance, we do not regard that element as essential. The claim that no controversial issue of public importance is presented by cigarette advertising is neither realistic nor persuasive.

22/ We recognize also (as set forth in paragraph 29 above and Appendix A) that the tobacco and broadcasting industries have endeavored in their codes to prescribe cigarette advertising standards aimed at reducing the appeal to youth. But the conclusions of the FTC Report (paragraph 37 above) and the statistics and other matters set forth in paragraphs 33-34 and 60-61 would seem to indicate that the standards are either not being followed or are not effective in discouraging new teenage smoking. Moreover, it occurs to us that teenagers on the verge of adulthood may be more influenced by a portrayal of the attractiveness and desirability of adult conduct than by one connoting childhood or youthful behavior. As the FTC Report notes (page 8): "They tend to view cigarette smoking as a visible marke of maturity, a passport to adulthood. Because the health dangers of cigarette smoking are not brought home to them in an effective and meaningful way, many teenagers take up the smoking habit."

23/ NBC, in urging that licensees could reasonably and in good faith conclude that no controversial issue of public importance is presented by cigarette advertising, notes that the FTC advertising guides permit presentation of enjoyment since they state:

> "Nothing contained in these guides is intended to prohibit the use of any representation, claim or illustration relating solely to taste, flavor, aroma, or enjoyment."

Our ruling is consistent. It, too, does not in any way prohibit the presentation of enjoyment in cigarette commercials. It merely requires the licensee adequately to inform the public of the potential hazard, as found by Congress and Government reports, entailed in commencing or continuing this habit.

E. The Contention as to a Substitution of "Commission Fiat" for Licensee Judgment

39. Petitioners also argue that the ruling, by requiring that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by cigarette smoking and by suggesting that a licensee might, among other things, present a number of public service announcements of the American Cancer Society or HEW, will cause a debasement of the Fairness Doctrine generally and a substitution of Commission fiat for licensee judgment. CBS in particular, noting that commercials are by nature repetitive and continuous, urges that treating all cigarette commercials as presentations of one side of a controversial issue will raise a question as to whether any one program or program series – however enlightening and informative as to all points of view – can constitute an adequate opportunity for response. Asserting that inevitably the licensee's only recourse will be a series of health hazard spot announcements, CBS states that broadcast treatment of cigarette health issues should not be reduced to a contest of opposing spot announcements, endlessly repeated long after any member of the public has understood and acted if he wished. It further asserts that such an approach makes no sense in the area of news and public affairs programming and that the net result of our ruling will be to convert licensee responsibility in such areas to presentations very similar to product advertising.

40. Like CBS, we recognize that the presentation of one side of a controversial issue of public importance in advertising programming poses a situation which differs from that usually pertaining to the presentation of controversial issues in news and public affairs programming. In the latter instance, the issue may arise only once, or a few times, or several times in a relatively short time period because of factors such as timeliness. But as CBS points out, commercials are by nature "repetitive and continuous;" the complaint here went to advertisements broadcast daily for a total of five to ten minutes each broadcast day. We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine under the Act's basic policy of the "standard of fairness" (supra, paragraph 10). For, while the Fairness Doctrine does not contemplate "equal time", if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue. This consideration is not limited to advertising. For example, if one side of a controversial issue of public importance were regularly presented in a daily network program, compliance with the Fairness Doctrine would require something more than an occasional presentation of the other side of the issue during the course of the year.

41. Moreover, here the controversial issue posed is one of health hazard and the repeated and continuous broadcasts of the advertisement may be a contributing factor to the adoption of a habit which may lead to untimely death. In the circumstances, we think that the licensee is under a higher duty than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard. As indicated in our ruling, and in light of the considerations set forth in

paragraphs 33-34 and 60-61, we believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regular basis (e.g., each week).

42. We note that, contrary to CBS' position, the repetition of short communications has apparently been regarded by the broadcasting and advertising industries and other interested organizations as an effective means of reaching the listener or viewer. But in any event, there is nothing in our ruling which compels a licensee to treat the issue through presentation of spot messages. In our ruling we stated: "A station might, for example, reasonably determine that the above noted responsibility would be discharged by presenting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of the public service announcements of the Cancer Society or HEW in this field." This example does not on its face indicate that the opposing viewpoint should be presented solely or principally through spot announcements, and it was not intended as a "Commission fiat" as to the manner of compliance with the Fairness Doctrine. 24/ We stressed in the ruling, and here strongly emphasize again, that "in this, as in other areas under the fairness doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. See Cullman Broadcasting Co., FCC 63-849 [25 RR 895] (September 18, 1963)."

43. In other words, we agree with CBS that the "question of whether a licensee is responsibly complying with the fairness doctrine cannot be resolved by per se guidelines, ratios or other rigid rules." A licensee which has just presented a very lengthy program on this issue obviously might reach a different judgment as to what his obligation was in this respect for the next week or so. But as stated, the carriage of the normally substantial amount of weekly commercials raises a concomitant responsibility to be met over relatively the same period of time. Further, in these circumstances, while a one-to-one ratio is ruled out by considerations of the legislative history of

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24/ As set forth in paragraph 25, prior to our ruling the American Cancer Society received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health. Moreover, the Public Health Service reported in January 1967 that it had distributed spot announcements to over 900 radio stations and was then approaching individual television stations to obtain further coverage for its messages. The example we gave merely took cognizance of the fact that such material is available to licensees if, in their judgment, its use would facilitate compliance with their obligations under the Fairness Doctrine. We thought it desirable to note its availability particularly for the small station with limited resources, which might have difficulty in preparing its own program material dealing with this issue.

the Cigarette Labeling Act, the licensee's obligation is just as clearly not met by an occasional program a few times a year or by some appropriate announcements once or twice a week. We stress again that what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials. We do not see why licensees, proceeding in good faith, should experience any real difficulty in reasonably discharging that responsibility nor why, in view of the nature of the issue – the public's health, they would seek to fulfill that obligation in a niggardly fashion, designed to raise problems or complaints. In sum, we have not usurped licensee judgment as to the type of programming or the amount or nature of the time to be afforded, but rather have left these matters to the good faith, reasonable judgment of the licensee based on his evaluation of the facts of his particular case. 25/

F. Effect of the Ruling on the Advertising of Products Other Than Cigarettes.

44. Petitioners further assert that the ruling cannot logically be limited to cigarette advertising alone, and hence will have broad-scale effect on broadcast operations and the presentation of advertising by radio generally. They state that very little in society is uncontroversial and, since many products are subject to one form of controversy or other, an appeal to the Commission by a vocal minority is all that is needed to classify a subject as controversial and of public importance. They further claim that if governmental and private reports on the possible hazard of a product are a sufficient basis for the cigarette ruling, the ruling would apply to a host of other products, such as: automobiles, food with high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles and even common table salt. We do not find this "parade of horribles" argument impressive.

45. We stressed in our ruling that it was "limited to this product – cigarettes," stating further in this connection:

25/ It is also argued that the licensees may simply substitute cigarette health messages for other public service announcements now being carried. The duty of a station carrying cigarette commercials to inform the public as to the hazards of smoking stems directly from the fact that its facilities have been used to promote the use of this product found by the Congress and Governmental reports to be so potentially hazardous to health; its responsibility is therefore the same as in the case of any other fairness situation. It thus has a duty to present the other side, over and beyond what a licensee decides in other respects to present in order to serve the best interests of his area. We therefore do not believe that a licensee would or should adopt a pattern of operation which he does not adjudge to serve fully the needs and interests of his public.

"Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that the normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular product as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance – that however enjoyable, such smoking may be a hazard to the smoker's health."

Our ruling does not state, and was in no way meant to imply, that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were twofold: (1) governmental and private reports and Congressional action with respect to cigarettes, and (2) their assertion in common that "normal use of this product can be a hazard to the health of millions of persons."

46. The products to which petitioners refer do not present a comparable situation. The example most uniformly cited is auto safety. But the governmental and private reports on this matter do not urge the public to refrain from "normal use" of automobiles in the interest of public safety; rather, the emphasis is on increased safety features in the manufacture of automobiles and increased care by drivers. Moreover, we know of no widespread contention by governmental or private authorities that the "normal use" of any of the other products cited by petitioners poses a serious health hazard to millions of persons who otherwise enjoy good health.

47. We adhere to our view that cigarette advertising presents a unique situation. As to whether there are other comparable products whose normal use has been found by Congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely. Thus, to say the least, instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred. In short, our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising.

G. The Claim as to Adverse Financial Impact Upon the Broadcasting and Tobacco Industries

48. Petitioners further assert that the ruling will seriously undermine the commercial structure of broadcasting, cause a substantial reduction in or the elimination of cigarette advertising to the severe detriment of these stations and their ability to serve the public interest, require a major change in the

operation of broadcast stations by necessitating the acquisition and presentation of new program material and the keeping of additional records to document compliance with the Fairness Doctrine, limit the ability of cigarette manufacturers and advertisers to obtain advertising time on broadcast media, and adversely affect the sale of cigarettes, all of which will impose an unlawful burden on interstate commerce and conflict with the Congressional intent underlying the Cigarette Labeling Act.

49. The contention that our ruling will seriously undermine the commercial structure of broadcasting is pressed principally by the Association of National Advertisers, Inc., an association composed of leading manufacturers and service concerns that use advertising, seven of whom market cigarettes. Their concern appears to rest principally on the fear that the ruling will be extended to many other products which are subject to controversy in one form or another. However, as set forth in the preceding section of this opinion (supra, paragraphs 44-47), we believe that this fear is groundless. The only real question here is the impact of our ruling on cigarette advertising on broadcast media and the sale of cigarettes.

50. We have no reason to think, and petitioners have proffered nothing concrete in support of their claim, that the ruling will cause any substantial reduction in or the elimination of cigarette advertising on broadcast media or adversely affect the ability of broadcast licensees to serve the public interest. As we have stated, we shall tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry.

51. Nor do we think it realistic to assume that the requirement will cause cigarette advertisers and manufacturers to turn to other advertising media. The attractiveness of the broadcast media, particularly television, as a means of effectively reaching the vast majority of the American public with advertising, as well as other, messages is without equal. 26/ We find it difficult to believe that cigarette manufacturers and advertisers would abandon or make substantially less use of a medium of this nature merely because our ruling may require an increase in the programming on the smoking-health issue which broadcast licensees are already presenting in the exercise of their judgment under the Fairness Doctrine and pursuant to their obligation to operate in the public interest. 27/ Rather, particularly in light of the consideration

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26/ The FTC Report states (page 10) that more of the money spent for cigarette advertising in the year 1966 was spent on television advertising than on all other media combined (66.6 per cent in 1966). The Report also states (ibid.) that "in 1966, cigarette advertising accounted for approximately 7.2% of total television advertising expenditures."

27/ In this connection, we note that many stations and the television networks (e.g., CBS's efforts as detailed in this case) have given coverage to the smoking-health issue and that they also continue to air numerous cigarette commercials.

set forth above (paragraph 50), we are not persuaded that the effect of our ruling on the amount of cigarette advertising presented on broadcast media will be significant. 28/

52. We also fail to see how the ruling would require any major change in the operation of broadcast stations. In complying generally with the Fairness Doctrine in their overall broadcast operations, broadcast licensees are required to afford reasonable opportunity for the presentation of the other side of controversial issues of public importance when they choose to present one side, and to document their efforts upon complaint. Our rules require the keeping of program logs (See, e.g., §§73.111 and 73.112; see also Section 303(j) of the Communications Act), and we are sure that licensees in the conduct of their business affairs presently keep full accounts as to advertising matters. Thus, we think that this particular controversial issue can be handled by licensees in a manner similar to their established practices in this area. 29/

53. There is nothing in our ruling which would preclude or curtail the ability of cigarette manufacturers to obtain advertising time on broadcast media. Licensees remain free to present such cigarette advertising as they choose. Conceivably, some licensees, in view of the mounting public concern as to the potential health hazard of cigarette smoking, might voluntarily decide to curtail or refrain from cigarette advertising broadcasts in the public interest. But that is appropriately a matter for licensee judgment as to how to conduct broadcast operations to serve the public interest, and not a requirement of our ruling. Under Section 3(h) of the Communications Act, broadcasters are not common carriers and they cannot be compelled to present advertising which they do not wish to present. Moreover, cigarette manufacturers clearly have no right to insist that a broadcast licensee, who is willing to present cigarette advertising, present it in a manner that does not comport with his statutory obligation to operate in the public interest. Nor does a cigarette manufacturer have any legal right to complain that the use of radio to inform the public as to the potential health hazard of cigarette smoking may lead to some decline in cigarette sales or slow down the present trend of rising cigarette sales (FTC Report, pages 4-7). Indeed, that is the very purpose of the educational efforts which Congress has directed HEW to undertake.

54. In sum, we see no merit to the contention that our ruling will lead to severe curtailment or possible elimination of cigarette advertising, or have a serious economic impact on the broadcasting industry, contrary to the

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28/ Certainly, there is no reason to anticipate that any such minimal impact could have any substantial adverse effect upon the ability of broadcast stations to serve the public interest. Cf. also FTC Report of June 30, 1967, at page 10.

29/ We note that WCBS-TV apparently had no difficulty in ascertaining what programs that station had broadcast on this issue in response to Mr. Banzhaf's complaint.

intent of Congress in the Labeling Act. The ruling properly effectuates the responsibilities of broadcast licensees and this Commission under the Communications Act. There is no unlawful burden on interstate commerce nor conflict with Congressional intent in, or the provisions of, the Labeling Act.

H. The Procedural Contention

55. Finally, petitioners urge that the ruling is procedurally invalid because it effects an important and unprecedented change of policy which will affect all licensees and it was adopted without affording WCBS-TV, broadcast licensees generally and other interested persons an opportunity to be heard. CBS, in particular, asserts that this was a departure from the Commission's procedure of advising a licensee of a fairness complaint and requesting its comments (Fairness Primer, FCC Public Notice of July 1, 1964, 29 FR 10415, 10416, cited with approval in the Red Lion case, supra, paragraph 8). CBS requests that the contents of its letter be treated as its comments on Mr. Banzhaf's complaint, and that we reconsider the ruling on the basis of such comments. 30/

56. We have granted this request of CBS and have carefully considered its comments in determining that reconsideration is not warranted by the arguments contained in its letter. Our omission to seek the comments of WCBS-TV initially was occasioned by our view that Mr. Banzhaf's complaint, which enclosed his request to WCBS-TV and the reply of that station, adequately set forth the facts of the case and the positions of the parties. Since WCBS-TV has a continuing policy of presenting the smoking-health hazard controversy and asserted only its position that the Fairness Doctrine does not apply to advertising, our letter of June 2, 1967 to that station had two purposes: One, to apprise WCBS-TV of the Commission's view that the Fairness Doctrine does apply to cigarette advertising, as a matter of law and policy, and second, to bring to the station's attention our view that a sufficient amount of time must be allocated, usually each week, for the opposing viewpoint so that WCBS-TV could appropriately exercise its licensee judgment in connection with its continuing program. As stated in paragraph 6, supra, the effectiveness of the June 2nd ruling will not be the basis for action against any licensee, including WCBS-TV, until publication of this Memorandum Opinion and Order in the

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30/ NBC notes that the Commission did not have before it the text of the three commercials Mr. Banzhaf referred to as examples. It has attached to its comments the texts of three advertisements and states that two of them appear to be those mentioned in the complaint and the third is probably the other. NBC further states: "They may show 'attractive' people 'enjoying' themselves while smoking cigarettes, but surely that does not constitute the expression of a viewpoint on whether smoking is a hazard to the smoker's health." For the reasons stated in paragraph 38 above, we do not think that the text of the particular advertisements was necessary to our ruling or to our decision on the requests for reconsideration.

Federal Register. In the circumstances, and particularly the fact that we have fully considered the comments submitted by CBS on reconsideration, we conclude that WCBS-TV has not been prejudiced by the procedures followed in this matter.

57. It is true that other interested persons were not accorded an opportunity to be heard prior to the ruling. It is not the Commission's normal procedure or usual practice to accord the public in general an opportunity to be heard with respect to fairness complaints against a particular licensee, even though the complaint may involve an important issue of policy (see, e.g., Cullman Broadcasting Company, FCC 63-849 [25 RR 895]; Times Mirror Broadcasting Co., 24 RR 404 and 407 (1962)). We thus followed long established procedures in this respect. In any event, we have now heard at length from the three television networks, numerous individual broadcast licensees, the NAB, and representatives of the advertising and tobacco industries. We have given extensive consideration to the arguments raised in support of their positions, and have found them without merit. Moreover, the ruling is not effective as to any broadcast licensee until publication of this opinion in the Federal Register. In the circumstances, we conclude that petitioners have been adequately heard and have suffered no prejudice.

58. Further, we are unable to conclude that any useful purpose would be served by affording petitioners a further opportunity for written comment or oral argument. The viewpoints of petitioners on the legal and policy issues are fully and amply set forth in the pleadings already filed, and nothing has been presented which would indicate the need or desirability of further study or proceedings; thus we are not persuaded that any public purpose would be served by initiating rule making in this area, as requested by the law firm of Smith, Pepper, Shack and L'Heureux. We note that the petition for rule making does not propose the adoption of any rules, but only the provision of a forum for consideration of the legal and policy arguments urged by petitioners and discussed herein. We do not think that a rule making proceeding is either needed or appropriate for their resolution. 31/

59. And, finally, we point out that we could not in any event conclude that stay relief would be warranted pending any such further proceedings. This is not only because we believe that petitioners have not shown any substantial likelihood of ultimately prevailing on the merits of their position, either before this

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31/ As set forth in paragraph 43 above, we agree with the CBS position that licensee responsibilities under the Fairness Doctrine, in this as in other areas, should not be subject to per se guidelines, ratios or other rigid rules prescribed by the Commission. Accordingly, we would not undertake rule making to prescribe such standards in the absence of some compelling showing leading us to revise our present judgment (see paragraph 43) and to conclude that rule making in this particular area would be appropriate and would serve a useful purpose.

Commission or the courts, but also because the public interest would require denial of such relief on injury grounds. We have already set forth the basis for our belief that compliance with the ruling will not cause any substantial adverse impact on the broadcasting or advertising industries. We have not been shown that any irreparable injury will flow to petitioners. In any event, in view of the strong public interest in adequately informing the public, and particularly teenagers, as to the health hazard involved in the cigarette habit which broadcast facilities are encouraging them to adopt and continue, we think that any injury to the affected industries is outweighed by the danger of irreparable injury to the public. Indeed, if our ruling will contribute to the avoidance of one untimely death, the public interest would not be served by any delay in its effectiveness.

60. In connection with this latter point, we have taken into account the further studies which have been undertaken since the Advisory Committee Report by persons competent in this field. Most important, of course, is the recent HEW Report of July 12, 1967 (already discussed in paragraph 33 and since confirmed and amplified in its Report of August , 1967). We shall therefore note here other pertinent studies. In February 1966 Dr. E. Cuyler Hammond's study for the National Cancer Institute made the first large scale survey of women cigarette smokers. His study showed that such women's death rate from heart disease and lung cancer were twice that of non-smokers. 32/ In May 1966 Dr. Green of Harvard University reported experiments with rabbits proving cigarette smoking can cause many lung and throat ailments. 33/ Roswell Memorial Institute announced in August 1966 a report finding filter tips of several cigarette brands ineffective in screening out harmful tars and nicotine. This report acknowledged that some filters were better than others, but asserts that none protects smokers. 34/ A study by the Public Health Service and the American Cancer Society reported in October 1966 that a five year study of Seventh Day Adventists in California, comparing death rates of 11,071 male Adventists who do not smoke and the general male California population, showed one-sixth as many lung cancer deaths and one-third as many deaths from all respiratory diseases among Adventists as among the total male population. 35/ Also in October 1966, a Louisiana State University five-year study, financed partly by the Tobacco Research Council, reported findings of a relationship between cigarette smoking and hardening of the arteries in the heart. 36/ Just recently, in a formal report to the President, it was stated by Dr. Kenneth M. Endicott, Chief of the National Cancer

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32/ New York Times, February 23, 1966, 41:8.

33/ New York Times, May 2, 1966, 39:1.

34/ New York Times, August 30, 1966, 1:7.

35/ New York Times, October 12, 1966, 54:1.

36/ New York Times, October 22, 1966, 20:2.

Institute, that "lung cancer – which will kill more than 50,000 Americans this year – can be brought under control because it is clearly caused by environmental factors – chiefly cigarettes." The President was also advised that "lung cancer has reached epidemic levels in men and may soon do so in women." 37/

61. As stated in our ruling, of most serious concern to the Commission are statistics as to the correlative rise in cigarette consumption and teenage smoking. In January 1966 the Department of Agriculture in a public report entitled, "Tobacco Situation", announced that 1965 had been a record year for cigarette consumption. 38/ The reason given by the Surgeon General for the increase was new smokers, not the increased use of tobacco by the then-current smokers. 39/ In July 1966 Surgeon General Stewart reported, based on American Cancer Society and Public Health Service surveys, that one-half of American teenagers are regular smokers by age eighteen despite two and one-half years of intensive educational efforts. 40/ In October 1966 the Rand Youth Poll, conducted by the Youth Research Institute, released findings that teenagers smoke ten million cigarettes per week, that 53 per cent of all 16-19 year olds are smokers, and that this represents a rise of 4 per cent in this age group during the almost three year period since the Advisory Committee's Report. 41/ In November 1966 the American Cancer Society noted a six-year study by Dr. E. Cuyler Hammond showing a marked drop in cigarette smoking among older people and a rise in consumption by young people. 42/ In December 1966 the Agriculture Department announced that Americans had once again set a new record for total consumption of cigarettes per year. 43/ In light of the statistics concerning teenage smoking, this increase in consumption appears correlated to the increase in population which occurs through the increase in youthful persons.

62. We wish to make it clear that this Commission is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue. We have cited the reports in question because they establish (i) that here is a most substantial controversial issue of public importance, which must be fairly aired to the American people, and (ii) that

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37/ The Washington Post, July 22, 1967, 2:1.

38/ New York Times, January 2, 1966, IV, 7:1.

39/ New York Times, January 11, 1966, 9:1.

40/ New York Times, July 17, 1966, IV, 10:1.

41/ Advertising Age, October 31, 1966.

42/ New York Times, November 3, 1966, 41:1.

43/ New York Times, December 31, 1966, 4:6.

because of the seriousness of the issue to the health of the people, a stay is patently inconsistent with the public interest. We recognize that there are countering efforts and arguments put forth particularly by the tobacco industry; there are also new and continuing developments in this field. See Hearings before the Consumer Subcommittee of the Senate Commerce Committee to review progress being made toward development and marketing of a less hazardous cigarette. We have not gone into detail on these matters, because they do not alter the two crucial findings set forth above.

63. As stated, this Commission agrees with the crucial point set forth in the concluding paragraph of the recent FTC Report (see paragraph 34). In view of the Congressional action, the Government and private reports, we conclude that a stay of our action would be contrary to the public interest. Licensees must therefore abide by the ruling, or seek judicial review of it (see Red Lion Broadcasting Company v. FCC supra). (Even in the event of such review, the ruling remains effective, absent entry of a Court stay.)

II. Conclusions

64. There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" (Section 315(a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the broadcasting industry might now make). But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter – that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.

65. In light of all the foregoing, we conclude and find:

(a) The ruling as to the applicability of the Fairness Doctrine to cigarette advertising is within the Commission's legal authority and discretion, and is in the public interest.

(b) Petitioners have made no showing which warrants reconsideration and withdrawal of the ruling or the institution of rule making in this area.

(c) Petitioners have made no showing that relief, except as indicated in paragraph 6 above, is warranted or in the public interest; on the contrary, the grant of stay relief would be likely to cause irreparable harm to the public.

Accordingly, it is ordered, that the petitions and requests for reconsideration, rule making, and stay listed in paragraph 1 of this Memorandum Opinion and Order are denied, except to the extent that relief is granted herein pending publication of this Memorandum Opinion and Order in the Federal Register.

It is further ordered, that copies of this Memorandum Opinion and Order shall be mailed to all broadcast licensees of the Commission.

APPENDIX A

Background to 1965 Cigarette Labeling Act

1. On January 11, 1964 the Report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the over-all death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." After the Report was issued, many groups private and public acted to provide this "remedial action."

(a) The Tobacco and Broadcasting Industries

2. Soon after the Advisory Committee's Report, the tobacco and broadcasting industries reacted with voluntary measures to control the content of cigarette advertising. In January 1964 the Television Code Review Board and the Television Board of Directors of the NAB recommended and approved specific amendments to the Television Code. The amendments prohibited some types of cigarette advertising directed at young people and health claims in cigarette advertising. 1/ In June 1964 similar amendments were approved for the Radio Code. 2/ These Code amendments were motivated by the Advisory Committee's Report.

1/ Television Code, Section IV, Program Standards, Paragraph 12

Care should be exercised so that cigarette smoking will not be depicted in a manner to impress the youth of our country as a desirable habit worthy of imitation.

Television Code, Section IX, General Advertising Standards, Paragraph 7

The advertising of cigarettes should not be presented in a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of our country.

2/ Radio Code I, Program Standards, Section H. 13:

The use of cigarettes shall not be presented in a manner to impress the youth of our country that it is a desirable habit worthy of imitation in that it contributes to health, individual achievement, or social acceptance.

[Footnote continued on following page]

In the words of the Television Code Review Board (Hearings, Senate Commerce Committee on S. 559 and S. 547, 89th Congress, 1st Session, part 1, page 591):

> "The board recognizes the burden of responsibility the report imposes on all television licensees in the area of cigarette advertising. Specifically, the board is concerned with the potential of cigarette advertising to give the false impression that cigarette smoking promotes health or physical well-being."

The Code Authority also made clear that regulation initiated by the cigarette manufacturers was what they envisaged. Thus the Authority provided that it would delay the issuance of general guidelines (interpreting the code amendments) which would assist advertisers and code subscribers in adhering to the television code restrictions, pending its determination of the implementation and effectiveness of the tobacco industry's self-regulation. Id., at page 592.

3. In April 1964 the major cigarette companies announced their agreement and adherence to the cigarette advertising code to impose standards and enforcement procedures for the self-regulation of cigarette advertising. The code provided advertising standards which would be applied by an independent administrator who would survey the advertising and labeling of cigarettes in the United States, with the power to levy fines for any advertising or labeling which does not conform to the industry code standards. These standards are basically of three types. The first prohibits many types of cigarette advertising specifically directed at persons under 21 years of age. Another prohibits health claims, except in certain limited circumstances. The third type prohibits suggestions that smoking is essential to social prominence, distinction, success, or sexual attraction. Robert B. Meyner, the former Governor of New Jersey, is the first and current administrator for the code. In evaluating the effect of the code on cigarette advertising, Mr. Meyner said in a Senate hearing (id., at page 568) that the character of cigarette advertising had been altered as a result of his enforcement of the code. 3/

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> The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to the youth of our country that the use of cigarettes contributes to individual achievement, personal acceptance, or is a habit worthy of imitation.

3/ However, we note the following exchange between Code Administrator Meyner and Senator Bass (id., at page 581):

> "Senator Bass: . . . don't you believe that the industry itself, with you as the administrator, don't you believe that you are capable of protecting the health of the American public as far as advertising of cigarettes is concerned?

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(b) HEW and Private Health Agencies

4. The Department of Health, Education and Welfare (HEW) also took action after the Advisory Committee's Report. On February 18, 1964, the Surgeon General, Luther Terry, convened a meeting of four voluntary agencies to discuss with them and other health agencies means of implementing the recommendations contained in the Advisory Committee Report. This meeting eventually resulted in the establishment of the National Interagency Council on Smoking and Health on July 9, 1965. The purposes of the Council are three-fold: "(1) to use its professional talents to bring to the nation – particularly the young – an increasing awareness of the health hazards of cigarette smoking, (2) to encourage, support and assist National, State and local smoking and health programs, and (3) to generate and coordinate public interest and action related to this area of health." The membership of the Council includes thirteen private agencies and three Federal Government agencies (United States Public Health Service, United States Office of Education, and United States Children's Bureau).

5. In 1964, the Public Health Service, which strongly endorsed the conclusions of the Advisory Committee's Report, awarded 10 grants and contracts to support demonstrations and projects to design effective methods of reaching various population groups with the facts about smoking. The comprehensive educational campaigns, however, which the Public Health Service desired to start had to await appropriations forthcoming from the 89th Congress. The President's Commission of Heart Disease, Cancer and Stroke recommended an appropriation of $10 million to educate the public on the health hazards of smoking and to provide a network of control clinics to assist those who desire to give up smoking. Two million dollars were forthcoming in the fall of 1965.

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6. As early as September, 1955 the Federal Trade Commission (FTC) had promulgated Cigarette Advertising Guides which, among other things, prohibited representations in cigarette advertising or labeling which refer to either the presence or absence of any physical effects from cigarette smoking,

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because of the seriousness of the issue to the health of the people, a stay is patently inconsistent with the public interest. We recognize that there are countering efforts and arguments put forth particularly by the tobacco industry; there are also new and continuing developments in this field. See Hearings before the Consumer Subcommittee of the Senate Commerce Committee to review progress being made toward development and marketing of a less hazardous cigarette. We have not gone into detail on these matters, because they do not alter the two crucial findings set forth above.

63. As stated, this Commission agrees with the crucial point set forth in the concluding paragraph of the recent FTC Report (see paragraph 34). In view of the Congressional action, the Government and private reports, we conclude that a stay of our action would be contrary to the public interest. Licensees must therefore abide by the ruling, or seek judicial review of it (see Red Lion Broadcasting Company v. FCC supra). (Even in the event of such review, the ruling remains effective, absent entry of a Court stay.)

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65. In light of all the foregoing, we conclude and find:

(a) The ruling as to the applicability of the Fairness Doctrine to cigarette advertising is within the Commission's legal authority and discretion, and is in the public interest.

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or which made unsubstantiated claims respecting nicotine, tars or other components of cigarette smoke, or which in any other respect contain implications concerning the health consequences of smoking cigarettes or any advertised brand (FTC Annual Report, 1960, page 82). In 1960 the FTC obtained agreement from leading cigarette manufacturers to eliminate unsubstantiated claims of nicotine and tar content (Ibid.).

7. Shortly after the issuance of the Advisory Committee's Report the FTC, on January 18, 1964, initiated a Trade Regulation rule making proceeding concerning the advertising and labeling of cigarettes. On June 22, 1964, after examining the advertising, labeling and other promotional practices in the cigarette industry, the FTC concluded that cigarette manufacturers should be required to make an affirmative disclosure of the potential hazard from smoking in labeling and advertising (29 FR 8325). The basis for its conclusion was twofold. First, the FTC found that the consensus of medical and scientific opinion was that cigarette smoking is a significant cause of certain grave diseases and contributes to the overall death rate. Second, the FTC found that the methods by which cigaretts had been and were being sold to the consuming public – by means of labeling and advertising which fails to disclose the health hazards of cigarette smoking – were deceptive and unfair to consumers under settled legal principles governing truth and fairness in advertising. The rule would have required that each cigarette package bear a warning statement by January 1, 1965. Also, if the warnings on the package together with such voluntary advertising reforms as the industry might have undertaken in the interim, had failed to change the circumstances leading to the FTC's findings, the rule would have then required, in addition, warnings in all cigarette advertising by July 1, 1965.

8. On September 3, 1964, at the request of Chairman Harris of the House Commerce Committee, the FTC extended the effective date of the rule for both packaging and advertising warnings to July 1, 1965 (29 FR 15570). Chairman Harris stated that he had requested such action because testimony which he had received during his Committee's Hearings in June and July, 1964 indicated that the validity of the trade regulation rule would be challenged in the courts, that judicial review could delay the enforcement of the labeling requirements for a considerable period of time, and that the enactment of legislation in this area by the Congress could very well eliminate this delay. The FTC rule never went into effect because Congress enacted the Cigarette Labeling Act.

CONCURRING OPINION OF COMMISSIONER LEE LOEVINGER

I concur with great doubt and reluctance in the Commission ruling that broadcast licensees presenting cigarette advertising must also present warnings of the health hazards of cigarette smoking. I concur because the result seems to me to be socially and morally right. I have doubts that the action is procedurally and substantively consistent with controlling legal rules. I am reluctant because of concern that this action may represent a subjugation of judgment to sentiment. Briefly these are my views.

Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the

youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of government agencies, and by Congressional reports and statute. 15 USC §1331 et seq. The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probabilistic. See Loevinger, Science and Legal Thinking, 25 Federal Bar Journal 153 (Spring 1965). Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. In an ordinary civil case or administrative proceeding a mere preponderance of the evidence is sufficient to carry the day. The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt. This is the basic premise of my position, as well as of the Commission position despite a rather feeble disclaimer that the Commission is not passing judgment on this issue. (paragraph 62)

However, a burning conviction of good to be achieved or harm to be avoided neither establishes jurisdiction in a regulatory agency nor provides a sound legal guide to action. The instant proceeding illustrates the point.

The Commission here was so eager to take its present position that it acted on a complaint against CBS without giving notice to CBS, without affording CBS the opportunity to comment or submit a statement to the Commission directed to the issues under consideration, and without even bothering to secure or examine the text of the advertisements in question. Surprising though it may seem to those unfamiliar with administrative agencies, the Commission was not aware of these irregularities at the time of the initial ruling, and how they occurred is more significant as a study of administrative efficiency than as an issue of due process. It is enough to say that were the issue before us now merely the validity of the original letter to CBS these procedural defects would plainly invalidate the action.

However, what the Commission is doing now is issuing a prospective, legislative-type rule relating to cigarette advertising and broadcasting. CBS has been entirely exonerated from any imputation of unfairness in its broadcasting regarding cigarettes. That ends the proceeding so far as CBS is concerned; so the absence of due process in handling that complaint is no longer significant. In its present action the Commission is exercising its quasi-legislative authority to make a prospective rule. It is acting on the material that has been submitted to it since the original letter to CBS, so it has before it a variety of differing views from many interested parties. I think it would be preferable to have oral argument on the proposed rule to give the Commission the advantage of the interchange and confrontation between advocates of opposing views, and to permit the exploration of issues by direct questioning. But the refusal to hold such oral argument is not fatal and does not preclude legislative-type action.

Despite the reiterated certainty of the Commission opinion, doubts remain as to the legal authority of the Commission. Repetitious reference to the "public interest" as establishing whatever conclusion is contended for is no more than question-begging. The "public interest" is a judgment encompassing whatever

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the person making the judgment deems to be socially desirable. See dissenting opinion in Regulation of CATV Systems, 6 FCC 2d 309, 330, at 335 et seq. [8 RR 2d 1677, 1698] (1967); Loevinger, Regulation and Competition as Alternatives, 11 Antitrust Bulletin 101, 129 et seq. (1966); Schubert, The Public Interest (1960). The Commission believes, and I concur, that it is socially desirable to discourage, rather than encourage, smoking by people, especially young people.

But the Commission has not been given a roving mandate by Congress to do whatever it may regard as socially desirable (i.e. "in the public interest"). On the contrary, it has been established by Congress with a limited jurisdiction and can act only within the power delegated to it by Congress, which means that it cannot act without some definite statutory basis.

The Commission opinion rests the present action on the Fairness Doctrine. This is a rule that broadcast licensees must afford reasonable opportunity for the discussion of conflicting views on issues of public importance. This principle was first developed on the basis of the statutory licensing power as to broadcasters, Editorializing by Broadcast Licensees, 13 FCC 1246 [25 RR 1901] (1949), and was recognized by reference in a 1959 amendment to Section 315. 47 USC §315. The context of both sources refers to "news" and the basic Commission opinion also refers to "commentary" and "discussion of public issues". Neither contains the slightest suggestion that the principle has anything to do with advertising, and that conclusion is most dubious.

Further, I am concerned that extension of the Fairness Doctrine to advertising is likely to lead either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable. No matter what the Commission now says about the distinction between cigarette advertising and other types of advertising, it is establishing the principle that the Fairness Doctrine applies to commercial advertising, as distinguished from paid political broadcasting. The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (paragraph 46), the "normal use" of automobiles does pose a health hazard, polluting the admosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids. The Commission will also find itself embarrassed when, as will surely happen, the cigarette companies demand time from some broadcaster who refuses to carry cigarette advertising but presents "public service messages" warning against the dangers of cigarette smoking. Having declared this to be a "controversial issue of public importance", the Commission will be bound to require that the viewpoints of those manufacturing and selling cigarettes are afforded access to broadcasting facilities.

The Commission opinion does contain findings that might support the result reached. Paragraph 37 finds that cigarette advertising expressly represents smoking as desirable and implicitly represents that it involves "relative safety" or "relatively little risk". This finding is corroborated by common experience and by scientific investigation. See Preston, Logic and Illogic in the Advertising Process, 44 Journalism Q. 231 (Summer 1967). In view of the clear weight of scientific evidence and official findings on this subject, this

means that cigarette advertising constitutes both implicit misrepresentation and concealment of a material fact, if the health hazards are not disclosed by the seller. It is elementary law that the supplier of a chattel is bound to disclose its latent dangers to prospective users. Restatement of the Law, Torts 2nd, §388. There is sound statutory and precedential authority for Commission action to prevent false representations on the broadcasting media. 18 USC §1343; KWK Radio, Inc., 34 FCC 1039 [25 RR 577] (1963), 119 App DC 144, 337 F2d 540 [2 RR 2d 2071] (1964), cert. den. 380 US 910 (1965); Loevinger, The Issues in Program Regulation. 20 FCBA J 3 (1966).

The normal remedy for such misrepresentation or concealment would be either to forbid the advertising altogether or to require that it carry adequate disclosure of the material facts. There are two reasons precluding such Commission action. First, the Commission has no authority over advertisers as such. Second, the 1965 Cigarette Labeling Act apparently forbids such action.

The first reason is easily surmounted. The Commission has held that a broadcast licensee must take reasonable measures to prevent the use of his licensed facilities for public deception. KWK Radio, Inc., supra. The application of this principle to the present situation suggests a means of achieving the result reached here within the limits of statutory authority and without doing violence to the Fairness Doctrine. The second reason is more difficult.

The Commission opinion recognizes the Cigarette Labeling Act as a substantial argument against the present action, since it devotes a large part of the discussion to it. (paragraphs 15 through 35 and Appendix A). By reading the terms of the Act very literally and the presumed purposes of the Act very loosely, the opinion concludes that the present ruling is not precluded by the Act but rather implements the policy of the Act. The opinion offers a mass of detail in support of this conclusion, but a review of the relevant points casts some doubt. In several messages to Congress prior to passage of legislation on this subject and during consideration of such legislation, the FCC stated that its authority is limited to the broadcasting field and that it believed that cigarette advertising should be regulated on a "broad, across-the-board basis". (paragraph 31). After receiving several such messages from the Commission, Congress in 1965 passed an act expressly stating: "It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, . . ." 15 USC §1331. This was clearly the "broad, across-the-board" regulation which the FCC had suggested, and Congress surely was warranted in assuming that the FCC would not undertake to exercise its limited jurisdiction in a "piecemeal" attack upon the problem.

Nevertheless, the Commission opinion argues that FCC action is not precluded for several reasons. The opinion says that conditions have changed because the FTC is not undertaking the comprehensive regulatory plan which it formerly proposed. (paragraph 32). But the reason for this is that the FTC plan was expressly forbidden by statute, and thus the only change in circumstance is the passage of the statute which limits, rather than extends, administrative authority to act in the field. The opinion also concludes that the terms of the Cigarette Labeling Act do not prohibit the present ruling because the Act

refers only to statements made "in advertising" and not to statements made "because of the advertising" of cigarettes. (paragraphs 16a, 23). However, the Act prescribes the form of health warning that is required on cigarette packages and explicitly provides that no other statement relating to health and smoking shall be required on cigarette packages or in cigarette advertising. If the Act is read as literally as the Commission opinion construes it, then it does not preclude the total prohibition of cigarette advertising, either altogether or in the broadcasting media. The opinion states that this would be inconsistent with the Act (paragraph 15) although there is no specific provision of the Act relating to this, any more than there is a specific provision relating to statements to be required "because of" cigarette advertising. The Commission opinion does not explain why the Act is construed to permit one remedy but not another for misleading advertising, when neither is explicitly covered. Despite the profusion of detail and the length of the discussion the opinion does not come to grips with the issue posed by the Cigarette Labeling Act. The real reason for the Commission's present action is that during the last several years the Commission has changed its "policy" – that is, its collective opinion – on this subject and now believes that it should take whatever action it can take to combat the health hazard of smoking, especially by young people who are likely to be influenced by the broadcast media.

It seems to me that the construction of the Cigarette Labeling Act attempted in the Commission opinion is strained and unconvincing. However, the basic difficulty is that Congress was obviously ambivalent on this subject and that there is no unequivocally clear Congressional intent to be derived from the Act or its history. It was a compromise between conflicting viewpoints which still have spokesmen who are heard in Congress.

I am as persuaded as the Commission majority and its draftsmen that cigarette smoking is hazardous and injurious to the health of smokers and extremely hazardous and injurious to the health of those who start smoking while young. Therefore I think it desirable that all legal and practical steps be taken to discourage smoking. I have serious doubts that the action taken now by the Commission is legally sound or practically effective. I think that if we spent less effort and space in proclaiming the righteousness of our purposes and objectives and more in careful and rigorous analysis of our procedures and of our legal jurisdiction and authority, and attempted greater specification of the scope and application of our ruling, we would be more convincing and more effective.

Consequently, I am reluctant to concur because this ruling seems to be the result of sentiment rather than conviction. It is based on a strong feeling that the public, especially the younger members of the public, should be protected against enticement to smoke cigarettes, rather than upon a well reasoned conclusion that this is an effective means of achieving that objective and that this ruling is soundly based on legal authority. My opinion cannot change the result, so all I can do is indicate the difficulties I see in this approach to the subject and the reasons that I have doubts, while confessing candidly that I put doubts aside and join, albeit reluctantly, in voting for the ruling here because of a strong feeling that suggesting cigarette smoking to young people, in the light of present knowledge, is something very close to wickedness.

CONCURRING OPINION OF COMMISSIONER NICHOLAS JOHNSON

I join the Commission's decision to apply the Fairness Doctrine to the use of television and radio broadcasting to promote cigarette smoking. In view of Commissioner Loevinger's concurring opinion, however, I believe some brief remarks are appropriate.

With admirable honesty, Commissioner Loevinger has confessed the "doubts and reluctance" about our cigarette ruling. The issues he raises are provocative and significant. They touch on concerns which are, I believe, widely shared by members of the public. They inspire qualms about a case of landmark importance. I consider these doubts unwarranted.

Commissioner Loevinger does not state flatly that he thinks the ruling unlawful. But he does cast grave doubt on its validity, for his dismissal of a number of arguments against the Commission's position displays something less than full enthusiasm. For this reason, I feel obligated to set forth the simple logic behind my support for the decision.

The decision takes as its major premise a factual assertion which is so trivial as to be beyond cavil. Advertising messages are part – an important and substantial part – of the information put before the public by television and radio broadcasting. Roughly one-third of radio's hour is spot commercials. As such, advertising messages should no more be granted automatic immunity from considerations of fairness than any other category of advocacy. If an advertisement takes a position on an issue that is "controversial" and of "public importance" then fairness – whether as a matter of Section 315, FCC regulations, or common decency – requires that an opportunity be granted to ventilate opposing views. Communications Act of 1934, as amended, 47 USC §315(a)(4) (1964). Federal Communications Commission, Public Notice, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Federal Register 10415 (1964).

The Commission's minor premise seems equally hard to question. The issue of whether people ought to smoke cigarettes is a "controversial" issue, and it is one of "public importance." It has been recognized as such by Congress, the Executive Branch, the Federal Trade Commission as well as the FCC, the scientific and educational community, and the mass media. Millions of Americans smoke. Commissioner Loevinger agrees with the by now quite impressive evidence that they thereby incur grave risks of impairing their health and shortening their lives. Broadcasters licensed by this Commission to serve the public interest devote significant amounts of their prime time to encouraging Americans to incur those risks. Given this set of circumstances, it is the minimum obligation of this Commission to see to it that a fair opportunity exists to present the other view: the warnings of those responsible citizens who believe cigarette smoking to be a dangerous and insidious habit.

Commissioner Loevinger does not explicitly dispute this line of reasoning. But he cautions against such an interpretation of the Fairness Doctrine by advancing what lawyers call a "slippery slope" argument. If the Commission brands cigarette advertisements controversial issues of public importance, he says, virtually all advertising will be covered by the logic of that decision. No one will know where to draw the line. Now, it is certainly true that it is

no easy matter to decide what is and what is not a controversial issue of public importance. But that difficulty is one which the Commission must live, whenever it confronts a fairness case. The fact that this particular case happens to involve paid commercial announcements does not make it unique in that respect. The slippery slope argument states, in essence, that the logic of this decision, however justified on the facts before us, could be extended to other, more questionable, cases. Of course, this is right. This decision could be extended to other situations. But the fact is that all the hypothetical cases brandished by Commissioner Loevinger are more questionable than this one. By 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.

Finally, Commissioner Loevinger broaches the argument that Congress may have intended to preclude FCC regulation of cigarette advertising when it passed the Cigarette Labeling Act. With all respect, I consider such a sweeping interpretation of that statute (which Commissioner Loevinger himself seems disinclined to accept) altogether misguided. It seems to me to reflect a very limited view of the relationship between particular Congressional actions and administrative agencies charged with enforcing established public policies of great significance.

This Commission has few, if any, responsibilities to the people of America greater than its duty to ensure that its licensees act consistently with the dictates of the Fairness Doctrine. That doctrine ensures that the most powerful medium of mass communication in our society does not stifle competition in the market place of ideas. Had the Congress and this Commission not written this doctrine into statutory and regulatory prescription, early in the history of the Communications Act of 1934, the Supreme Court might well have felt obligated to make the requirements of fairness a matter of constitutional law. For fairness plainly deals with issues of constitutional dimension.

In view of the stature of the Fairness Doctrine, we would be underestimating our obligations as members of this Commission if we concluded that the Cigarette Labeling Act tied our hands in the present case. I agree with the Commission that our action here is entirely consistent with the regulatory design created by that Act. But even if I shared Commissioner Loevinger's conclusion that the Act is ambiguous, it would not alter my view of this issue. Elemental principles of public law dictate that forces within the legislature cannot override a major national policy, unless they persuade a majority of the legislature to inhibit the application of that policy with clarity if not explicity. In plain political terms, if there was "ambivalence" it means that a majority of Congress did not state an intention to immunize the advocacy of cigarette smoking from the requirements of the Fairness Doctrine. Thus, the Commission's obligation to apply that doctrine according to its inherent logic remains in force.

In conclusion, I would like briefly to express my personal regret at the seeming reluctance of some broadcasters to accept the spirit of the fairness doctrine and this ruling. There is no social force more powerful than broadcasting today. If popular support is to be sustained for industry programming relatively unfettered by governmental restraint – which I encourage – the

broadcasters must not only act responsibly but appear to act responsibly. Nothing contributes more to the appearance as well as the reality of responsible broadcasting than the Fairness Doctrine, and the FCC's enforcement of that doctrine. The broadcaster need not withstand alone both the charge that he has been unfair and that he has been unilaterally irresponsible in the self-evaluation of others' charges of his unfairness. He can point to the FCC, its procedures for evaluating such complaints, and its judgments on his behalf. Indeed, if the Fairness Doctrine and procedures did not exist I would think the broadcasters would be the first to urge their creation.

Note that, for a variety of reasons, the FCC has not banned cigarette advertising from broadcasting. Our action today simply requires broadcasters – public licensees charged with operating "in the public interest" – to afford opportunity for fair response to the appeals of cigarette commercials. It is a mild form of regulation. It will have little, if any, impact on the advertising revenues of station owners and networks. It will increase the amount of public service time for which they may take credit.

Unfortunately, it will probably also do little to brake the still-climbing rate of cigarette consumption by Americans, especially our young people – who see, on the average, at least one television program every day sustained by commercials associating cigarette smoking with adulthood and other goals of youth. FTC Commissioner Elman has estimated that some 300,000 Americans die prematurely each year because of their affection for cigarettes. Given these facts I should think broadcasters would want to give far more serious consideration than they have to a voluntary ban on the carriage of cigarette advertisements.

For, once again, it is the appearance as well as the reality that moves men's souls. And, unfortunately from the standpoint of the broadcasters' relations with their public, broadcasting's encouragement of cigarette consumption is an issue wrapped in profits as well as propriety – indeed, roughly $200 million of advertising revenues a year. For, whether or not the judgment be warranted, association with profitable enterprise dependent upon the promotion of disease, death, dismemberment or degradation of one's fellow man – especially children – has historically been viewed in most human societies with even less charity than the senseless criminal act which produces the same end. It is true that $200 million is not an insignificant amount of money voluntarily to forego. But, especially if its loss is ultimately inevitable anyway, it may be far cheaper in the long run to gain the goodwill of voluntary forbearance than to risk forever tainting the good name of American broadcasting.
